ICJ-KENYA AND KAS ANNUAL JURISTS CONFERENCE

30TH November – 3rd December

2010

[Reflecting, Monitoring and Embedding, Integrity Concepts within the Judicial Reform and the Constitutional Reform Process.]

[A reflection on the Constitutional Gains; Judicial Reforms, Implementation and Accountability Debate.]

REFLECTING, MONITORING AND EMBEDDING, INTEGRITY CONCEPTS WITHIN THE JUDICIAL REFORM AND THE CONSTITUTIONAL REFORM PROCESS.

PARTICIPANTS AT THE ICJ-KENYA -KAS ANNUAL JURISTS CONFERENCE

MOMBASA CONTINENTAL HOTEL

30TH NOVEMBER – 3RD DECEMBER, 2010

ABBREVIATIONS

ADR	Alternative Dispute Resolution
CJ	Chief Justice
COE	Committee of Experts
CP	Civil Procedure
CSO	Civil Society Organization
DPP	Director Public Prosecutions
DRC	Democratic Republic of Congo
GBV	Gender Based Violence
ICC	International Criminal Court
ICJ-K	International Commission of Jurists – Kenya Section
IEBC	Independent Electoral and Boundaries Commission
IIBRC	Interim Independent Boundaries Review Commission
IICDRC	Interim Independent Constitution Dispute Resolution Court
JSC	Judicial Service Commission
KAS	Konrad Adenauer Stiftung
KMJA	Kenya Magistrates and Judges Association
LSK	Law Society of Kenya
MDG	Millennium Development Goals
PEV	Post Election Violence
PSC	Parliamentary Select Committee
SA	South Africa
TJRC	Truth Justice and Reconciliation Commission

WELCOME REMARKS

EXECUTIVE DIRECTOR ICJ-K ENYA - MR. GEORGE KEGORO

The Executive Director of ICJ-Kenya welcomed all participants to the conference and introduced the key note Speakers for the day. Key among the speakers was the presence of Lady Justice Yvonne Mokgoro a former judge of the Constitutional Court of South Africa and the current chair of the South Africa Law (reform) Commission, Hon. William Cheptumo Assistant Minister for Justice, National Cohesion and Constitutional affairs, Prof. Kivutha Kibwana, Judges and Magistrates. The director also acknowledged the presence of partners at the conference among them KAS, UNDP, TIRI, KMJA and the Government of Kenya.

KONRAD ADENAUER STIFTUNG - MR. PETER WENDOH

On behalf of KAS, Mr Peter Wendoh reiterated that the partnership with ICJ-K was important in view of the fact that both organizations share similar objectives insofar as the pursuit to the realization of a just society in Africa is concerned. He noted that whereas ICJ-K had been instrumental in advocating for Judicial Reforms which could come to bear with the promulgation of the new Constitution, a lot more remained to be done and called for continued advocacy and vigilance on the part of the organization and of all jurists in general if the gains envisaged in the new constitution especially in regard to the justice and human rights spheres are to be realized. He observed that this was the time for the hard work so as to ensure that Kenya gets a new stronger and independent Judiciary that will serve the interests of her citizens regardless of their status in the society.

WELCOME NOTE

CHAIRMAN ICJ-K – MR. ALBERT KAMUNDE

The Chairman acknowledged the successes of the current year. There had been a lot of change since the last Annual Jurists Conference and there was a need to recognize the achievements of the Nation and the contribution of ICJ-Kenya towards the attainment of a new Constitution. At the last conference the Harmonized Draft Constitution had just been published and there was a lot of debate around it. We have now managed to enact and adopt a new Constitution. The next challenge for ICJ-Kenya and all jurists is to ensure that the implementation of the new Constitution sets a good foundation for future generations on constitutionalism and the rule of law.

"If we fail to implement the constitution then we set the ground for lack of the rule of law for future generations," said Mr. Kamunde.

In Kenya, various thematic groups sprang up to ensure that their interests were protected by the constitution and therefore there is a need to ensure that there is a common ground on the way forward. Each group must pay special attention to the chapters that are affecting them. ICJ has already taken steps in areas such as Judicial Reform as under the Constitution. ICJ K's 1st intervention was the reconstitution of the JSC. The next phase is in the daunting task of vetting of

judicial officers. As jurists we have an obligation to ensure that we are closely involved in the process.

Moving forward

The vetting of judges and magistrates must be done right. It must be objective, transparent, fair and quick and must respect the human rights of the officers. It must inspire the confidence and trust of the public. It is not a chance to settle scores with Judicial Officers. The support staff within the Judiciary seems to have been left out in the vetting process. Currently, Court filing fees are being paid through the bank due to corruption within the Judiciary and this must be addressed if we are working towards a judiciary that can be looked upon as an institution of integrity. The support staff therefore also has to be looked at by the JSC. ICJ has tried to work towards ensuring that the public can have trust in the judgments and rulings of the court. The judiciary is the organ mandated to carry out the interpretation of the Constitution and therefore it is important to get it right.

SESSION ONE:

REMARKS BYTHE GUEST OF HONOUR– HON. WILLIAM CHEPTUMO, ASSISTANT MINISTER FOR JUSTICE, NATIONAL COHESION AND CONSTITUTIONAL AFFAIRS

The new Constitution as promulgated by the people of Kenya marks the beginning of a new dawn for the country. The Constitution seeks to establish a free and democratic system of Government, Promote devolution, protect human rights and rule of law, gender equality and affirmative action and offers checks and balances. It provides for the restructuring and strengthening of critical institutions in governance including the Judiciary.

Steps taken by government thus far:

In May 2009 Government established a multi-stakeholder task force on judicial reforms chaired by Hon. Justice William Ouko. Their task was to 'consider advice and recommend the necessary measures to be taken to address judicial reforms. The Taskforce submitted a report in August 2009 and in October 2009, with an expanded membership, further considered its initial report against the new Constitution and made further recommendations that

- The intention of government in Judicial reform is based on listening to the public and realizing that there is lack of confidence in judiciary, police, prisons, public service, etc. judiciary is only one of many sectors that is being reformed.
- Judiciary purge done previously was not very productive as it was not very transparent.

- The dignity and stability of government depended on upright and skilful administration of Justice.

Key Constitutional provisions on the Judiciary

1. Establishes the Supreme Court with original and appellate jurisdiction to hear and determine disputes relating to elections to the office of the president, interpretation and application of the Constitution and matters of general public importance.

2. It strengthens JSC by providing inclusion of two advocates to represent LSK and two people to represent the public and other stakeholders.

3. Functions of JSC are set out and secured in the Constitution. The restructured JSC is now fully constituted.

4. The establishment of a Judiciary Fund is a move towards independence as planning and management of the fund shall be undertaken up by the Judiciary. Currently 0.5% of National Budget goes to the Judiciary, a very minimal allocation. Establishment of Judicial Development Fund will assure infrastructural development of Judiciary.

5. Provision for office of Chief Registrar who shall be the chief administrator and accounting officer of the Judiciary and this is so as to promote administrative efficiency of the Judiciary.

6. Constitution provides for competitive and transparent process of appointment of Judges and ensures gender equality within the Judiciary.

7. The transitional and consequential provisions of the Constitution provides for establishment of mechanisms and procedures for vetting of Judges and Magistrates. Once the vetting of judges bill is passed. , the vetting process will become very clear.

Government steps towards Implementation of the Constitution

1. Ministry has published Vetting of Judges and Magistrates Bill, 2010 and the Judicial Service Commission bill 2010. Both Bills have gone through 1st reading.

2. Cabinet approved the draft implementation Action plan that the ministry came up with. Action plan to run through with all the laws that need to be passed as per the constitution.

3. Cabinet directed a technical team comprising office of the President, Officer of the Prime Minister, Office of the Deputy Prime Minister and Minister for Finance, Ministry of Justice, National Cohesion and Constitutional Affairs and State Law Office to review the budget implications. There is currently a budget of 3.4 billion to go through 1st phase of implementation (2010 - 2011 financial year). Budget estimates support activities that promote timely enactment of enabling legislation, creation, restructuring and strengthening of crucial institutions.

4. Constitutional Implementation Oversight Committee of Parliament was established on 9th Oct, 2010.

5. The Commission on the Implementation of the Constitution Act, 2010 was published on 27th October, 2010. The President published vacancies of the member of the commission on 1st November, 2010 and invited any qualified citizens to apply to serve as within the commission.

6. The President and the clerk of the National Assembly declared vacancies for Commission on Revenue Allocation. This has already led to applications being passed for the various positions allowing for transparency.

    - At what stage should parliament be an entrant in these issues? Parliament has proven that it can be a road block to the processes following recent parliamentary debates where they have failed to agree and pass names following lengthy debates.

    - MOJ has been involving stakeholders in the media, private sector, civil society organizations, professional associations and political parties to create strategies on the effective implementation of the constitution.

    - MOJ will continue to play a vital role in civic education to the public on the Constitution. They have allocated Kshs. 200 Million to create and roll out programs to go out to the public.

The AJC Conference is a chance to engage and dialogue as we restructure Judiciary. The ministry has engaged stakeholders and the discussions of the conference will be taken into serious consideration. The ministry wants to be vigilant to ensure that the implementation of the constitution is transparent and above board. All jurists, must participate in the implementation process as experts in their own rights and as a constituency with the ability to shape or influence policy.

KEY NOTE SPEECHES

LADY JUSTICE YVONNE MOKGORO, CHAIRPERSON OF THE SOUTH AFRICAN LAW REFORM COMMISSION

CONSTITUTIONAL COURTS AND CONSTITUTIONAL MAKING IN POST CONFLICT STATES: THE CASE OF SOUTH AFRICA, THOUGHTS AND REFLECTIONS.

The South African Constitution has to be looked into with the history of apartheid in mind. The then constitution making process came about after the collapse of apartheid. South Africans felt they needed to change their tactics from violent struggle. War against apartheid was beginning to bear fruit. It was necessary for both sides of the war to come together and decide to change tactics and it was agreed on a constitution making process that needed all stakeholders to come together and map out the future. A future where there would be equality and institutions would be created to

realize that equality for all people in South Africa, citizens or not. The question of race would no longer be an issue

Previously rights were allocated depending on your race. It was therefore necessary for equality to be a prominent tenement of the new Constitution. It was also important to ensure that the new constitution was a supreme Constitution with a Bill of rights that agreed and acknowledged that certain basic constitutional values had to permeate through the constitution and, create governance based on those constitutional values.

The role of the Constitutional Court was limited to certifying the 1996 Constitution in terms of principles which had been agreed upon in the Interim Constitution of 1993. The Interim Constitution had created a Constitution Court and it was given the role to certify the 1996 Constitution. The court was established in terms of a political settlement that was the result of the negotiations process. Many believe that the interim constitution was a political settlement. The parties recognized by the South African people came to an agreement. Compromises had to be struck to agree to that constitution and hence it was seen as an aspect of political comprise among them: Truth and Reconciliation Commission, Sunset clauses (required that the institutional memory should not be lost and therefore there was a need to involve people who had previously not been part of the institutions.: There were debates on whether institutions should be purged as a whole, but debate resulted in a settlement that the judiciary and public service would be kept in place but mechanisms would be put in place so that previously marginalized persons would be absorbed into the institutions.)

Moving forward in a new society where all were equal it was necessary for mechanisms to be created in order to enhance opportunities for the formerly marginalized to come into the process (e.g. affirmative action) as part of the process of compromise.

There was debate on whether the Supreme Court of Appeal should continue to be the Supreme Court of the land or whether a Constitutional Court should be established to become the highest court of the land. It was agreed that there would be a new super-imposed court, the Constitutional Court which in the beginning only focused on constitutional matters.

It became necessary to come up with an open process through which judicial officers would be appointed. The Judiciary lacked the legitimacy and trust of the people due to the role it had played during apartheid, never questioning the unjustified laws or the application of those laws, a legal system that had propagated the struggled for apartheid as a crime.

The process put in place was the establishment of a Judicial Service Commission in the Interim Constitution. The JSC was constituted by a cross section of lawyers, and judges, with the Chief Justice as chair, judges of provincial courts, advocates (representing the Bar Council) and attorneys (representing the Law Society), academia represented by law teachers society of South Africa, politicians (representatives from both houses of parliament) leading to about 30 people a majority of whom were politicians. Parliament has formed a habit of sending lawyers who are politicians to represent them in JSC.

Previously the JSC had to have at least 4 judges. Judges always had to be appointed from senior counsel which was a way to lock out black people and women. The new JSC started to diversify the Judiciary. The JSC adopted an open and transparent process. Nominations could be made by any member of the public and one could now become a judge based even on academic experience. The JSC would then short-list candidates for an interview that took place in a public place in the presence of the media. The hour long interview gave opportunity for thorough public scrutiny (this is still the case though nominations are from bar and people with judicial experience and there are complaints that the pool of selection is starting to contract).

The Constitutional Court has attained trust as the highest court in the land. The public generally feels that the court deals with their matters without fear or prejudice. There are critics at a political level. Realization that the court has a particular mandate which it must exercise skillfully to ensure that the public trust is maintained. Politicians will not engage in public spats with the Judiciary and with the Constitutional Court and it is necessary for it to remain like that especially following the lack of trust present in apartheid.

The Legislature and the Executive become the first call to ensure that the rights and needs of the people are met. The Legislature must ensure that the laws passed reflect the needs of the people and the Executive must ensure that governance must be for the people. People will not come to the Constitutional Court if the Legislature and the Executive fulfill their mandates all the time. Initially the court had a lot of work to set aside apartheid laws. When socio-economic rights became justiciable then there were cases against the Executive for failing to ensure that those rights were provided. Each arm of government must focus on its constitutional mandate and carry out its mandate independently without fear or favor and with a realization that there is a common goal which is the people of South Africa.

The need for legal education became necessary. Judicial training is important and must be continuous. Judicial ethics is important especially when remembering the political tensions that will arise. They have to be dealt with in a manner that ensures that integrity is maintained at all times.

The Constitutional Court felt that it had a duty to create public awareness on the new legal order and on the role of the Constitutional Court. The Constitutional Court created a role for CSOs in creating public awareness. CSOs were appointed regularly to serve as *amicus curiae* in matters that were important to them. There was also invitation for law students to be a part of the process and thus creating avenues for the general public to become involved in the process.

SESSION TWO:

JUDICIAL REFORMS UNRESOLVED ISSUES: THOUGHTS AND REFLECTIONS

MR. CURTIS NJUE MURUNGI, INDEPENDENT EDITOR

OVERVIEW OF JUDICIAL WATCH REPORT

This years Judicial Watch Report is titled ***Constitutional change, Democratic Transition and the Role of the Judiciary in Government Reform: Questions and Lessons for Kenya***.

There are two themes that present themselves throughout the various articles in the Report and it is important to be vigilant of those themes as we deliberate the role of the Judiciary in Kenya's democratic transition.

1. Potential place of Conservatism in progressive and reform politics – deliberate and systematic attempt not to bring about pre-set change but to provide the conditions through which evolutionary change can occur.

2. The possibilities to be found in ordinariness of everyday existence in setting the stage for and guiding the reform process. If we are to be deliberate and systematic in bringing about reform, and if we are to acknowledge that for true reform, the majority of the country's citizens have to be engaged in and contribute to the process, we are implying that reform has to come out of an understanding of the everyday ordinariness of personal existence.

Role of the judiciary during transition period

a. Leadership role in reforming institutions of governance and in remaking national societies. An accountable, effective, transformed and transformative judiciary is at the centre of the process. The reasons for this are two-fold:

    i. Practical reasons – a way of mediating and deciding reasons between individuals, between individuals and government, between branches of government while holding them accountable to the spirit of reform and intentions of the new laws.

    ii. Normative reasons – in order to ensure that the rule of law is firmly and continuously established as the fundamental core of democratic governance.

b. To establish a shared and structured set of core values around which both the nation and its state can be built.

c. Political role – because it is structurally shielded from politics but ultimately tasked to be a part of enforcing the rule of law. Political choices made by judiciary should provide for long term change and requires contemplation, understanding and exposition of the national mood. It must reveal to Kenya the truth of itself.

Judiciaries in more established democracies have increasingly taken on a more bureaucratic role having been forced to respond to the sheer volume of regulation produced in these societies. The

judiciaries in transitional societies like Kenya have the potential freedom to make choices that focus on promoting long-term change by providing a platform for the development and protection of the process through which the values around which a national society builds itself are generated.

"There are lessons to be learned in the process, for those who lead, for those who aspire to leadership, and for those seeking to be led. It is in the ordinariness of life that truth resides, in its rhythm and it is from there that the Judiciary must seek it; it is in this rhythm that it must continuously engage. It is through the repetition of this act, and the humble acknowledgement, but not inactive acceptance, of the futility of its task, that the Judiciary can earn the respect of its citizenry that will trust its leadership in helping a national society to emerge."

MS. JUDY GITAU – JUDICIARY PROGRAMME ICJ KENYA

KENYA'S CONSITUTIONAL REFORM: THE KADHI COURT DEBATE

The calls for constitutional reform in Kenya were focused on specific issues of reform mainly the excess power vested in the Executive, the lack of faith in the Judiciary, the inequitable distribution of resources – particularly land and more recently an overzealous and greedy legislature. It was never envisioned that the Kadhi's court would prove a contentious issue. However towards the conclusion of the last phase of the reform process, the question of Kadhi's courts came into national focus.

Arguments for the Enshrinement of the Courts in the Constitution

1. The position that 10 mile strip was given to Kenya by the Sultan – It was a land transaction which involved a purchase of land. British government purchased the land and kadhi court issue was part of the land deal.
2. Parties felt that the courts were indispensible in the resolution of disputes within the Muslim community in Kenya. "These courts provide an avenue through which the Muslim community expresses their singular cultural system for a community having specific values and rules."
3. Muslim community is a minority group and should have their rights protected.
4. The courts are harmless to non-Muslims as they only apply to Muslims.
5. Establishing the Kadhi courts in any other way would make them unconstitutional.

This paper looks at different laws on the issues of personal law – South Africa does not have provisions dealing with personal law and this has had some effect on minorities and compare this to Gambia and Nigeria.

Lessons for Kenya

Personal status law, regardless of religious affiliation, must be in conformity with international laws on human rights as well as the Constitution of a given country. The challenge for Kenya is to build peace and unity in diversity. The recognition of Muslim law does not elevate Islam over other religions. Neither does it violate the principles of equal treatment of religions.

There is a need to conduct civic education around the New Constitution devoid of emotion to allow all concerned to understand that 'to differentiate is not necessarily to discriminate.

SESSION THREE:

MS. MONICA MBARU - IGLHRC

MULTIPLE SPACES OF JUSTICE: AN EXPLORATION OF JUDICIAL REFORM EFFORTS IN AFRICA IN POST-CONFLICT SITUATION

No judicial system anywhere in the world has been designed to cope with the requirements of prosecuting crimes committed by tens of thousands, and directed against hundreds of thousands. The use of *multiple spaces of justice* is one way of approaching issues of justice from various angles and perspectives. These mechanisms strengthen the formal justice mechanisms in a post-conflict situation and ensure the restoration of normalise

Post conflict provides opportunity societies. This involves ensuring that key institutions of governance are re-structured in a manner that ensures that the society is governed in a proper manner. Use of multiple spaces is one way in which you can bring about reform.

- Common elements of post conflict states:
    - Crimes against humanity
    - Problems addressing crimes committed during the conflict
    - Inadequate law enforcement
    - Increased instances of crimes against humanity
    - Involvement of government institutions in the crimes committed

Countries emerging from conflict often suffer from weak or non-existent rule of law, inadequate law enforcement, insufficient capacity in the administration of justice, and increased instances of human rights violations. The institution of the Judiciary cannot handle all the multitude of cases/issues/political/social and others that require attention after such conflicts. Ideally all defendants should face justice before domestic courts, but most domestic systems in post-conflict situations are not prepared, or lack the legal framework within which, to arbitrate over these crimes.

Situations call for strategic approaches; each case is unique and you must craft it to suit the issues in that state. These include some of the following:

1. Commissions of inquiry – South Africa, Kenya
2. International Criminal Tribunals – established to provide International Justice after the genocide in Rwanda. First court to find someone guilty of genocide (*The Prosecutor v. Jean Kambanda).*It explored restorative justice by establishing a programme for victims especially rape and sexual violence victims.
3. Truth Commissions – South Africa, Sierra Leone, Liberia, Burundi, Kenya.
4. Hybrid courts – designed to take a small number of defendants accused of serious crimes against humanity. In Sierra Leone those 'bearing the greatest responsibility were charged.
5. More recently the intervention of the ICC to support and compliment national justice institutions – Uganda, Central Africa Republic, DRC, Sudan, Kenya.
6. Peace negotiations in Uganda
7. National Unity and Reconciliation Commission in Rwanda

Transitional Justice comes about to restore law and order as a result of historical injustices. Historical injustices must be looked at. It is a test to restoration of real democracy and restoration of the rule of law. It must ensure accountability for atrocities committed by previous regimes. This also involves the use of Traditional Justice system

Multiple mechanisms in addressing justice include the use of traditional courts, formal courts, and the international justice system through the International Criminal Tribunal for Rwanda. The genocide made literally everyone a direct or indirect participant and initial attempts to tackle this crime led to the flooding of national prisons with suspects that a weak and inefficient judicial system struggled to handle. The internal solution was the establishment of local/traditional Rwandese courts (Gacaca) which exacted different penalties, including compensation, but most importantly, emphasised confession and forgiveness as a way to begin to heal the wounds caused by the genocide.

In DRC the long-standing conflict has left a weakened police force unable to carry out investigations and a dysfunctional national court system unable to prosecute the types of crimes committed against the Congolese people hence the involvement of the ICC.

In Sierra Leone, the civil war affected the entire country, and has caused mass population movements with refugees streaming to neighbouring countries, a consequence of widespread and systematic attacks against the civilian population. Complimenting the national courts, the Special Court has had a concurrent mandate where persons tried before the Special Court cannot be subsequently tried by national courts. Special courts may try a person tried by national courts if these national trials were not impartial or independent or the acts for which a person was tried were not ordinary crimes.

The Kenyan Scenario

The Kenyan criminal justice system came under scrutiny following the 2007 post-election violence. Various institutions, including the Judiciary, were blamed for their inaction and failure to respond effectively to the situation. The Judicial system was unable to adequately address the crimes committed during this period mainly because there was no appropriate legislation. Kenya's response to this has been the following:

- International Crimes Act – looking at how this can be applied to the Kenyan situation
- Draft statute Bill on the proposed 'Special Tribunal for Kenya'.
- Parallel processes to promote peace:-
    1. National Accord and Reconciliation Committee
    2. Commission of Enquiry into Post Election Violence
    3. Truth, Justice, and Reconciliation Commission

Way Forward

1. Respect for the rule of law is critical in the search for lasting peace and for social reconstruction. Institutionalizing the rule of law requires an effective separation of powers, an effective and independent Judiciary, effective laws and policies on human rights.
2. A culture of constitutionalism - a rebuilding of social norms in line with values and principles agreed upon by the citizenry.
3. A democratisation process.
4. Comprehensive judicial reforms.
5. Get the justice and penal systems up and running.

DR. JAN VAN ZYL SMIT – LAW LECTURER, OXFORD BROOKES UNIVERSITY

PRACTICAL FEASIBILITY OF VETTING: COMPARATIVE EXPERIENCE FROM BOSNIA, EAST GERMANY AND SOUTH AFRICA

The call for Judicial Reform often brings out tension between judicial independence and judicial accountability. There is a need to strike a balance between judicial independence which is provided for by security of tenure while providing for instances in which it is possible to remove a judicial officer from office.

An extremely comprehensive vetting of the judiciary was carried out in East Germany directly after its absorption into the Federal Republic of Germany in 1990.[1] This was part of a larger programme of vetting all public officials in East Germany which was required by the Unification Treaty between East and West Germany. There was a twofold reform of the Eastern judiciary: the courts were restructured to mirror their West German counterparts, introducing divisions such as those between civil and administrative courts, and at the same time all serving judges in the East were vetted to determine whether they should continue to hold office in the new structures.[2]

- Political support for vetting was considerable. Vetting was not simply imposed by West Germany as a condition of re-unification. Democratic activists in the East had argued before the fall of the Berlin Wall that vetting was necessary to restore public trust in state institutions, including the judiciary.[3] On the other hand, the vetting process in East Germany benefited from resources provided by West Germany.

  When evaluating reforms, the most important question is whether wholesale vetting is a better course of action than any of the available alternatives

- Attempts to exclude some judicial officers in Czech Republic. In Poland judges of the old order were treated more generously as they were required to make statements about their conduct during the communist era but would lose office only if this statement was proved false.

- The wholesale vetting programme in East Germany fell between these two extremes. The vetting programme brought judicial reform to an end sooner than in either Poland or the Czech Republic, and this was a considerable advantage as it established a stable and legitimate judiciary for the long term.

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1 See I Markovits 'Children of a Lesser God: GDR Lawyers in Post-Socialist Germany' (1995-1996) 94 Mich LR 2270; D Kommers 'Transitional Justice in East Germany' (1997) 22 *Law and Social Inquiry* 829; C Wilde 'The Shield, the Sword, and the Party: Vetting the East German Public Sector' in A Mayer-Rieckh and P de Greiff (eds) *Justice as Prevention: Vetting Public Employees in Transitional Societies* (New York: Social Science Research Council, 2007, available at http://www.ssrc.org/publications/view/57EFEC93-284A-DE11-AFAC-001CC477EC70/).

2 Kommers (n1) 833.

3 Wilde (n1) 353.

- In East Germany there was a two-phased reform process involving both the restructuring of courts and the reform of judicial personnel Phased judicial vetting similar to that found in the Kenyan Judicial Vetting Bill. All judges holding office in the old courts were formally relieved of their positions at the start of the review, although they continued to hear cases in an acting capacity, either until they had completed their pending cases and retired, or until their application for a position in the new court structure had been determined. Applications for positions in the new courts were heard in phases, starting with the highest court of appeal and finishing twenty-one months later when appointments to the lowest courts were completed.[4] This phased approach to the re-application process resembles the phased approach to judicial vetting contained in Kenya's Vetting Bill of September 2010, which proposes that the judges of the Court of Appeal will be vetted first, followed by the High Court and then by the magistracy.[5]

- Politically judicial reforms in Bosnia were highly controversial and met with strong opposition from the different ethnic communities as each ethnic community resented the merger or closure of its courts. There was a high rate of re-appointment with 70% of those who re-applied re-appointed and only 18% of the new judiciary had not previously been judges or registrars.

Building Public confidence in the judiciary

1. Restructuring of the courts as part of judicial reform
2. Restructured courts were given new names.
3. Jurisdictional boundaries of the courts were changed
4. New institution established (The High Judicial and Prosecutorial Council of Bosnia and Herzegovina (HJPC) which was responsible for future judicial appointments, as well as court budgets and judicial training.
5. Institutional changes made at the same time.

Case study of South Africa

There was no programme for vetting done under the first democratic elections of 1994. The Truth Justice and Reconciliation Commission conducted a hearing on the legal community and highly criticized South African judges for not attending the hearings and only sending in written submissions.

Symbolic changes should not be under-estimated e.g. all judges were required to take new oaths under the interim constitution as well as under the later constitution. Taking of new oaths shows a

4 Mayer-Rieckh (n**Error! Bookmark not defined.**) 197. The original period had to be extended by five months.
[5] Vetting of Judges and Magistrates Bill 2010, clause 18.

respect and willingness to uphold the new constitution as well as instill public confidence that it would not be business as usual.

Kenya Scenario

The Constitution of Kenya makes provision for institutional changes in the judiciary similar to those made in South Africa, by establishing a Supreme Court[6] and a Judicial Service Commission[7] and requiring judges and magistrates to take a new oath of office.[8] In respect of the vetting of judges, there is a commitment that *all* serving judges and magistrates shall be vetted for their suitability to serve under the new Constitution. The Vetting of Judges and Magistrates Bill that is currently before Parliament sets out proposals for how this is to be done.

The examples of East Germany and Bosnia and Herzegovina demonstrate that best practice may include wholesale vetting in some circumstances, and that judicial independence does not prohibit this when the unique circumstances of a particular country's constitutional transition are taken into account.

DISCUSSANT: Dr. Musila

Kenya's progressive new Constitution incorporates aspects from foreign jurisprudence and international best practices. It embeds international law as a source of law of the land. It requires that judges and academics seek to inspire from the jurisprudence that was referred to.

We must expand our horizons of knowledge in order to inform what we do in the implementation of the constitution as we seek answers to questions that will arise from the implementation as well as from any issues that will arise.

The leadership role of the Judiciary is not just in mature democracies, but also in transitional societies. Part of the leadership role is to keep the state focused on the reform project in terms of breathing life into the instrument. What if the judiciary itself requires reform and has been part of the undemocratic rule? Challenge for the judiciary to be a leader due to legitimacy questions. How have countries dealt with the issues of legitimacy (Dr. Val Smit dealt with some creative ways of handing this challenge.)

We must not lose sight of the fact that constitutional reform is a national project and belongs to the nation, not the judges and the judge's only lead the process with regard to their mandate. It is necessary to reform the judiciary in order to achieve the national project. The issue is how will this be done?

[6] Article 163.
[7] Articles 171-172.
8 Sixth Schedule, para 13. The oath for judges is set out in the Third Schedule.

The process of vetting must be subjected to the constitutional provisions. We must not lose focus of the objectives of the constitution. In South Africa part of the negotiations process dealt with such issues which were very difficult issues. Issues were discussed on whether the country was to move forward with a judicial vacuum? For more than 300 yrs the South African judiciary was male and white and creating a whole new judiciary would have been difficult. There were questions that the apartheid judges had not received any training and that they had applied the apartheid laws without any thought to the consequences. They had to compromise for the sake of practical realities that were in the ground. The country could not start with a vacuum. Super imposition of a constitutional court was a compromise to the practical realities that were on the ground. 4 of the 11 judges had to be judges with experience (apartheid regime judges) again for practical reasons. The judges however still had to go through the public process to ensure that they got the best of the judge and also for the sake of institutional memory. Those who came from the previous regimes also wanted to be seen to want to be a part of the new democratic process and hence the legal education on the new constitution and democratic processes.

It was important to note that imposing an institution might not work and thus the need to create parallel institutions such as the Truth and Reconciliation Commission and the new appointment processes. The Judges were not able to come before the Commission and could not present themselves for a one on one appearance.

The Judiciary is structurally isolated from electoral politics and from politics itself. Judges must maintain the distinction between the law and politics. The survival of the judicial entity should therefore be based on this. However judges must understand the societies in which they operate as well as the politics of the circumstances in which they are operating and this presents a challenge. Institutions are constructed through a political process and the judicial process gives legitimacy to those institutions. At what point does the judiciary distinguish itself from the political process?

Judges are not political party members. What you need are judges that are committed to the cause. They must recommit themselves to the people and publicly denounce all political party politics. You cannot lose sight of the political processes and its context for every issue that you deal with but you must always do so with the people in mind.

The use of multiple spaces of justice to address different publics pre-supposes a coherent strategy and policy on the part of government to address the various aspects. How does ICC interact with TJRC? With the COI and other mechanisms that have been used. How can the Constitution be used as a space of justice? The Constitution vests various rights upon individuals and then provides spaces on where to seek redress when those rights have been violated.

The role of 'international actors' in the reform processes e.g. Rwanda, DRC. This raises questions of legitimacy. Do these international actors strengthen the judiciary in those countries they are serving or do they in fact weaken the judiciary? Do they send the message that the transitional countries cannot trust their judiciaries to respond to the crises? There is no full proof mechanism you try and ensure that whatever process is adopted inspires the reform process. In 1994 Rwanda after genocide, it was suggested that the traditional justice mechanisms to address the vast majority of the cases and then take those that were responsible be taken to the Tribunal. Rwanda has been

able to restructure their country and guard against genocide. In Sierra Leone they still cannot deal with everything that happened during the civil war and only a handful has been before the hybrid court. The legitimacy still lies with the people. How comfortable do people feel approaching the TJRC? Will people be granted immunity? How do you deal with the two principles as they are being accused by their political parties and the wider international community's? It is about ensuring that the wider public feels that they can approach the regular courts and be able to get justice for themselves.

How do you access the reforms of the judiciary in South Africa in the last 16 yrs? The South African Constitutional Court is one of the most respected constitutional courts in the world. Can we look at the problems brought about by the issue of a super imposed court without far reaching reforms to the rest of the courts? To what extent does it inspire things to be done differently in the other courts? The court remains highly criticized for remaining highly un-reformed. Interim constitution made it clear that constitutional court matters could by- pass the Supreme Court but they could also originate in the constitutional court. Currently the constitutional court does hear appeals coming from the supreme court of appeal. Change for the rest of the courts has been very gradual.

Vetting should be done fast and an absolute requirement that the human rights of the judicial officers will be maintained. The longer the process takes, it is taking its toll on judicial officers and some have already decided to quit. How do we ensure that the judicial officers are safeguarded when the const provides that there is no recourse for the judges in any court as a result of the carrying out of the vetting process?

Criticism of the judiciary by the political class through public utterances that malign and display a lack of confidence in the judicial officer is an enemy of the reform process. Objective criticism is welcome by the judiciary but not the public utterances made by politicians who are public opinion shapers.

Did we make a mistake with wholesome vetting? What happens to judicial officers currently serving? Judicial officers are finding themselves fatigued by the continuous bashing. If judicial officers are found not suitable to serve, what happens to their rulings and judgments? Will this not bring about issues? Are we ready to deal with them? Does the threat of vetting compromise the independence of the judiciary? The vetting process might lead to public lack of confidence in the judiciary. Judges currently do not have security of tenure if parliament will be looking and interrogating all judgments that are made that affect them without due regard to the institution of the judiciary.

Looking at the history of the Vetting of Judges and Magistrates Bill – should we empower in the bill an element of vetting on its own? Schedule 6 s 23 speaks of vetting of judges and magistrates and then says that judges have no recourse but does not speak on what happens to magistrates. The fear is that the process of vetting proposed in the latest bill creates a body that in itself is not accountable to the principles set down in the constitution. Are we submitting judges and magistrates to a cleansing process? Or are we creating 'personal' judiciaries?

Vetting of judges and magistrates was felt to be necessary because of the public feel and view of the judiciary. Following the elections of 2007, politicians declared that they would not go to the courts because they had no confidence in the judiciary. The political class has sometimes used the judiciary to settle scores they are unable to settle politically. It is unconstitutional to exclude members of the judiciary when you are subjecting them to an appellate process. The constitution is clear that you cannot deprive anyone of their rights and as such cannot deprive them of the right to seek redress. Vetting process is a process of stepping aside to seek suitability of candidates for office and employment and therefore really makes it more like the JSC.

Will the vetting really restore public confidence in the judiciary? What if the vetting process appoints most of the current judiciary? Will that mean that there will be no public confidence in those judicial officers who are re-appointed? The Judiciary feels left out and let down in the whole process of vetting and reform. The judiciary as a whole feels targeted and this brings about a delicate conflict that needs to be dealt with as such. It is however important for people to remember that reform is going to be wholesome and will not just be about reforming the Judiciary but it will be about wholesome reforms and as such it is not a targeted approach. The reforms that are being done are a public process and it would be important not to look at it as a targeted approach. It is important that we realize that reform does not mean doing away with the judges but we have to be careful the processes that are used to do so. We should remember that reforms should be done with a view to strengthening democracies and should therefore not weaken them. We must strike a balance and remember that it is about the people and not about the institutions.

SESSION FOUR:

KENYA'S NEW CONSTITUTION: TRIUMP IN HAND, TESTING TIMES AHEAD?

MR. TOM WOLF

Why has it taken Kenyans so long to get a new constitution?

1. Political process
2. Constitutions main new features
3. Implementation challenges
4. Challenges

The main challenge for the judiciary in light of the new constitution is to bridge the gap in public opinion on how the judiciary would deal with a regular person and with a political person on whatever charges that are brought against them.

GJLOS programme survey of 2006 had very many stakeholders in the design of the questionnaire.

It is unfortunate that there was no provision in the review act for any changes made in the harmonized draft after the parliamentary select committee recommendations that allowed for

extension of time. On 22nd Dec, 2010 the COE stated that there was a parliamentary regime in Kenya that would have needed strong political parties but that disappeared when the PSC gave their input.

Role of the COE in the future: their terms have currently come to an end. US framers of the constitution had full authority even after the constitution had been adopted. When the Ministry of Internal Security started to speak about imposing a new structure for the provincial administration there was no recourse to the COE on what they had intended. This is an issue that COE could have been able to deal with if they had more time.

How do you make a constitutional break with all the same people still in place?

The role of the Judiciary in Uganda: The government has sought to limit the judiciary through various forms of pressure, by influencing the composition of the court, leaving vacancies in the judiciary. New judge appointments tilt the scales in favor of the government.

MS. ANNIE MUMBI MUCHIRI
PROGRAMME OFFICER HUMAN RIGHTS
KENYA AIDS NGO CONSORTIUM (KANCO)

GENDER MAINSTREAMING, AN EFFECTIVE TOOL FOR ACHIEVING TRANSITIONAL JUSTICE: A COMPARATIVE ANALYSIS

Women are affected in many ways during war especially as far as sex based crimes are concerned e.g. rape, defilement, gang rape, etc. Gender mainstreaming is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes in all areas and at all levels. Therefore it is important to mainstream gender in TJ mechanisms so as address the effects of war on women.

Role of Transitional Justice

Transitional Justice Mechanisms are largely thought to be processes that are specifically designed to bring about a restoration of order once a state or nation has been through a period of instability. However, Transitional justice mechanisms are broadly applied to bring about restoration through various avenues such as: providing justice for victims, reinforcing the possibilities for peace, democracy and reconciliation, addressing and attempting to heal divisions in society that arise as a result of human rights violations, closing and healing the wounds of individuals and society, particularly through 'truth telling', providing justice to victims and accountability for perpetrators, creating an accurate historical record for the society, restoring the rule of law, reforming institutions to promote democratization and human rights, promoting co-existence and sustainable peace.

Transitional Justice Mechanisms include Truth, Justice, Reconciliation, Reparations etc.

Role of Gender Mainstreaming in TJ Mechanisms

Gender mainstreaming in TJ mechanisms is important so as to ensure that the experiences of women, some of which are unique to women, are also recorded and that women are actively involved in the reform processes that will be undertaken. Gender Mainstreaming also ensures that: states meet their responsibilities under international law, states are able to respond to the particular justice needs of all sections of the community, processes undertaken build public trust in the justice sector, states form a representative and legitimate justice sector, there is a reform of all discriminatory laws and an advancement in the protection of human rights, states consciously make effort to end impunity for gender-based violence (GBV), that there is equal access to justice and to strengthen oversight and monitoring of the justice sector.

Gender Mainstreaming in TJ Mechanisms

Gender Mainstreaming in TJ mechanisms will involve an appreciation of the role of women during the conflict situation and post-conflict. Women play a role in as planners and designers during post-conflict situation and in some instances women are also perpetrators. This must be taken into consideration when designing TJ processes.

In post-conflict situations, women play a role as designers or TJ processes, as judges and commissioners in any Transitional Justice Commissions or any resulting courts, as witnesses and also as civil society advocates. The role of women in all aspects of TJ mechanisms must be taken into consideration to ensure the TJ mechanisms are effective and serve a restorative purpose for all parts of society.

Way Forward

- International and national actors should promote partnership among all justice reform stakeholders.
- A thorough assessment of the justice sector should include women and men's differential experiences with access to and participation in the justice system.
- Adequate implementation of CEDAW.
- Reform laws and policies to ensure that principles of non-discrimination, gender equality and affirmative action are enshrined.
- Address Gender Based Violence.
- Access to justice should be increased through legal literacy programmes, use of paralegals where appropriate and legal aid programmes.
- Use of traditional justice mechanisms.
- Identify and counter gender bias in the judiciary.
- Reform the judiciary so that it is more representative of the society it serves.

- Strengthen oversight and monitoring of how the justice system addresses gender issues, and how gender justice reforms are implemented.
- Public education.
- Ensure women in the rural area access justice.
- States should ratify international and regional human rights instruments, including CEDAW, and meet all relevant obligations.
- Support civil societies including women organization.

LADY JUSTICE YVONNE MOKGORO

TRANSFORMING THE CONSTITUTION TO A LIVING DOCUMENT: COMPARATIVE BEST PRACTICES FROM SOUTH AFRICA ON THE BILL OF RIGHTS

The Constitution of SA must be reviewed in the context of the history of South Africa. The constitution adopted was not only meant to heal the wounds of the past but to promote social justice. The promises that it makes are lofty and are firm. Under the constitution every right may be limited if it is reasonable. The Constitution conferred on the courts a power of Judicial Review and a constitutional obligation on all arms of government to protect and promote the bill of rights. The constitution also uniquely operates to natural and juristic persons. The role of CSO cannot be over emphasized having played a central role in the anti-apartheid movement. They are generally viewed as the eyes and ears of the government.

The role of a strong media is a strengthening aspect of its democratic processes in particular the investigative pieces on corruption and other integrity issues in government. The opposition in parliament, although not strong, raises issues all the time which the ruling party cannot disregard.

Constitutions thrive upon fulfillment of their provisions. It is important for the judiciary in all its endeavors to do so consistently and the way to achieve consistent implementation is to formulate tests, criteria and principles which will be consistently applied in all cases which come through the courts. Constitution of South Africa other than protecting human rights in the bill of rights also establishes the state and how it operates and how the state and organs of state relate to each other.

Parliament must ensure that all applied law is consistent with the constitution. When laws are set aside by the courts then parliament must ensure that the laws are then made to ensure they are consistent with the constitution.

Historically, successive constitutions in South Africa will have always adopted the Westminster system of government, with its parliamentary sovereignty and supremacy of legislation. As already indicated, the adoption of a supreme Constitution[9] with a Bill of Rights, where an independent

[9] See section 2 of the Constitution.

judiciary[10] exercises the power of judicial review was for South Africa a novelty. In the context of decades of apartheid oppression and suppression, with among others, the constitutional obligation placed on all three arms of government to respect, promote, protects and fulfil the rights in the Bill of Rights,[11] an independent judiciary with the power of review which must exercise its role and functions impartially and without fear, favour or prejudice;[12] the constitutional establishment of independent state institutions supporting democracy[13] which essentially monitor government and are subject not only to the Constitution and the law, state governance and government—no longer business as usual.

The supremacy of the Constitution thus requires that all three legislative spheres ensure that the statute books are free from legislation constitutionally inconsistent; it requires constitutionally sound standards of governance by the executive. The judiciary, which is independent and subject only to the Constitution and the law, must fulfil its judicial function impartially and without fear, favour or prejudice.

Executive has its authority vested in the president and it exercises its executive power. President is required under the constitution when accenting bills to refer back to the assembly or even to the courts any bill for reconsideration of its constitutionality. Executive has duty to ensure that no legislation makes it to the statute books if there is a question of its constitutionality.

With the Judicial authority of the Republic is vested in an independent Judiciary, this authority is constitutionally protected, where it must be exercised without fear, favor or prejudice. All judicial officers take oath of office to enhance their independence and the independence of the court. There is further provision that no organ of government can interfere with the court. When a court issues an order that order shall be binding on any organ to which it applied. Judicial action can be taken against any person who attempts to frustrate the courts.

If courts do not lose sight of the constitutional mandate that they have to protect the people for whom the constitution was formulated in such a way that every decision that they make can stand scrutiny by the constitution itself then they will know that they have done what they were purposed to do.

MR. JOHNSON SAKAJA

CRITIQUE AND ANALYSIS OF THE REPORT AND PROCESS OF THE IIBRC (LIGALE COMMISSION)

Basic concept of delimitation is that we need to be organized in such a manner that we can ensure adequate representation. Boundary delimitation is to strengthen and safeguard the democratic expression of the will of the people of the country and foster national cohesion. It is a very political process as boundaries can determine your majority in parliament.

10 See section 165 of the Constitution.
11 See sections 7 and 8 of the Constitution.
12 See section 165(2) of the Constitution.
13 See chapter 9 of the Constitution.

Boundary commission failed to present before the parliamentary select committee in Naivasha. There is no way in which you can measure whether the product of delimitation is fair or not. This commission was formed as a result of the Kreigler commission recommendations which intimated in its report that part of the reason for the PEV was the current delimitation as people did not understand how the party with higher representation in parliament was not the ruling party.

Kenya has mixed allocation of resources with the representation of the people meaning that Embakasi and Lamu which have great discrepancies in the population sizes end up having similar CDF allocations.

The constitution does not have a formulation on boundary delimitation. The constitution has a limit and a methodology but not a formula.

Constitution creates 290 constituencies. The number of inhabitants of each constituency must be as equal enough as possible. The population quota however allows you certain deviations to take into account certain provisions in article 89(5).

The constitution has provided a legal range of inhabitants that can be in a constitution. Similar standards were set for wards though there is no optimal number of wards set out in the constitution. The boundaries commission had to take these into consideration.

The unit of deviation is the constituency itself and not the provinces which the IIBRC also used.

Nairobi was thought to be the only legal city as per the IIBRC though it failed to define terms such as sparse populations, cities, etc

Lack of constructive consultations – they went and asked the people 'what do you want'? The consultations would have been constructive had they gone on the ground and sought what was needed as opposed to what people want.

The results of IIBRC show that some constituencies which were closer to the population quota have been moved further from the population quota creating imbalances.

Ideal Process

1. IIBRC comes up with a population quota
2. Define sparsely populated areas and cities
3. Rank all constituencies based on how far they are from the population quota. Address constituencies that fall way below the range through redistricting neighbors.
4. Apportion the additional 80 constituencies in order of merit and then produce the first allocation.
5. Then produce guide maps
6. Go to the ground with the guide maps and have consultative discussions with the people.

Way forward

- Expedite on the formation of the IEBC
- There has to be a means to audit the process
- inclusiveness

MR. PHEROZE NOWROJEE

EMERGING CONFLICTS ON THE INTERPRETATION OF THE NEW CONSTITUTION AND WAYS IN WHICH TO RESOLVE THOSE CONFLICTS

A. Boundaries case which has a ruling on the interim case

There are currently 5 cases that were brought to the HC to halt the process of the publication by the Boundaries Commission. The 1st was brought on the 16th Nov, 2010 under certificate of urgency where the applicant sought the certificate on the grounds that the commission would expire on the 27th Nov, 2010. The Judge allowed the application and an inter-parties hearing was set 2nd Dec, 2010 after the boundaries commission's term had expired.

When the matter finally came to court, the issues that came to court were arising out of the two Constitutions. The IIBRC's mandate under an amendment in Dec 2008 stated that they were to make recommendations to parliament on optimal number of constituencies. IIBRC started work in 2009 however the new constitution changed the mandate of the IIBRC and stated that IIBRC would delimit the boundaries. The new constitution put the power in the hands of the commission however it failed to state how the IIBRC would conclude its work in respect of the delimitation. The new constitution now also gave the optimal number of constituencies and stated that an application for review of the decision of the commission could be made to the HC within 30 days of the publication of the decision in the Gazette (article 89 (10), (11). This would however only apply to the next commission and not to the Ligale commission. While saving the IIBRC and changing its mandate, it was not given machinery to conclude its work.

IIBRC alternatives for concluding its work:

a. Send the Report to parliament – this could not be done as there was no authority to do so under the new Constitution and the principles to be applied were the ones that were in the new Constitution and not the old one.

b. Publish the report – took the argument to article 259 which deals with construing the Constitution. What does the constitution say about these conflicts? Article 259 was used to argue that going to publication did promote the purposes of the constitution such as accountability, separation of powers, removal of powers from parliament to determine its own boundaries and it would advance the rule of law. Article 259(3) *the law is always*

speaking, Sixth Schedule s 7 , reading the two articles together concluded that the best step would be to follow what the constitution intends should be the process in the future.

c. That there should be no action at all – felt that the commission must take action. Constitution provides that the law is always speaking and therefore should find ways to make it speak in this case.

The Judge upheld the decision of Ligale commission to go to publication and it was in these contexts that the case was heard.

B. Economic and social cultural rights.

The preamble recognizes these rights. The principle is not only an aspiration but it is a constitutionally recognized area. Article 10 *'national values and principles of governance.'* National values include human dignity and social justice. Article 19 (1), the bill of rights is the framework for economic and social cultural rights.

It is our task to turn the directions in the Constitution into movement towards the goals of the constitution. We are looking at taking this aspects and giving them a form. The heart of social economic rights is social economic realities and we must bring those realities to the courts in defense of social economic rights. this done through bringing statistics, affidavits, visual realities and other social science of what is going on to show that the consequence of these policies.

Social economic rights are set out in Article 43 however there is a rider in article 21. The courts have already held that it was the duty of the state to have protected the property of the applicant and as such applicant was awarded damages (*Roshanali Karmali Khimji Pradhan vs The Attorney-General*[14] *)*

Article 21(2) State shall take legislative policy and other measures ….. State obliged to take 2 steps:-

1. It must state standards and we can go to court and ask the court to state standards e.g. budgetary allocations

2. Progressive steps taken by the state to achieve the realization of the rights set out.

Constitution allows us to move to court without a client as a public interest case as the issue of *locus standi* has been moved away. We can now press for the rights to be realized. Case of Kituo Cha Sheria seeking the rights of prisoners to vote which the courts granted and affirmed these rights. Where there is a technically imaginative reading of the constitution we are now looking at a judiciary which is ready in part to accept the responsibilities and duties of the judiciary under these constitutions and to bring a realization of these rights.

[14] Civil case 276 of 98

PROF. KIVUTHA KIBWANA:

There are many challenges ahead and there is therefore a need to have clear thinking. Lawyers are going to be more critical in terms of litigating as there are many grey areas. Grey areas are partly because of the various succession drafts that were in place in trying to ensure that they harmonize.

Other challenges that we could face:-

i. Hurried manner in which legislation is being initiated without thinking through the policy framework. This has a tendency of producing legislation that has many grey areas. There is a need for sound policy frameworks.

ii. Lack of harmonization of the legislative proposals e.g. AG, CIC, Parliamentary oversight Committee, Kenya Law Review Commission, etc and thus there is a multiplicity of players which could at terms seem to create a sought of tag between the players. These must be harmonized.

iii. Parliament needs to clarify its role in that how do you vet officers who are elected to office e.g. CJ, AG

iv. There are other laws, other than those that are specified in the 6th Schedule that will still need to be enacted.

v. We have to ask how the guiding principles and values of the Constitutions guide in the implementation of the const. You can lose very important purpose of the Constitution through thinking that the principles are mere aspirations. How do we actualize those principles to make sure that they are not lost in the implementation?

vi. What happens to the commissions? What is the source of the power of the commissioners? Are they part of the executive?

vii. How do you give substance to affirmative rights in the constitution? How do you concretize the social economic rights and ensure that they are achieved and that they do not remain 'progressive step taking' that is never ending.

viii. Substantive discussion will be needed on the issue of Public land. Public land is now vested in the counties however there have to be enabling legislation to allow the counties to deal with the land. The question is that currently while the counties legislations are yet to be enacted, is the Ministry of land still dealing with Public land? What is the status of those who are acquiring the land now? What are their land rights?

ix. Article 97 '1/3 must be of either gender' is likely to be the 1st amendment. There is a danger that parliament can end up with more than 2/3 being from one gender. Women even if they get all the 12 nomination positions plus the 47 other women will still not meet the majority needed to have 1/3 representation in parliament. This can potentially serve as a threat to parliament as someone can take the issue to court if the representation does not meet the criteria in article 97.

x. What is the meaning of a body implementing a policy that it has not created? Government will create policies which will then be implemented by the counties. How will this work? What will their interpretation be?

xi. Budgetary allocations and the functions of the counties. Do the two tarry? Will the budgetary allocation set be sufficient for the functions of the counties?

xii. Nairobi and Mombasa which will probably be cities. How will the two operate yet they are also counties but have a right to be local authorities?

Article 254 has a reporting mechanism for all commissions.

Sixth Schedule S 27(1c) – 'members of the commission shall be subject to Chapter 7' – Chapter 7 therefore disqualifies any members of commissions who have previously been members of parliament.

NB: Section 7 is suspended by Schedule 6 s 2. [S 27 6th Schedule]

As a country we must learn to promote national interest and by-partisanship as opposed to individual interests and partisan politics to move the country forward with the new constitution.

Issues arising

Lawyers will also need to be teachable to be able to ensure that social economic rights are achieved. We have to be part of promoting and protecting social economic rights. We must learn to realize those rights. (UN website looks at General comments). We need to look beyond the lawyers circles and invite input from Economic scholars. We need to have structures that will make it possible for these rights to become a reality.

Supreme Court and all other judicial officers have no quota for gender and these needs to be looked at.

IIBRC- has an appeal been taken to court? What happens to the parliamentary impasse that has resulted from the decision of the court? Parliament has stated it will not be business as usual until the IIBRC issue is resolved.

Can there be progressive implementation of the Constitution and what does this mean? We must ensure that the social economic rights are realized. They must be concretized in terms of policy and standards that are concrete and this is a process.

Independent survey showed that a majority of Kenyans (47%) wanted their constituencies reduced so who did the IIBRC speak to that wanted an increase in the constituencies?

The issue is about the Institutional and administrative capacity to implement the constitution. The people who execute the rights are largely the county governments and we need to think around the capacity that is available and how it can be enhanced to be able to implement the capacity.

Looking at article 221 which has everyone presenting their budgets to parliaments, there is no structure set up and it does not state who then has the duty to reconcile those budgets.

The new Constitution has given enormous powers under the Constitution and thus the need to vet the judges to ensure that the persons that are coming in are not only persons of integrity but are also persons that will adequately enforce and use the powers that they have been given under the constitution.

Social economic rights are about social justice. Whether social economic rights are political aspirations or whether they are political directives is neither here nor there. We have to ensure that the people who bring the cases to the courts find appropriate cases which will bring about the appropriate results. Try and find a court process that allows for *amicus curiae* to come in, let the social scientists come in and give the evidence if the courts are unable to deal with the social economic rights.

Kenya currently has a population of about 38M. What will happen when the population increases? Will there be another boundary review? Is it stated that the process will happen after a specific period of time?

- After the initial apportionment, once the population grows again the population quota will change but the number of constituencies will remain the same. What will change are the boundaries of the constituencies to ensure that the number of populations is always nearly similar throughout the country.

HON. JUSTICE SANKALE KANTAI (IICDRC)

REFLECTING ON EMERGING JURISPRUDENCE ON THE INTERIM INDEPENDENT CONSTITUTIONAL DISPUTE RESOLUTION COURT: LESSONS FOR JURISTS

Figure 1 Justice Sankale Kantai making his presentation.

The governance reforms that we see in the country today can be attributed mostly to the elections fiasco of 2007 and the subsequent strife. The National Accord came in 4 phased forms (agenda 1-4).

The decisions of the IICDRC were not appealable. Is this a good idea? The foreign judges did not hear any of the petitions and this was of concern to many people.

The rules set by the courts (rule 10) were more set towards substance rather than the issue of procedure. The 1st petition brought about the issue of *locus standi* as Kituo stated they were representing the prisoners from Shimo la Tewa prison and yet there was not a single affidavit from the prisoners. The foreign component of the court sent authority from various jurisdictions on how the supreme courts of such countries had dealt with such issues before the courts and most of those jurisdictions refused to allow the prisoners to vote. The IICDRC however decided to entertain the petition before them.

Lessons learnt

a. Recruitment and appointment of judges – recruitment was done through competitive process. This method ensured impartiality and independence of the court was guaranteed.

b. Election of the presiding judge.

c. Law research assistants

d. Electronic recording – court moved with the error of technology.

e. Electronic version of court files – how can we interlink and do everything online? The rules of the court allowed for electronic petitions.

f. Case management system

g. Substantive justice as opposed of procedural justice

Mandate of the court has ended. Its jurisprudence will come in handy with the establishment of some of the courts under the new constitution.

Ms. PRISCILLA NYOKABI

EXECUTIVE DIRECTOR, KITUO CHA SHERIA

Kituo Cha Sheria brought the petition to allow prisoners to vote to the IICDRC. The reasons for the petition were as follows:

1. Advocacy done after the post election violence, presentations made to parliament were to affect that electoral reform and constitutional reforms were key before we could get another Constitution.

2. Pro-longed paralegal work at Shimo la Tewa prison and constant interaction with the prisoners brought to light their desire to be involved in the countries democratic processes.

3. Prisoners were disgruntled that while everyone was talking about s 26(4) on abortion and nobody was talking about the death penalty s 26(3)

4. A large number of prisoners are actually on remand and they usually would not be able to vote courtesy of the fact that they were currently being held by the prisons even though they had not yet been tried.

Issues arising

Budgetary allocations for the judiciary are insufficient.

New rules have come from the Rules committee have come up with a new system of Case Management that will be coming out on 17th Dec, 2010. They allow for opening statements and others ways in which the cases can be managed better.

The Judiciary is going ICT and has already started with the Court of Appeal and there is a feel that this will trickle down.

Vetting and Selecting. Fundamental change comes in during the vetting process when you open up the pool and allow even minorities. The selection process will be different from what has been happening.

Do you think it would have been prudent to extend the jurisdiction of the IICDRC to be able to handle some of the matters that are coming out of the referendum?

Judiciary is highly understaffed and cannot handle the populations. The Financial independence of the judiciary is therefore important.

HON. JUSTICE LENAOLA, CHAIR KMJA

KMJA and ICJ have had discussions on Integrity and thought it would be prudent to discuss them and came with 2 objectives

Objective 1: to contribute towards embedding integrity concepts in the judicial systems and structures in proposed reforms in administration of justice

This was the result of Agenda 4; judicial reforms were one of the reforms under agenda 4. Chapter 6 of new constitution focuses on the issue of integrity and hence the need to focus on the issue. Kenya judiciary suffers a real issue of integrity whether presumed or otherwise. Issues of competence and integrity are always being raised when it comes to judges. The discussions on integrity are based on the need to imbed integrity as a concept within the judiciary.

Objective 2: *To enhance the capacity and understanding of Judicial Officers of Pro-Poor Integrity Concepts*

Integrity and pro-poor concepts are related because when the judiciary gets bashed on grounds of integrity, the poor get affected because they say that justice is on sale and that it is only available to the rich. There is the reasoning and attitude that 'why hire a lawyer when you can buy a judge'.

Perception can become a truth. How do you address perception when it could be a truth somewhere? Integrity whether as a perception can become a truth. We need to build the confidence of the poor with regard to the judiciary.

We must talk about wholesome and holistic reforms and as such remember that it is to the lawyers as a whole. Lawyers are not exempt from the vetting as reforms will be across the board in the legal and judicial sector. We must work towards a judiciary that is respected. Vetting again must be fair and transparent so as to ensure that the new judiciary is focused towards dispensing justice without fear or favor.

MS. ELSY SAINNA – PROGRAMME OFFICER, JUDICIAL REFORMS PROGRAMME

SUMMARY FINDINGS OF TIRI JUDICIAL INTEGRITY; STATUS REPORT AND THE CONSTITUTION

The Objectives of the Judicial Integrity Status report were:

1. To recap highlights of the regional discussions with a focus on the 'Poor' in order to enhance an in depth understanding of judicial officers on Pro Poor Integrity Concepts
2. To integrate these integrity concepts into the judicial systems in the proposed reforms on the administration of justice
3. To cultivate ownership of the process by Judiciary in order to enhance their responsiveness to the needs of the poor and marginalized.

Methodology

1. Regional Consultative Bench Focus sessions with the Kenya Magistrates and Judges Association (KMJA)
2. Problem solving approach – 'inward looking out'
3. Tools – Individual Questionnaires and Focus Group Discussions
4. Key Question for consideration;
   a) What does Integrity mean?
   b) Who is a poor person
   c) What institutional challenges exist to impede a 'pro poor integrity approach by the courts?

DEFINITION OF TERMS

- Joint Working definition of Integrity
- *Transparency and professionalism in the delivery of mandate as a judicial officers*
- Compare this with the TIRI approach for purposes of this training.
- Joint working definition of a 'poor person'
- Each region defined it differently
- One region stated –*a magistrate is a poor person*
- Overriding agreed definition,

- Persons deprived off opportunities, broadly in our context economic, social and perhaps political

FOCUS OF THE FINDINGS IN RELATION TO THE POOR (REFLECTIONS OF JUDICIAL OFFICERS).

Challenges faced;

- Inability to afford legal fees
- Infrastructural difficulties e.g. access to the courts – distance
- Courts processes too complicated
- Intimidation by the courts processes
- Traditional customs and practices

SYNOPSIS OF DELIVERY OF SERVICES IN COURTS RELATION TO THE POOR

a. Infrastructural – physical and financial constraints of the courts
b. Frustration caused by inordinate delays
c. Bribery of court support staff
d. Lack of information
e. Withholding of information – court files at the registry

Way forward

1. Use of mobile courts in remote areas – already in place in some areas
2. Simplified court processes in e.g. litigants charter
3. Magistrates can move to prisons and take pleas
4. Judiciary open day – intension is to demystify the courts to the public
5. Task force Report recommendations on strengthening judicial administration and processes
6. New Constitution 2010 – various recommendations on how the Judiciary will be reformed as well as other institutions.

Role of Judicial Officers

- Duty to uphold the Constitution, the rights, freedoms and liberties contained therein – Article 159 (1) – '*…judicial authority is derived from the people'* as per delegated power under Art. *1(3) (c)*

- Duty to dispense justice to all irrespective of status – see guiding principles and in particular under Article 159 (2) Constitution of the Republic of Kenya

How will the role of judicial officers be recognized?

1. Set benchmarks for Judicial Officers based on institutional best practices and international standards

2. Engaging with Pro-poor Experts e.g. TIRI

3. Focus on the new Civil Procedure rules and how they assist with access to justice for the poor.

MR. KEN OTIENO – PPI East Africa Coordinator

INTRODUCTION TO INSTITUTIONAL INTEGRITY CONCEPTS

Tiri's Pro-Poor Integrity (PPI) project seeks to enhance service delivery by key state institutions that contribute to realization of MDGs. The Focus is on 4 MDGS - health, education, water and sanitation and social protection. Human rights and economic and social rights are a key aspect. Economic growth rarely gets down to the poor. The poor are of special focus because of their place in society. Institutions that Tiri works with are judiciary and local government.

Institutional integrity is a set of characteristics that improve **trustworthiness to stakeholders**. It exists when your organization – by **acting competently, ethically and in alignment with its purpose and values** –demonstrates its trustworthiness to internal and external stakeholders. The **desired outcome** of its use is stakeholder **trust.** The programme is to fit into the organizational structure and objectives. It requires continuous engagement over a period of 3-6months. The key element is not 'what you think of yourself' but rather 'what others think of you'. Perception is therefore a key element.

Integrity prism is a tool that helps you analyze your management and decision making practices. Integrity means also that you have certain standards that you adhere to as integrity is not a static concept. It involves a readiness to identify improvements within the organization constantly. You must always want to seek to look back at improvements and seek to work on more improvements.

Institutional integrity you focus away from the individual perspective to a more holistic look at the institution because failure by one person to act in integrity will lead to a poor person/ user of the institution having a perception that the institution as a whole is not an institution of integrity. Commitment to institutional integrity is an expression of readiness to **identify improvements in the way an organization or institution functions**.

Focus of Work of TIRI with ICJ and Judiciary

- Building institutional capacity for delivery of effective and efficient services that is responsive to the need of the poor and marginalized groups
- Judiciary is a key state institution and access to justice a key service in the context of PPI

Key components of integrity

- Alignment - "doing what you say you will do"
- Competence - "doing it well" and
- Ethical behavior - "doing it with honor"

Components of a sustainable 'process'.

a. Mission, vision and values
b. Integrity Leader
c. CEO Commitment
d. Executive Champion
e. Commitment of resources (especially time)
f. Integrity Working Group

Embedding Institutional Integrity

1. The integrity of the process should **always be viewed from the user's perspective.** This will require an interactive process to understand what compromises trustworthiness from a stakeholder experience perspective.
2. Need for all constituent elements in the judicial process to work collectively to assure the integrity of the process
3. Ultimately, integrity will derive from the (judicial) process demonstrating trustworthiness
4. Given its standing/influence, the judiciary needs to take a leading role in promoting/championing any initiative to strengthen the integrity of the process

Way fwd

1. Understand the challenges of court users in accessing justice (e.g. focus groups involving court users/court officials)
2. Build consensus and willingness to take on the institutional integrity process (IIP)
3. Devise practical means/tools to address the challenges vi the IIP (e.g. cartoon workbooks, guidance manual, training sessions, service level agreements with internal/external stakeholders)

4. Develop indicators of integrity that can be monitored over time
5. Possibility of a pilot initiative in 1 or 2 courts
6. Partners will monitor with the court user/ community to access whether after the integrity engagements the communities feel that the judiciary is operating in integrity.

DR. PATRICK RAFOLISY

ROLE OF JUDICIAL OFFICERS IN ENHANCING COURT INTEGRITY

Is trust necessary in the judiciary?

What level of trust do we currently have in the Kenyan judiciary?

What is the real problem that will impede the trust? We have to address the root cause of the problem and not just deal with the symptoms.

- The appointing process
- Class and inequality
- Conduct of the judicial officers
- Lack of understanding of the court processes by the users

It is important to understand the real issue here is not corruption. The main problem with the judiciary in Africa is passivity of the courts. Passivity here is found in that there is a diffusion of responsibility and also the syndrome of 'good Samaritan' (we walk by people's problems as everyone is walking by and the users will therefore be waiting for the Good Samaritan that will at some point stop and address their issues. We wait for donors, legislative, CSO to come in and change the institution rather than attempt to change). Solutions can only be found within the judiciary. This will involve trying to overcome the passivity and become more active.

Intention – the institution already has a value system and as such this can be measured. However without a value system then it means that there is no intention.

CSO need more bargaining power because the tendency of donors and the 'good Samaritan' is to offer gifts that come with 'clauses'. Expectations only lead to disappointment if they are not managed.

Institutional integrity programme then needs to work on both sides; to deal with the institution (court) and the court users (community) on the other hand.

CSO and other stakeholders have the role of advocacy and communication with the court users as well as the institutions.

KMJA has a role of engaging all the stakeholders i.e. top leadership, court leaders and the court users. Change has to be voluntary; you cannot force them to change. They have to be willing and then you can help them change.

KMJA also has the role of being an oversight of the implementation through technical support (capacity training e.g. judge with experience in clearing backlog can share that with other judicial officers; information e.g. comparison information so as not to repeat the same mistakes; joint working groups)

Issues arising

While there is consensus that there is a need for change in the judicial and legal profession**,** where does it begin? Integrity needs to be taught from the training ground as lawyers are being taken through the legal training. Are people buying their qualifications? If persons are buying their qualifications then what is to stop that person from buying their way in the court room? Integrity has to be taught at every stage of the legal training.

Integrity is about society and should begin from much younger from the institutions where we beginning learning.

LSK is complacent. They have failed to discipline errant advocates even when their dealings are public knowledge.

What is the cost of not having integrity? We do not have the pressure of lack of integrity. What can we do to compel integrity? Can it be embedded in the rules of ethics?

Can the judiciary invest in a better communications department and conduct its own perception indexes?

- 2007 1st open day. GTZ and KMJA did a survey on the problems found with the judiciary. In 2009 the same was carried out in Machakos and Nairobi and found that the perception of the public was that the judiciary was corrupt.

The judiciary can no longer remain passive and removed from the public. This year the Judiciary applied for a Director of Communications and nobody applied as, the salary was not commensurate with the demands of the job. This again goes back to the issue of finances for the Judiciary.

As soon as the new CJ hits the office, CSO need to hit it from the beginning.

How do you measure whether perception has changed? Perception will give you a feedback through the use of a tool. TIRI is developing a court integrity index and has so far developed a framework. They are in the process of conceptualizing this framework to suit the individual questions.

Have we examined whether the social phenomenon called law is adequate? The law we know came from foreign jurisdictions. How far removed are the consumers of law? If the consumers of the law have a problem with the law then what good is changing the institution? Have we examined what perception of the law is to Kenyans?

We need to find a way to manage expectations especially those from the public. Are we expecting too much from the Judiciary too soon?

MS. MILLY ODONGO

INTRODUCTION TO PRO POOR INTEGRITY CONCEPTS

We need to refocus our attention back to the poor.

Reform is about well-being; being at a better place than we were at yesterday. A judiciary that is vibrant that has taken into consideration the public perceptions of them and, has sought to change to become better than they were before. It involves an inclusive process that consciously engages itself and that takes into consideration the weakest person in the link.

While there is provision for pauper briefs in court, is the process of bringing those briefs friendly to the persons who need to use them?

Pro-poor strategies: public awareness, information and education, provision of services such as judges going to prisons to listen to matter there, well-administered pauper brief system etc.

WAY FORWARD

Integrity must be embedded in society and as such from the earliest institutions of learning. Integrity should be embedded in our education.

Engage with the new CJ immediately and give him an agenda for the Judiciary based on all the reports that have been conducted to ensure that there is good leadership in the Judiciary.

Understand the challenges in so far as the perception of the user of the court

Partners will monitor with the court user/ community to access whether after the integrity engagements the communities feel that the judiciary is operating in integrity.

Moving forward as judiciary to begin implementation; begin to apply the concepts of integrity in our day to day work. Getting the public to actively acknowledge and see the strategies being applied by the Judiciary.

An inclusive process that consciously engages itself that takes into consideration the weakest person in the link.

GROUP WORK: AREAS OF ENHANCING COURT INTREGITY AND PRO POOR POLICIES IN NEW JUDICIAL ORDER

GROUP A: OPPORTUNITIES IN THE NEW CONSTITUTION

A: Practices within the Constitution

- Article 159 – specifically targets the poor and access to justice regardless of their status. Recognizes traditional mechanisms
- Bill of rights
- Locus standi and how it has been altered
- Provision for amicus
- Recognizes social, economic and cultural rights
- Enhancement of the JSC
- Legislation – National legal and awareness program, draft legal aid bill and policy on it.
- Access to justice is available right now
- Pauper briefs for murder trials

B: Practices within the Judiciary that counter change

- Non-recognition of industrial courts and other lower courts resulted in backlog.
- Supreme court – procedure and costs: does it make it more accessible to the poor person
- Combination of judicial and administrative functions have also contributed to backlog

C: Practices outside of the Judiciary that counter change

- Lack of Bail legislation – there have been administrative decisions requiring that valuation reports are attached to sureties and this reports are very costly and not within the reach of the poor hence impeding justice.
- Delay by investigators – police and correction facilities will delay in bringing persons to court, constantly seek adjournments, missing files, etc.

<u>Recommendations</u>

1. Information
    a. PR desk- people can seek information on the courts on procedures, processes, etc.

b. Notice boards can be placed within the courts and at the local levels and can be catered for by the court users committee and be updated regularly.

Action plan: should start immediately. Can be done by ICJ and KMJA and information put out by judicial officers within their course of work.

2. Legislation – such as the Bill Legislation

   Action plan – 5 years within which to have the relevant legislation. ICJ can put forth Best practices and forward them to the National assembly.

3. Administrative

   a. Increase the role of the clerk

Action plan: can start immediately and be implemented within 5 yrs. KMJA can assist.

GROUP B: OPPORTUNITIES UNDER THE NEW CIVIL PROCEDURE RULES

Processes within the Judiciary

1. Rules committee

   a. Previously poor people could only know how to access the courts through a lawyer. New rules provide that filing and drawing of documents is not so simple.

      Order 3 – is not bound by procedures. Small claims take care of the poor. At fast track level, while they still need a lawyer, the saving grace is a cap on the time within which they can be finalized. Multi-track level has also placed a cap on the time.

      Order 3 rule 2 – full disclosure. Issues are narrowed down

      Order 7 – defendant to narrow down their issues and make full disclosure thereby shortening the process of disclosure.

2. Injury claims – still difficult as there are experts needed and other documents
3. Pauper briefs
4. Simplicity of the new rules
5. Elements of Overriding Objectives – looking at Substantive justice rather than procedural justice
6. Elements of diversion of civil matter to arbitration and other ADR Order 45 of CP rules
7. Order 46 rule 20 – specific legislation needs to be made on the issue of referring for ADR
8. Delivery of judgment time has been capped at 60 days within which to deliver judgment.

Practices without the Judiciary

1. Resource Allocation for the Judiciary – they have very meager allocations.
2. Lack of information on the new rules even among the lawyers

Recommendations

Direct allocation of funds to the Judiciary based on the needs assessment

Need to have synergies within the stakeholders

Action plan

1. Civic education and Sensitization on the CP rules – immediately they come into force.
2. Website – can be done by Judiciary, NGO's and any organizations working with legal aid.
3. Need to filter cases to ensure that small cases can be handled immediately
4. Need to have synergies within the stakeholders and throughout the courts - must be immediate and all stakeholders have a responsibility
5. Advocacy for financial autonomy of the Judiciary - responsibility of the Judiciary

CSO' and other stakeholders should begin to translate and simplify the CP rules and then disseminate them to the public.

CLOSING REMARKS

HON. KENNETH MARENDE, SPEAKER OF THE NATIONAL ASSEMBLY

The theme of the conference is timely and of great significance to Jurists at this point in time for Kenya. One of the key pillars of the new constitution is judicial reform. The article by Dr. Mbondenyi in the Judicial Watch Report draws a comparison of the Judiciary in democratic transition in Africa between post-apartheid SA and post authoritarian Kenya. The Judiciary is placed as the ultimate organ vested with authority to interpret the Constitution therefore safeguarding and giving effect to it.

The Judiciary will breathe life to the Bill of Rights as enshrined in Chapter 4 of the Constitution. People of Kenya have yearned for fuller justice and called for reform of the judiciary. The importance of a sound judiciary cannot be said enough. We must have a sound judiciary to be able to realize the gains made in the constitution. Article 159 sets out guiding principles on how the judiciary should exercise judicial power. Other changes provided in the constitution include:

1. Establishment of a supreme court (*article 163*)
2. CJ and deputy CJ to be appointed by the president in accordance to recommendations made by the JSC and subject to approval of the National assembly (*article 166*)

3. All other judges to be appointed by the president with JSC recommendation

4. Expansion of JSC (*article 171*)

Sixth Schedule requires actions by various actors during the transition phase. Some of the actions are as follows:

1. Establishment of JSC (*s 20*) – Commission was to be appointed by 26th October, 2010. Two members were appointed on time and so for purposes of *s 20(1)* the JSC was deemed to have been appointed on time. National assembly is in the process of vetting the balance of nominees to the commission.

2. Enactment of relevant legislation – JSC bill and Vetting of Judges and Magistrates bill. CIC should be in place by next week. Failure to constitute the commissions is not fatal as long as appropriate action is taken. Both bills have been read and as per standing order 111, the bills stand committed to the relevant departmental committees. Parliament has taken the view that vetting legislation is an urgent requirement and they plan to enact it before the end of December 2010. The JSC bill is an omnibus bill and will look at a whole range of issues. It is important for the achievement of judicial reform and they plan to enact it before the current session ends.

3. Appointment of the Supreme Court – the Supreme Court is to be the final jurisdiction in matters of interpretation of the constitution. Parliament has taken view that the court be urgently constituted by May 2011.

4. Appointment of CJ and deputy CJ – they are to be the president and vice president of the Supreme Court respectively and their appointment needs to be expedited. Action will soon be taken by relevant authorities.

5. Appointment of AG and DPP – proposal that vacancies be advertised by end of Nov 2010. Hopefully will be done at the earliest.

Judicial reform involves multiple players. Constitution provides for a nomination process, an approval or vetting process and finally an appointment process. Legislation is to be done in a consultative process. Failure by any of the players to take part will result in a delay. All stakeholders have a duty to perform their mandate within their constitutional timelines.

ICJ and all jurists bear a great responsibility in the process of judicial reform and should ensure all actors perform their duty as custodians of the public interest to ensure that all actors faithfully perform the mandates set out in the Constitution.

Jurists have a duty to ensure the actions of various actors are in keeping with provisions of the Constitution as a whole and in particular article 10 on National values and principles of governance and 159 on judicial authority.

THE ANNUAL JURISTS CONFERENCE

DECEMBER 3rd 2010, Mombasa Continental

COMMUNIQUÉ ON WAY FORWARD ON THE IMPLEMENTATION OF THE NEW CONSTITUTION OF KENYA

FOR IMMEDIATE RELEASE

We the participants at the Annual Jurists Conference, comprising of Judges, Magistrates, Academics and Lawyers, meeting in Mombasa to reflect on constitutional gains; judicial reforms, implementation of the constitution and the accountability debate, we;

IN TAKING STOCK of the current efforts to implement the constitution,

RECOGNIZING the opportunity to reform institutions of State and specifically Judicial Reforms

NOTING THE IMPORTANCE of the need for consultations and inclusiveness in implementation of the Constitution

AWARE of the strict timelines provided for in the Constitution of Kenya to enact implementation legislations and the set up of key commissions and institutions

URGE AND DEMAND the following to be done to ensure effective implementation of the Constitution:

On the Boundaries and the Ligale Report:

- ✓ That the allocation of the Boundaries should be in line with the Constitutional provisions as provided.
- ✓ We note that the process was not well carried out and there were irregularities in following the criteria stated in the constitution.
- ✓ We recommend the work be taken over by the yet to be established IEBC and urge that its formation be prioritized.

On the vetting of Judicial officers:

- ✓ That the vetting process must be objective, transparent and fair and must respect the human rights of the judicial officers.
- ✓ We urge the allocation of sufficient resources and political support of the vetting process to ensure that the process takes place expeditiously, effectively and with due regard to the relevant constitutional provisions and objectives.
- ✓ Urge the political class and citizens to refrain from public utterances which malign and display a lack of confidence in Judicial Officers.

To Parliament and Government:

- ✓ There is need to have legislations developed in a consultative process and with clear policies to guide the contents of the laws.
- ✓ We urge the harmonization of the legislative proposals by the multiple players such as the Minister of Justice and Constitutional Affairs, A-G, CIC, Parliamentary oversight Committee, Kenya Law Review Commission, to avoid confusion and the creation of tug of war between the different players.
- ✓ We remind parliament that they represent the people and Sovereignty rests with the citizens of Kenya and they should not bargain and gamble with the constitutional implementation at the expense of Kenyans.
- ✓ The State must ensure that the social economic rights are realized. They must be concretized in terms of policy and standards that are concrete.

We call on citizens of Kenya, the private sector, and all concerned citizens to take proactive efforts to engage with the implementation of the constitution.

We demand that Parliament reflect on its role as representatives of the People of Kenya and avoid delaying implementation of the Constitution.

We urge the two principals to lead in national reconciliation efforts and ensure that the implementation of the constitution is consultative.

Signed this 3rd Day of December 2010

At the Annual Jurists Conference 2010

INTERNATIONAL COMMISSION OF JURISTS (K) AND KAS

2010 ANNUAL JURISTS CONFERENCE

MOMBASA CONTINENTAL RESPORT

30TH NOVEMBER – 3RD DECEMBER

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PROGRAMME

ANNUAL JURISTS CONFERENCE

VENUE: MOMBASA CONTINENTAL

30TH NOV – 3RD DEC 2010

Day One: 30th November 2010

Time	Activity	Session/Contact Point

07:00-8.00pm	Registration of Participants	ICJ Kenya Secretariat
08:00 – 9.00pm	• Welcome Reception Launch of the Judiciary Watch Report (JWR Vol.9)	Albert Kamunde, ICJ Kenya - Chair George Kegoro, Executive Director Konard Adenuer Stiftung (KAS)

9:00pm	**Dinner**	**All Participants**

Konrad Adenauer Stiftung

Day Two (Facilitated by KAS): 1st December 2010

Facilitators: George Kegoro, Executive Director – ICJ Kenya

Theme:

Constitutional Change, Democratic Transition and the Role of the Judiciary in Government Reform:

Questions and Lessons for Kenya.

A Peer Review and critique recommendations of selected JWR vol.9 Papers

***Objectives**:*

- *To examine the state and role of judiciaries during transition periods*

- *To advance scholarly debate on rebuilding institutions of governance*

- *To explore scope of judicial institutions likely to emerge in post conflict and democratisation*

Time	Activity	Session/Contact Point

07:30-8.00	Registration of Participants	ICJ Kenya Secretariat
08:00 – 8.45	Welcome and Introductions	George Kegoro Prof. Christian Roschmann - KAS
8:45- 9:30	**Session One**	

	Hon William Cheptumo Assistant Minister of Justice , National Cohesion and Constitutional Affairs	Albert Kamunde, **ICJ Kenya - Chair**
9:30- 10:00	**Key Note Address** : **Hon Justice Yvonne Mokgoro** Constitutional Courts and Constitutional making	

	in post conflict states; the case of South Africa, thoughts and reflections	
10:00 -10:30	**Coffee/Tea Break / Group Photo**	
10:30- 11:00	***Session Two***: Overview/Synopsis of JWR Selected Paper	**JWR (Editor) Curtis Murungi**

	Presentations Judicial Reforms unresolved issues: thoughts and reflections	**Judy Gitau**
11:00 – 11.30	***Session Three*** Multiple Spaces of Justice: An Exploration of	Discussant: **Dr. Godfrey Musila** Presentation One:

	Judicial Reform Efforts in Africa in Post-Conflict Situation	**Monica Mbaru**
	Practical feasibility of vetting: comparative experience from Bosnia, east Germany and South Africa	Presentation Two: **Dr Jan van Zyl Smit**

11.30 – 12:30	Plenary	**Felistus Njoroge** **ICJ - Vice Chair**
12.30 – 14.00	**LUNCH**	
14:00 – 14.30	***Session Four*** The Place of the Judiciary in Democratic	Paper Presenter Three:

	Transitions in Africa	**Dr. Morris Mbondenyi**
	Gender Mainstreaming, an Effective tool for Achieving Transitional Justice: A Comparative Analysis	Paper Presenter Four: **Anne Mumbi**
14.30 – 15.30	Plenary	**ICJ Council –John Gikonyo**

15:30- 16:00	Wrap Up and way forward	Rapportuer/ICJ Secretariat
16.00	**Coffee/Tea**	

Day Three (ICJ Kenya – Jurist Members Forum): 2nd December 2010

Facilitator: Albert Kamunde ICJ-Kenya Chair

Theme:

The role of Jurists in monitoring the Constitution Implementation process on the provisions of the

Bill of Rights and Judiciary

Objectives:

- *To internalize on the practical role of jurists in facilitating and monitoring the implementation process*

- *To share comparative and best practices from the South Africa experience*

- *To review emerging jurisprudence of the Interim Independent Constitutional Dispute Resolution Court*

Time	Activity	Session/Contact Point
7:00-7:30	Arrival and Registration	ICJ Secretariat

7:30- 8.00	Re-cap and overview of expectations and objectives	Felistus Njoroge Vice Chair - ICJ
8:00 – 8:30	**Session One** **Key Note Address** Transforming the Constitution to a living document:	**Hon Justice Yvonne Mokgoro**

	Comparative Best Practices from the South Africa on the Bill of Rights	
8:30- 9:00	Emerging Conflicts on the Interpretation of the New Constitution	**Pheroze Nowrojee** Discussant: **Professor Kivutha Kibwana**

9:00-10:00	Plenary	**ICJ Chair – Albert Kamunde**
10:00 – 11:00	**Coffee/Tea Break**	
11.00. – 11:30	**Session Two** Reflecting on emerging Jurisprudence of the Interim	Judge of the IICDRC

	Independent Constitutional Dispute Resolution Court: lessons for Jurists	**Hon Justice Sankale Kantai** Discussant: **Priscilla Nyokabi** ICJ Council
11.30 -12.00	Plenary Discussion	ICJ Council – **Njonjo Mue**
	Wrap up and way forward	ICJ Secretariat

12.00 -12.45		
12.45 – 14:00	**Lunch**	
14:00 – 16.00	ICJ Kenya AGM	ICJ Secretariat
16.00	**Tea / Coffee Break**	

Day Four (Tiri) 3rd December 2010:

***Facilitator**: Dr. Patrick Rafolisy and Milly Odongo*

Theme:

Embedding Integrity in the Constitutional Implementation process: Focus on the Kenyan Judiciary

Objectives:

- *To contribute towards embedding integrity concepts in the judicial systems and structures in proposed reforms in administration of justice*
- *To enhance the capacity and understanding of Judicial officers of Pro Poor Integrity Concepts*

Time	Activity	Session/Contact Point
07:30- 8:00	Arrival and Registration	**ICJ Secretariat**
08.00-8.30	Welcome remarks and review of the session objectives	**Hon. Justice Isaac Lenaola ,Chair** **KMJA**
8.30-8.45	Summary findings of Tiri Judicial Integrity	**Elsy Sainna**

	Status Report and the Constitution	**Programme Officer** **ICJ Kenya**
08:30 – 9:15	Introduction to Institutional Integrity Concepts	**Ken Otieno - Tiri** **East Africa Coordinator**
9.15-10:00	Role of Judicial Officers in enhancing Court Integrity	**Tiri- Dr. Patrick Rafolisy** **Head of Integrity Africa**

10.00-10.30	Plenary Discussions	**KMJA**
10:30 – 11:00	**Coffee/Tea Break**	
11:00 – 11:20	Introduction to Pro Poor Integrity Concepts	**Milly Odongo**
11:20-12.20	Group work: Areas of Enhancing Court Integrity and Pro Poor Policies in new	**Milly Odongo and** **Dr. Patrick Rafolisy**

	judicial order **Group A** - Opportunities in the new Constitution **Group B**- Opportunities under the Civil Procedure Rules	
12:20 – 13:00	Plenary Discussion	**KMJA**

13.00 – 14:00	**Lunch**	
14:00 – 15:00	Plenary Discussion Feedback of the group work	**KMJA**
15:00 – 15:30	KMJA Action Plan on promoting Court Integrity	**KMJA/ Tiri/ ICJ**

15:300 – 15:30	Wrap up and way forward	**ICJ Secretariat**
15:30 – 16:00	**Closing Ceremony** Guest Speaker Hon Kenneth Marende	 **ICJ Kenya Council**
19.00	Farewell Gala Dinner	