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Reforming Justice in East Africa

A Comparative Review of Legal Sector Processes

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Abbreviations and Acronyms

ADR	Alternative Dispute Resolution
AG	Attorney General
ASP	Afro-Shiraz Party
AU	African Union
CADER	Centre for Arbitration and Dispute Resolution
CCM	*Chama Cha Mapinduzi*
CHRAGG	*The Commission for Human Rights and Good Governance*
CID	Criminal Investigation Department
CJ	Chief Justice
COMESA	Common Market for Eastern and Southern Africa
CSO	Civil Society Organisation
CUF	Civic United Front
DANIDA	Danish International Development Agency
DFID	Department for International Development
DM	District Magistrate
DPP	Director of Public Prosecutions
EAC	East African Community
EACA	East African Court of Appeal
EALA	East African Legislative Assembly
ECK	Electoral Commission of Kenya
ECOWAS	Economic Community for West African States
E-LSRP	Expanded Legal Sector Reform Program
ERSWEC	Economic Recovery Strategy for Wealth and Employment Creation
EU	European Union
FES	Friedrich Ebert Stiftung
FIDA	Federation of Women Lawyers

FIDA-K	Federation of Women Lawyers – Kenya
FILMUP	Financial and Legal Sector Management Upgrading Project
FMA	Financial Management Agent for GJLOS
FPBR	Financial Planning and Budget Reform
GJLOS	Governance, Justice, Law and Order Sector
GoK	Government of Kenya
HEAC	Higher Education Accreditation Council
HIV/AIDS	Human Immune Virus/Acquired Immune Deficiency Syndrome
ILI	see last page of Zanzibar article
IDM	Institute of Development management
IFES	International Foundation for Election Systems
IGG	Inspector-General of Government
ILI	International Law Institute
IMF	International Monetary Fund
IPC	Inter Party Committee
IPRs	Intellectual Property Rights
JLOS	Justice, Law and Order Sector
JPSC	Joint Presidential Supervision Commission
JSC	Judicial Service Commission
KACC	Kenya Anti Corruption Commission
KCC	Kenya Cooperative Creameries
KCK	Kituo Cha Katiba
KLRC	Kenya Law Reform Commission
KNCHR	Kenya National Commission for Human Rights
KRAs	Key Result Areas
LLB	Bachelor of Laws Degree
LRA	Law Reform Act
LRC	Law Reform Commission
LRCZ	Law Reform Commission of Zanzibar
LRF	Legal Resource Foundation
LSK	Law Society of Kenya

LSR	Legal Sector Reform
LSRF	Legal Sector Reform
LSRP	Legal Sector Reform Program
LTF	Legal Task Force
MoFPED	Ministry of Finance, Planning and Economic Development
MoJCA	Ministry of Justice and Constitutional Affairs
MTEF	Medium-Term Expenditure Framework
MTS	Medium-Term Strategy
MKUKUTA	National Strategy for Growth and Reduction of Poverty (NSGRP) (Swahili)
NACADA	National Campaign Against Drug Abuse Authority
NARC	National Rainbow Coalition
NEC	National Executive Committee
NGOs	Non Governmental Organisations
NPAP	National Policy and Action Plan
OHADA	L'Organisation pour l'harmonisation en Afrique du droits des Affaires
PCM	Primary Court Magistrate
PCM	Primary Court Magistrate
PCO	Programme Coordination Office
PEAP	Poverty Eradication Action Plan
PRS	Poverty Reduction Strategy
PRSP	Poverty Reduction Strategy Paper
PSR	Public Sector Reform
PSRP	Public Sector Reform Program
QSP	Quick Start Project
SADC	South African Development Community
SAGAs	Semi-autonomous Government Agencies
SAPs	Structural Adjustment Programmes
SIP II	Second Strategic Investment Plan
STDs	Sexually Transmitted Diseases

STPP	Short Term Priorities Program
SWAP	Sector-wide Approach
TANU	Tanganyika African National Union
TCC	Technical Coordination Committee
TLS	Tanganyika Law Society
TShs	Tanzanian Shillings
UDEAC	Customs Union of Central African States
UDSM	University of Dar-es-Salaam
UEMOA	West African Monetary and Economic Union
UHRC	Uganda Human Rights Commission
UK	United Kingdom
ULS	Uganda Law Society
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
URT	United Republic of Tanzania
USA	United States of America
ZEC	Zanzibar Electoral Commission
ZLS	Zanzibar Law Society

1
Introduction: Legal Sector Reform in East Africa – A Comparative Critique

Maria Nassali

Introduction

> For decades, social scientists and legal scholars had debated a large and crude question: Can legal systems be used to change society. The obverse question was: Is law merely a codification of societal practices...but depending on ideological predisposition one could select an illustration here, an example there to prove both cases...The sophisticated question, becomes: under what conditions can the law and judicial action be used to effect change? Mayer Zald[1]

Rather than belabouring the utility of law as an arbiter of social change, this publication interrogates the extent to which law reform has been useful in achieving pro-poor development. Indeed, law and access to justice are contemporary buzzwords in East Africa. All three East African countries have undertaken legal sector reform processes within the framework of poverty reduction strategy plans (PRSP). PRSP views the justice system as part of the social well-being of the people. Thus it lays emphasis on reform of the effectiveness (doing the right thing) and efficiency (doing things right) of the legal sector in order to make justice more accessible to the poor. These poverty reduction strategies are premised on the popular definition of poverty by the grassroots, who define poverty beyond the absence of basic needs to include ignorance of the law, lack of access to justice and protection of the law.[2]

1 Zald, M. 1979, Foreword in Handler, *Social Movements and Legal Systems: A Theory of Law Reform and Social Change*. Academic Press.

2 Narayan, D et al (2000), *Voices of the Poor: Can anyone Hear Us*?. Oxford: Oxford University Press

Accordingly, one of the aims of improving access to justice, especially for the poor, is to ensure security for the person and property, reinforce good governance and ultimately improve the enjoyment of rights. Further, legal sector reforms are anchored in a sector-wide approach to development that aims at greater collaboration between different legal service providers, including civil society organisations.

In view of the above, Kituo Cha Katiba (KCK) commissioned country study papers to offer a comparative review of legal sector processes, highlighting the commonalities and differences but most importantly, critiquing the extent to which legal sector reforms have indeed been pro-poor. Secondary to the above, Partner States can no longer afford to conduct their programmes and policies oblivious to the existence of the EAC. In pursuit of a people-centred and private-sector driven integration process as a panacea for sustainable integration, the Hon. Secretary-General of the EAC, Amanya Mushega, reminds us that the EAC considers cooperation in legal and judicial affairs of paramount importance because it provides a legal basis for initiating and implementing regional projects and programmes. Likewise, Kaahwa articulates the utility of law as a necessary tool for laying the foundation for economic integration through accessible, predictable, transparent and uniform legislation in order to foster investment and growth of markets as well as facilitate a regional mechanism for the settlement of business disputes. Moreover, given the recent vintage of fast-tracking towards the East African Federation, the study provides an opportunity to reflect on the extent to which the three Partner States are moving towards a regional jurisprudence. To this end, the study of the EAC analyses whether the legal reform processes are geared towards the building of a common legal regime and to what extent the

EAC has contributed to the development of a common legal jurisprudence within East Africa.

Jjuuko rightly places the philosophy of the current legal sector reform processes in the neo-liberal economics of Structural Adjustment Programmes (SAPs): privatisation and reliance on market economics, as well as the phenomenon of the failing state, compelling the idea of civil society participation amidst the minimalist state. As such, the administering of SAPs in order to jump-start African economies from their abject poverty, prescribed a weak state that withdrew from the provision of basic social services.

Lately, more emphasis has been placed on poverty reduction or alleviation, based on the blue-print of the PRSP deployed world-wide.[3] Moreover, the en-vogue concept of "good governance" which is advanced by the World Bank is essentially a reincarnation of the law and development discourse grounded in liberal legalism, which perceives development as an inevitable destiny on condition that developing countries ensure a free-market economy, liberal democratic institutions and the rule of law. Accordingly, "good governance" is largely relied upon as a framework for making markets work more efficiently rather than making governments more accountable to their citizens in the pursuit of human-centred development. Expectedly, in spite of growth at macro-economic level, these policies have resulted in the deprivation of a majority of people of their livelihoods and a diminished sense of human dignity.[4]

3 Oloka-Onyango, J. 2004 Interrogating NGO Struggles for Economic, Social and Cultural Human Rights in Contemporary UTAKE: A Perspective From Uganda. Paper Submitted to the Conference on Emergent Human Rights Themes in East Africa: Challenges for Human Rights NGOs. 8 – 10 October 2004. pp. 2, 9.

4 For a more thorough critique refer to Nyamugasira, W. & Rowden, R. n.d. Do the IMF and the World Bank Loans Support Countries' Poverty Reduction Strategies? World Bank Documents, http://www.esrftz.org/ppa/documents/aa_2.pdf, accessed 25 February 2004.

The development models espoused and marketed by the World Bank have proven to be primarily motivated to aiding capital, rather than the noble ideal of enabling the poor to assume centre stage in the development discourse. Consequently, it is imperative that civil society organisations (CSOs) like KCK continue monitoring and pressuring government to actually realise the ideals of the pro-poor legal sector reform process currently embarked on in East Africa.

Critique of the Studies

The studies adopt a uniform style, outlining the historical development of the legal sector reform processes, the gains made and the challenges faced. Rather than recap what each author encompasses in the respective studies, this editorial adopts a comparative analysis that highlights major commonalities and differences across the five studies conducted; by Kaahwa on the EAC, by Michuki on Kenya, by Mapunda on Tanzania, by Jjuuko on Uganda and by Peter on Zanzibar.[5]

Status of the Legal Reform Process

Expectedly, there are differences in focus and in reflection of the actual context of each country. Besides, all the countries are at different levels of reform and have articulated their programmes differently with varying scope regarding what is included in the legal sector. In Tanzania, the reform process is referred to as the Legal Sector, encompassing institutions that directly address the administration or implementation of laws. Given the advanced stage of the reform process in Uganda, it is broader and is referred to as the Justice, Law and Order Sector (JLOS). Although initiated later, the reform process in Kenya is much more expansive and embraces governance

5 While Zanzibar is not an independent country, it has its own legal regime and constitution and as such is addressed independently from Tanzania by KCK.

as the basis for systematically addressing issues of corruption, hence the acronym GJLOS: Governance, Justice, Law and Order Sector.

Mapunda details how, since 1993, Tanzania has witnessed one of the most protracted legal reform processes in East Africa, characterised by numerous revisions without substantive implementation. The Bomani Action Plan of 1993 was shelved for being exorbitant. Instead, the Medium Term Strategy (MTS) was launched in December 1999 as a flagship for legal sector reform. Concurrently, the Quick Start Project (QSP) was launched to kick-start the MTS by providing an environment conducive to the implementation of the MTS. However, the QSP failed to take off, rendering the reform disjointed and sector-specific, in addition to the obvious wastage of time and resources. Mapunda tritely wonders whether the actual reform shall ever take off.

At the bottom of the ladder is Zanzibar which has had almost no legal sector reform. Peter graphically paints the deplorable and disappointing state of the legal sector in Zanzibar. The legal regime was rendered redundant after the 1964 Revolution, when the ruling party's decrees assumed the force of law. In fact, with the exception of the High Court, all courts were abolished in 1969. Moreover, the sector is poorly resourced in terms of numbers of qualified personnel. Worse still, the only aid received through the United Nations Development Programme (UNDP), is impromptu. This situation warrants concerted reform as a matter of priority.

In countries where some substantive reform has taken place, such as Uganda and Kenya, some gains have been registered, as documented by Jjuko and Michuki. The legal sector reform processes have resulted in better coordination, cooperation and synergies within the sector, elimination of duplication

and unnecessary competition as well as priority setting and rationalised financing of the sector through sector-wide approach plans. Further, the participatory process of the reform that involves key stakeholders, particularly civil society, has increased the impact of the legal sector reforms. Again, key institutions have been established, prominent of which are the Commission of Governance and Human Rights in Tanzania, The National Commission on Gender and Development in Kenya and the Centre for Alternative Dispute Resolution and the establishment of specific Commercial Courts in Uganda.

Challenges of the Reform Process

The above notwithstanding, the studies allude to numerous challenges that plague reform processes in East Africa. It is the hope of KCK that highlighting these challenges will draw attention to these gaps in order to invoke further remedial action on the part of all stakeholders.

Lack of Legal Sector Policy

The most prominent challenge bedevilling East Africa is the lack of a legal sector policy. Yet, this is essential for guiding the reform processes, for outlining the key purpose of the reforms, the scope, the objectives and the intended beneficiaries, among matters. Further, having an East African Legal Sector Policy would guide the reforms within the respective countries to ensure that they learn from each other in a systematic fashion, but most importantly, promote the harmonisation or approximation of the legal frameworks within the EAC.

As a result of this lacuna, areas of inclusion or exclusion in the reform process are often determined through bilateral agreements between donors and individual governments. For example, in Tanzania, the police is regarded as an option programme of the legal sector, excluded or included at whim.

In Uganda the exclusion of the Uganda Human Rights Commission and Parliament creates a serious gap, while the inclusion of the Land Registrar, Immigration and even the Company Registry is regarded as an anomaly. In contrast, the Kenyan programme includes institutions that address corruption and civil society.

At the regional level, Kaahwa laments that although the Treaty for the Establishment of the East African Community (the Treaty) provides for cooperation in legal and judicial affairs in respect to legal training and certification, standardisation of the judgments of courts within the Community, harmonisation of all national laws pertaining to the Community; and the revival of the East African Law Reports and journals (Art 126), in the quest for common legal regime, conceptual straitjackets and practical limitations hamstring the process of harmonising laws. These include among others, lack of an enforcement mechanism of relevant decisions of the EAC Sectoral Council on Legal and Judicial Affairs, due to the tensions between national sovereignty and regional integration; the extent of the expected work on harmonisation; adoption of different and independent laws and legal systems, different procedures for the enactment of municipal laws in pursuit of national interest; failure to align the new laws to the regional harmonisation process and lack of sufficient financial resources. The total effect of the above is the imperative of a regional Legal Sector Policy to ensure the systematic approximation or harmonisation of laws at both the national and regional levels. Kaahwa recommends the enhancement of the political commitment of Partner States to the timely implementation of the EAC programmes, empowering the East African Legislative Assembly (EALA) to legislate Community law as pragmatic efforts in forging a regional legal framework.

The Ambivalent Position of Zanzibar within the EAC

A related challenge is the ambivalent position of Zanzibar within the EAC. Peter underscores the importance of an honest and frank discussion of the position of Zanzibar within the EAC, particularly in view of the fact that the judiciary in Zanzibar is partially a purely Zanzibari and partially a Union matter. In other words, the highest appellate body, the Court of Appeal of Tanzania, is a Union Matter, under Item 21, while the rest of the judiciary is "domestic" to Zanzibar. Given that the legal sector is not one of the Union matters, it is not surprising that when the Government of the United Republic of Tanzania decided to upgrade its legal sector in 1993 under the Financial and Legal Sector Management Upgrading Project (FILMUP), it began in one part of the United Republic only, Tanzania mainland. Yet, Zanzibar has an independent constitution, legal framework and judiciary. Moreover, strategic reforms remain under-funded. Although the de-linking of the Director of Public Prosecutions' (DPP) Office from the Attorney-General's (AG) Chambers was a welcome intervention that enhanced the neutrality of the office in Zanzibar, this step has not been matched with adequate resources. Again, since its establishment in 1986, The Law Reform Commission (LRC) has had no budgetary allocation or staff, with the exception of its chairperson; Mr. Justice Wolfgang Dourado.

While it is purported that Zanzibar's interests are part and parcel as those of Tanzania at the EAC, there are non-union matters such as labour, gender, sports and culture that are currently being addressed at the EAC, which require the overt representation of Zanzibar's national interests.

Pro-poor Rhetoric

Without disparaging the efforts of making the poor the key beneficiaries of reform processes within the framework of the

poverty reduction strategy, none of the East African countries seems to be achieving the desired goal: pro-poor development. Once again, the poor have been used as a smokescreen to advance the interests of finance capital. Apparently, all the papers suggest that the motive force behind legal sector reform has not been primarily ensuring justice, law and order for the poor, but rather the realignment of the law to facilitate globalisation. This is evidenced by the prioritisation of laws that sustain the operations of a market economy such as the new Company Acts, land laws to facilitate easier access to land for investors as well as labour laws which aim at making labour more investment friendly. Thus, the people have not been the main beneficiaries, as propagated. In illustration, in Uganda, the prioritisation of the establishment of the Centre for Alternative Dispute Resolution is of marginal consequence to the poor, who cannot afford the $50 United States dollars fee per arbitration sitting. In Kenya, the existing commercial laws are biased against small-scale traders. Moreover, the few that are favourable to small enterprises are hardly implemented. Harassment by law enforcement agents and frequent demands for payments for numerous trade and business licenses are major stumbling blocks to the growth and vibrancy of the small-scale enterprise sector. Further, in Kenya and Uganda, important bills that address the immediate legal needs of the poor, such as the Domestic Relations Bill, the Sexual Offences Bills, to mention but a few which are part of the Criminal Justice Reform Programme, were not a priority of the Poverty Eradication Action Plan (PEAP) but were merely included after the revisions of the PEAP in Uganda and Kenya. Consequently, legal reform processes are blatantly gender-blind. Yet, the poor have pointed out that they cannot live in peace, make free choices and maximise available opportunities if the institutions of justice and law and order fail to protect

them in their daily lives. Therefore it is proposed that, given that women constitute the largest proportion of the poor, the sector-wide approach be expanded to include the ministries responsible for gender and women's affairs.

To mitigate the above, in all the three countries the improvement of access to justice for the poor and the disadvantaged has unofficially been delegated to non governmental organisations (NGOs), under the guise of civil society participation and collaboration. Indeed, in Uganda, civil society organisations' independent strategic planning exercises to guide their involvement in the legal sector reform process emphasised access to justice, with specific focus on legal aid and legal awareness.

Donor Dependence

Throughout East Africa, complaints about the miniscule financial resources allotted to the legal sector reform process by the respective governments abound. Worse still, all the countries' budgets as well as the EAC budget are highly donor funded, which automatically infers dependency in terms of oversight and accountability. Again, while conceding that donors have played a very crucial role in facilitating initiation of the reform exercise, late disbursement of funding has caused inordinate delays in programme implementation in almost all countries. This begs the question: Where is the ownership of the reform process? And whose reform is it? The sum effect of the above is that governments' political muscle to direct reform according to its priorities is eroded. Indeed, a highly donor dependent reform process automatically translates into a donor-driven agenda. This explains the outlandish resource imbalance, with a bias towards commercial justice programmes, to the detriment of the criminal justice programme in all three East African countries.

At the regional level, although the Treaty obliges Partner States to jointly and equally fund the budget of the Community, for the last ten years, Partner States' contributions to the EAC budget not only arrive belatedly but also in percentage portions. Furthermore, donor contributions for studies/research have strings attached, are cumbersome to access as well as inflexible to the short-term requirements of the Community. Thus, programmes have been delayed, postponed or sometimes abandoned. Integrating the cost of reform in national budgets would enhance governments' ownership and direction of the reform process.

In summation, operationalising the rights-based approach to development currently in fashion infers that issues of human rights and governance are no longer an exclusive government prerogative, but oblige the participation of all stakeholders. Pro-poor development and access to justice presupposes that the poor will be at the centre stage of determining their development.[6]

The most outstanding challenge for the whole of East Africa is the strategic positioning of legal sector reform in the current political transition and constitutionalism. The legitimacy of Partner States to enforce Treaty provisions is largely dependent on their national credentials regarding promoting rights. Unfortunately, civil society organisations are said to lack capacity for effective participation in JLOS beyond legal provision and awareness-raising. Without being pessimistic, given that the studies raise more challenges than gains, it is critical for civil society to constructively critique the ongoing reform processes in order to reorient them toward their

6 McGee, R.: 2004. "Unpacking Policy: Actors, Knowledge and Spaces", in Brock, K. R. MacGee and J. Gaventa (Eds) *Unpacking Policy: Knowledge, Actors and Spaces in Poverty Reduction in Uganda and Nigeria*. Kampala: Fountain Publishers. p. 37.

formally stated goals: improved service delivery and pro-poor development. Significantly, civil society has to organise itself, develop alternative agendas and serve as a check and balance of state power as well as influence the state's democratic evolution.

2
The State of Harmonisation of Municipal Laws in the East African Community Context

Wilbert T.K. Kaahwa

Introduction

The East African Community is an inter-governmental organisation made up of the states of Burundi, Kenya, Rwanda, Tanzania and Uganda.[7]

According to the Treaty for the Establishment of the East African Community (the Treaty), the Community[8] seeks to strengthen the Partner States' cooperation in political, economic, social and cultural fields, research and technology, defence, security, legal and judicial affairs, for their mutual benefit and fast, balanced and sustainable development. A closer examination of the provisions of the Treaty in respect of different areas of cooperation is a pointer towards sustainable development of the EAC region.[9] For that purpose, the Partner States undertake to establish among themselves and in accordance with the provisions of this Treaty, a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation.[10] As a foundation for these projections it should be noted that the EAC Partner

7 Please note that this paper was prepared before the admission of Burundi and Rwanda into the East African Community in 2006.

8 The full text of the Treaty, which came into force on 7 July 2000, can be found on the EAC's website http/www.eachq.org

9 The Treaty covers major areas of socio-economic and political development of the EAC region.

10 The East African Community Customs Union was established by the Protocol on the Establishment of the East African Community Customs Union. The Customs Union became effective on 1 January 2005.

States bind themselves to the pursuit of good governance, including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights.[11]

The regional organisation aims at achieving its goals and objectives through the realisation of the following:

(a) promotion of sustainable growth and equitable development of the Partner States, including rational utilisation of the region's natural resources and protection of the environment;

(b) strengthening and consolidating the long-standing political, economic, social, cultural and traditional ties and associations between the people of the region in promoting a people-centred mutual development;

(c) enhancement and strengthening of participation of the private sector and civil society;

(d) mainstreaming of gender in all programmes and enhancement of the role of women in development;

(e) promotion of good governance, including adherence to the principles of democracy, rule of law, accountability, transparency, social justice, equal opportunities and gender equality; and

(f) promotion of peace, security and stability within the region and good neighbourliness among the Partner States.

The regional cooperation and integration envisaged in the EAC as stipulated in the Treaty is broad-based, covering,

11 Article 6(d)

among other areas of cooperation, those in trade, investments and industrial development, monetary and fiscal affairs, infrastructure and services, human resources, science and technology, free movement and natural resource management; tourism and wildlife management, health, social and cultural activities, the role of women in socio-economic development; participation of the private sector and civil society; and cooperation in political matters, including defence, security, foreign affairs and legal and judicial affairs.[12]

The EAC operates on the basis of five-year development strategies. The strategy document spells out the policy guidelines, priority programmes and implementation schedules. Both the initial Development Strategy, which serially spanned the period 1997- 2001 and 2001-2005, and the current strategy in respect of the periods 2006 - 2010 emphasise economic cooperation and development with a strong focus on the social dimension. The role of the private sector and civil society is considered as central and crucial to the regional integration and development in a veritable partnership with the public sector.[13]

In integration processes, this type of projection requires policy rationalisation and harmonisation of the states that, by action envisaged under international treaty law, cede their sovereignty or opt to exercise that sovereignty at a supra-national level. Indeed, the provisions of the Treaty and the Development Strategies emphasise policy rationalisation and harmonisation as being the basic *sine qua non* for the success of the integration process. For comparative purposes it is important to note that the EU has developed its integration programmes largely on

12 The areas of cooperation are succinctly provided for under Article 4 and Chapters 11 to 24 of the Treaty.

13 East African Community 2001 The East African Community Development Strategy 2001 – 2005. Arusha: EAC Secretariat. pp. 21 – 22.

the basis of harmonisation of programmes in diverse areas including environmental protection; the free movement of persons, labour and services; and customs management and administration.

This paper seeks to address the rationale and extent of the EAC's (policy) harmonisation of the Partner States' municipal laws in the Community's context.

Rationale for the Harmonisation of Laws in The East African Community

Conceptual view

Integration processes involve the process of harmonisation at different levels and to serve different purposes. This is true at the basic levels of economic cooperation and also at the more comprehensive levels of economic integration and ultimately at those of political federations. Under most of the economic integration processes harmonisation has been mainly with regard to such economic matters as fiscal harmonisation; monetary harmonisation; and convergence in other areas of economic interest, including services.

The essence of harmonisation is the assignment by member states of a given union or community of states, of particular economic functions and instruments and their exercise to such a union or community. In economic terms it is a second level of merger of national economic pursuits and policies, following upon basic integration and preceding the coordination of national policies and measures in particular selected fields.

A back-up for such processes is the harmonisation of laws. According to Yakubu, "one viable method of bringing about

international cooperation is through the harmonisation of laws."[14]

The exponents of the economic theory on harmonisation as a second level of merger recognise that "harmonisation involves the adoption of legislation by the institutions of the union or community that is designed to bring about changes in the internal legal enactments of the member states".[15]

It has been argued that, in the aftermath of the New International Economic Order, harmonisation of laws is a necessary consequence of globalisation. Globalisation has given rise to the need and establishment of regional economic processes such as trading blocs as paths to both economic growth and survival in multi-lateral trading, security and political spheres. In tandem with this, there has been technological advancement, the impact of which on commerce and international trade is fundamental to growth. In this scenario, law is not just a tool for implementing economic integration. It is indeed a basis for economic integration because stable, clear and uniform legislation, once commonly implemented, will encourage investment and growth of markets.

In the EAC therefore the objective of harmonisation of laws is to create an enabling environment for greater private sector participation in economic and social development in East Africa through the establishment of accessible, predictable and transparent laws at both regional and national levels.

14 Yakubu, A. 1999. *Harmonisation of Laws in Africa*. London: Malthouse Press. pp. 56 – 57.

15 Robson, P. 1999. *The Economics of International Integration*. London: Routledge. p. 65.

Basis for Harmonisation of Laws in the East African Community

(a) Provisions of the Treaty

From the onset, the East African Cooperation, the intergovernmental arrangement that preceded the EAC, identified economic cooperation as the key priority for the region's development. In this regard, the Cooperation's area of immediate focus was in sectors which jointly and severally promote economic development within the member states. These priority areas included Legal and Judicial Cooperation.

Specifically, with regard to cooperation in legal and judicial affairs, the Treaty provides that:

"1. In order to promote the achievement of the objectives of the Community as set out in Article 5 of this Treaty, the Partner States shall take steps to harmonise their legal training and certification; and shall encourage the standardisation of the judgments of courts within the Community.

2. For purposes of paragraph 1 of this Article, the Partner States shall through their appropriate national institutions take all necessary steps to:

   (a) .....;
   (b) harmonise all their national laws appertaining to the Community; and
   (c) revive the publication of the East African Law Reports or publish similar law reports and such law journals as will promote the ex-

change of legal and judicial knowledge and enhance the approximation and harmonisation of legal learning and the standardisation of judgments of courts within the Community.

3. For purposes of paragraph 1 of this Article, the Partner States may take such other additional steps as the Council may determine."[16]

This undertaking is reinforced by the Partner States' commitment to secure the enactment and effective implementation of such legislation as will domesticate the Treaty within their respective national jurisdictions[17] and to accord precedence to Community laws over similar national ones on matters pertaining to the implementation of the Treaty.[18]

(b) Strategy in Legal and Judicial Cooperation

According to the East African Cooperation Development Strategy 1997-2000, the justification for prioritising cooperation in legal and judicial affairs was the postulate that it would facilitate, among other things, establishing a regional mechanism for the settlement of business disputes and the harmonisation of municipal laws in the East African cooperation context. These objectives were regarded as vital for the systematic pursuit of policy-oriented and development programmes.[19]

16 Article 126
17 Article 8
18 Ibid
19 East African Co-operation 1997 East African Co-Operation Development Strategy (1997 - 2001), East African Co-operation Secretariat. Paragraphs 66, pp. 88 - 90.

The East African Community Development Strategy (2001-2005) provided that:

> In order to promote a smooth transition to the East African Community, the Partner States shall harmonise their legal training and certification within the Community. The Partner States shall endeavour to harmonise all their national laws and regulations in the following areas:
>
> - Trade and investment
> - Civil aviation
> - Telecommunications
> - Immigration
> - Environment
> - Health
> - Labour and employment
> - Education sector
> - Joint action in international agreements/protocols."[20]

The current Development Strategy provides that the strategic interventions in legal and judicial affairs during the period 2006-2010 include harmonisation of municipal laws, legal training and certification.[21]

Scope of the Harmonisation of Laws Process[22]

Identified Areas

From the outset the EAC sought to pursue the process of harmonisation of laws for two purposes i.e. the systematic

20 East African Community 2001 East African Community Development Strategy (2001 - 2005). Arusha: EAC Secretariat. Paragraph 4.7.

21 East African Community 2006 East African Community Development Strategy (2006 - 2010). Arusha: EAC Secretariat. Paragraph 149.

22 The information contained in this part of the paper is derived from the reports of the meetings and decisions of the Permanent Tripartite Commission and the Council of Ministers for the period 1994 - 2006.

establishment of a Customs Union, Common Market, Monetary Union and ultimately a Political Federation; and support for implementation of relevant policy-related decisions of the Council of Ministers in all other areas of cooperation. The areas so far identified for harmonisation include the following:

(a) Agriculture and Food Security (including conservation of flora and fauna, control and monitoring land-based sources of pollution); pesticides and pest control; and agricultural production, livestock development and fisheries);

(b) Education, Culture and Sports (including education standards, syllabi and curricula development; research; examinations, evaluation and certification; student and staff exchanges; information sharing);

(c) Commercial laws (including those on banking business associations; business dispute resolutions; procurement; investments; capital markets; building societies);

(d) Energy;

(e) Environment and Natural Resources (encapsulating pollution control and environmental protection and utilisation and protection of shared resources);

(g) Health (covering control and prevention of STDs, HIV/AIDS; control of communicable diseases; specialised training; health research; nutrition; gender issues; reproductive health);

(h) Labour and Employment (including core labour areas of a regional nature in the context of related international conventions);

(i) Movement of factors of production across borders (covering immigration/health requirements; labour requirements; and resident/citizen requirements);

(j) Trade, Industry and Investment (including investment codes and laws; customs procedures; patents, copyrights, trade marks and the whole area of intellectual property rights; standardisation, quality assurance and metrology);

(k) Transport and Communications (including road traffic and safety; rail transport and safety; use and management of Lake Victoria; and civil aviation);

(l) Security (including police cooperation; extradition; cross-border investigations; crime control; refugee arrangement; licensing and control of firearms);

(m) Tourism and Wildlife Management; and

(n) Other cross-border service sector interests including cross-border practice of professional services.[23]

Following the coming into force of the Protocol for the East African Community Customs Union, it is imperative that laws relating to trade and investment are harmonised to facilitate investment, movement of goods and factors of production and resolution of commercial disputes within the region.

23 Ibid

In its endeavours the EAC takes cognisance of the fact that the Partner States are also undertaking reform of laws relating to activities within the contemplation of the Treaty. These include, for example, the work of Uganda's Institutional Capacity Building Project on Legal Sector Reform and that of Kenya's Task Force on reform of various laws. It is also understood that Tanzania has undertaken a study towards the review of her Companies' Ordinance. The Partner States are also exploring the feasibility of enacting E-commerce legislation.

Furthermore, the Partner States, under the UNEP/UNDP Joint Project on Environmental Law and Institutions in Africa, are expected to enact framework environmental legislation with similar content and thereafter enact relevant sectoral environmental laws. The East African sub-regional component of this project has emphasised reporting on harmonisation in the areas of environmental impact assessment regulations; forestry legislation; trans-boundary movement of hazardous wastes; methodology for the development of environmental standards; management of the Lake Victoria environment; and wildlife legislation.

Institutional Framework and Methods of Work

The process of harmonisation of laws in the EAC is spearheaded by a Task Force on Approximation of Laws comprising representation from the Partner States' Law Reform Commissions, Offices of the First Parliamentary Counsel, coordinating ministries and line sectoral departments.

The Task Force, which reports to the Sectoral Council on Legal and Judicial Affairs, through a sub-committee headed by the chairpersons of the Law Reform Commissions and the

Sectoral Committee on Legal and Judicial Affairs, is charged with:

(a) identifying priority areas for the approximation/ harmonisation of municipal laws;

(b) identifying statutes for consideration in relation to the prioritisation of identified EAC areas of cooperation;

(c) facilitating exchange of information between the Law Reform Commissions on the approximation/ harmonisation of municipal laws;

(d) establishing synergy with other institutions and bodies engaged in law reform programmes in the East African subregion;

(e) preparing working papers for the sub-committee on Approximation of Laws; and

(f) preparing draft tripartite instruments to be agreed to from time to time.

The Task Force researches identified sectors of the laws that need to be harmonised at national level. In consideration of best practices and other global trends, the Task Force makes recommendations to the sub-committee for enactment of an EAC law, amendments to or repeal of national laws to conform with global trends or best practices. If the sub-committee approves the recommendations of the Task Force, it recommends accordingly to the Sectoral Council on Legal and Judicial Affairs. Once the Sectoral Council approves the recommendations, they become a directive to the Partner States to implement.

Progress to Date

In 1998, the Partner States' Attorneys-General adopted the decision of the Sub-Committee on Approximation of Laws to orientate the exercise of "Harmonisation of Laws" to "Approximation of Laws" except in cases where circumstances on specific legislation demand otherwise. Approximation of Laws has been approached mainly through:

(a) The re-orientation of Partner States' enactment of municipal laws to take into account and to reflect EAC developments and needs; and

(b) The use of protocols to the Treaty (as integral parts thereof) and tripartite agreements on agreed areas and activities of cooperation.

Approximation of laws at its basic level was deemed to start with an exercise in standardisation of provisions of different states' statutory provisions on any given subject under integration. It is this standardisation that would form the basis for the protocols and tripartite agreements. The Southern Africa Development Community (SADC) has, with regard to legislation on firearms control, noted some success on using a standardisation of provisions approach regardless of the different legal systems of that Community's membership.[24] This is what has given rise to the conclusion of an agreement between the Government of the Republic of Mozambique and the Government of the Republic of South Africa in respect of Co-operation and Mutual Assistance in the Field of Crime Combating.

24 Gamba, V. 2000 *Governing Arms: The Southern African Experience*. Pretoria: Institute for Security Studies. p. 83.

In line with its mandate, the Task Force has:

(a) identified the following priority areas of law for approximation:
   i) Travel Restrictions, Movement of Persons and Services;
   ii) Property and Title;
   iii) Commercial Transactions (including insurance, building societies; banking; capital markets; and investments);
   iv) Finance and Investment;
   v) Environment;
   vi) Infrastructure Development;
   vii) Energy;
   viii) Agriculture and Animal Husbandry; and
   ix) Health;

(b) facilitated exchange of information between Partner States' Law Reform Commissions on approximation of municipal laws such as reports, statutes and other publications;

(c) established synergies with other institutions and bodies engaged in law reform programmes in the East African subregion.

Problems that Affect the Process of Harmonisation of Law

In the first instance there is a conceptually-founded problem. It involves considerations of the Partner States' commitment to the integration process. The Treaty, as an instrument of International Law, has a provision for a general undertaking regarding implementation. According to this provision:

1. The Partner States shall:
   (a) plan and direct their policies and resources with a view to creating conditions favourable for the development and achievement of the objectives of the Community and the implementation of the provisions of this Treaty;
   (b) co-ordinate, through the institutions of the Community, their economic and other policies to the extent necessary to achieve the objectives of the Community; and
   (c) abstain from any measures likely to jeopardise the achievement of those objectives or the implementation of the provisions of this Treaty.

2. Each Partner State shall, within twelve months from the date of signing this Treaty, secure the enactment and the effective implementation of such legislation as is necessary to give effect to this Treaty, and in particular:
   (a) to confer upon the Community the legal capacity and personality required for the performance of its functions; and
   (b) to confer upon the legislation, regulations and directives of the Community and its institutions as provided for in this Treaty, the force of law within its territory.

3. Each Partner State shall:
   (a) designate a Ministry with which the Secretary General may communicate in connection with any matter arising out of the implementation or the application of this Treaty, and shall notify the Secretary General of that designation;
   (b) transmit to the Secretary General copies of all relevant editing and proposed legislation and its official gazettes;

(c) where it is required under this Treaty, to supply to or exchange with another Partner State any information, send copies of such information to the Secretary General.

4 Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty.

5. In pursuance of the provisions of paragraph 4 of this Article, the Partner States undertake to make the necessary legal instruments to confer precedence of Community organs, institutions and laws over similar national ones."[25]

It is against this general undertaking that the challenges facing the Community, which principally relate to the implementation of the Treaty, can best be examined. The Partner States are obliged to ensure not only the ratification of the Treaty but also its domestication within their respective municipal laws, the timely implementation of its projections; and general adherence to its provisions. However, conceptually the actualisation of the ideals of the integration process is afflicted by the question of the Partner States' constitutionally enshrined sovereignty.

The question of sovereignty may impact on the Partner States' will and commitment towards the harmonisation process. By way of comparison, one notes that pursuant to the various treaties that have evolved over time in Europe, the European Commission has the authority to issue binding directives which Member States are obliged to adopt into their respective national laws as *acquis communitaire*. These directives have the force of law, even if the member states do not adopt them into national law.[26]

25 Op. cit. Footnote 11.

26 Harding, C. & Sherlock, A. European Community Law: Text and Materials. London: Longman. pp. 75 - 150

Another point worth noting in relation to the issue of sovereignty is the fact that Zanzibar has a different municipal law system from that of mainland Tanzania. Related to this general problem is the fact that the EAC does not have a clear mandate to police enforcement of Council decisions by Partner States. Accordingly, in most cases, the decisions of the Sectoral Council on Legal and Judicial Affairs regarding harmonisation often remain unimplemented.

Besides the general problem, there are a number of specific handicaps that affect the process of harmonisation of laws in any integration process. From the EAC's experience the major handicap is the magnitude of the expected work on harmonisation. The wide scope of the laws under purview has to be seen against the time span within which the EAC is expected to achieve its objectives. The work of the Task Force involves extensive research on identified laws at national level. Lack of resources to facilitate research work at national level has continued to hamper operations of the Task Force. The work of the Task Force may increase in accordance with the needs of other sectors within the Community that need their respective legal frameworks approximated. This has the implication of increasing the workload, with the resultant effect of failing to meet objectives as envisaged.

For example, in the area of environmental law alone, the task involves a consideration of at least 37 Acts of Parliament of Partner States.[27]

27 The Environmental Acts include the following:
Laws of Tanzania
The National Environment Management Commission Act
The Mining Act 1998
The Water Utilisation Act 1974
The Wildlife Protection Act 1974
The Forestry Act 2003
The Petroleum Exploration Act 1980
The National Parks Ordinance, Cap 412

The European Community, notwithstanding the relatively large extent of the development of EU law, is yet to effectively settle the problem of the growing scope of its member states' laws yet to be harmonised. Peytz has, with regard to the legal consequences of the single currency on the law of business organisations, observed that:

> If an overall harmonisation of private law obligations was to be successfully attempted, it would require strong and unified political will, the commitment of significant resources, and the adoption and communication of clear goals and time-tables. In the absence hereof, a piecemeal approach may be more likely to succeed ... a sufficient legal basis for harmonisation should be created, providing for unanimity.[28]

The Ngorongoro Conservation Ordinance, Cap 413
The Land Act No. 4/1999
The Village Land Act No. 5/1999
The Natural Resources Act Cap 259
The Marine Parks Act 1994
The Factories Ordinance

Laws of Kenya
Environmental Management and Co-ordination, Act No. 8 of 1999
The Forest Act, Cap 385
The Water Act, 2002
The Mining Act, Cap 306
The Petroleum Act, Cap 116
The Timber Act Cap 386
The Factories Act Cap 514
The Land Planning Act, Cap 303
The Wildlife (Conversation and Management) Act, Cap 376.

Laws of Uganda
The National Environment Act, Cap 153
The Atomic Energy Act, Cap 143
The Electricity Act, 1964 Revision, Cap 144
The Electricity Act, 1999, Cap 145
The Forest Act, Cap 146
The Minerals (Prohibition of Exportation) Act, Cap 147
The Mining Act, Cap 149
The Petroleum (Exploration and Production) Act, Cap 150
The Timber (Export) Act, Cap 152

28 Peytz, H.N. 1999 Legal Consequences of the Single Currency (unpublished overview).

It is, however, instructive to note, for comparative purposes, that the Common Market for Eastern and Southern Africa (COMESA) has addressed this issue with regard to trade and investment laws. It has accordingly agreed upon a phased approach.[29]

Thirdly, although the three Partner States share a common legal system, having received their law from the United Kingdom and having had regional legislative systems under past phases of integration, they have, since 1977, when the earlier Community ceased to exist, had different and independent legal systems. Under these systems different legislative practises and procedures are applicable in the enactment of different municipal laws. To that extent legislation has been developed in different ways, that inevitably emphasise national interests.

A uniform legal system is critical for integration processes. Tomori argues with respect to integration processes in West Africa that "it is often not enough to agree upon a decision that is based on purely economic analysis and which is a product of difficult political negotiation when there is no legal structure capable of implementing the decision and giving practical content to it. In this regard, the diverse legal systems of West Africa constitute an obstacle to the harmonisation of policies and promotion of community interests".[30]

And the EAC process notwithstanding and contrary to the dictates of *pacta sunt servenda*[31] the Partner States sometimes enact new laws without giving due regard to the regional harmonisation process.

29 Report of the Eighth Meeting of the COMESA Council of Ministers.

30 Tomori, S. 1997. Towards Monetary Co-operation in West Africa, in Bourenane, et al *Economic Co-operation and Regional Integration in Africa*: *First Experiences and Prospects. Nairobi*: East African Academy of Sciences. p. 146.

31 A literal interpretation of Article 8 of the Treaty binds the Partner States to implement the Treaty and all projects and programmes thereunder.

Fourthly, one has to take note of the fact that if harmonisation is to have full effect it should cover both hard law (based on existing national legislation) and soft law (such as that based on model laws, rules and legal guides). To date, the emphasis of harmonisation has been only on hard law. Besides, each of the Partner States lacks a legislative framework on new emerging issues such as e-transactions.

Fifthly, the "approximation" paradigm so far used by the EAC remains open-ended. Besides the fact that implementation of relevant decisions on harmonisation of any handled legislation remains the preserve of the Partner States, the process has not ascertained the best option. Taking a leaf from harmonisation experiences in the EU and the Economic Community for West African States (ECOWAS), it would have been an advantage to decide on an appropriate option. The four broad options are centralised harmonisation, separated jurisdiction; a decentralised approach and centralised policy (with implementation at national level). The EAC's approach seems to be mainly an amalgam of centralised policy (with implementation at national level) and decentralised harmonisation whereby Partner States are expected to legislate taking cognisance of the Treaty and the harmonisation process.

Furthermore a substantial amount of resources will be required to implement the Treaty. Generally speaking, the implementation of the Community's programmes including that of harmonisation of laws, is afflicted by lack of sufficient financial resources. The Treaty provides for the Partner States' joint funding of the budget of the Community through equal contributions. Other sources of funding include receipt of regional and international donations and any other sources as may be determined by the Council of Ministers.[32]

32 Article 132

Other resources of the Community shall include such extra budgetary resources as "grants, donations, funds for projects and programmes and technical assistance" and "income earned from activities undertaken by the Community."[33]

The experience had to date indicated that despite the,

> "strong political will and hard bargaining in the budgetary process, Partner States find the EAC budget a burden on their national budgets. As such contributions to the EAC budget always arrive not only belatedly but sometimes in percentage portions. Further, donor contributions for studies/research not only come with strings attached; but also take too long to access and are inflexible for short term requirements of the Community."

The implication of all these factors is that programmes have to be either delayed, postponed or sometimes abandoned. Therefore, the Community must look for better means of financing its budget (activities) if it is to fulfil its mandate of uplifting the standard of living of the people of East Africa.

Another problem relates to the normally wide scope and extra-territorial connotations which makes harmonisation of laws an intractable exercise. For example, within the EU, it has been realised that one way of dealing with problems caused by different legal systems is their harmonisation, so that the rules of law on a particular topic would be consistent throughout the EU. The Vienna Convention on International Sales 1980 seems to be one way in which European Laws have been harmonised in relation to international sales. Nevertheless, problems still subsist with regard to different aspects of Contract Law, where variances are yet to be resolved on a state to state basis

33 Article 133

in commercial transactions.[34] Because the received private law has, since reception, remained largely intact in the Partner States, harmonisation will face problems relating to conflict of laws.

Proposed Re-orientation of the Harmonisation Process

On account of the problems outlined above, the process of harmonisation of laws in the EAC has not proceeded in accordance with plan. There is, therefore, a need to re-orientate it. In the first instance, there is a need to urge the Partner States to emphasise their commitment to nurturing and supporting the EAC. In this regard they are obliged by the general undertaking they made in the Treaty's Article 8 to ensure support for all EAC programmes and projects and timely implementation of all decisions of the Council of Ministers. It is under this guise that the Partner States would ensure adequate financial and logistical support for the harmonisation of laws process. It is also under this framework that they should base their enactment of such legislation as having a bearing on the integration process.

Secondly, the harmonisation process could benefit from a wider involvement of stakeholders and interested parties. To the extent that the Treaty provides that the Community is "people-centred and market driven"[35] and creates an enabling environment for participation by the private sector, the civil society[36] and development partners,[37] there is a need to extend the scope of work to involve more public and private sector agencies and bodies that can contribute ideas and logistical

34 The British Council 1999 Conflicts of Laws within the European Union – Problems of the Single Market and Monetary Union. London: British Council. p. 178.
35 Article 7(1)(a)
36 Articles 127 - 129
37 Article 130

support proposals for enhancement of the implementation of the harmonisation process.

When the EAC adopted the approximation approach, there was no legislative basis within the Community. Although the Treaty had established the East African Community Assembly[38] this organ was not yet in place. The Legislative Assembly is charged with legislating for the Community[39] and discussing "all matters pertaining to the Community and make recommendations to the Council as it may deem necessary for the implementation of the Treaty."[40]

It is high time the Council of Ministers, using its powers to initiate and submit Bills on policy matters,[41] utilised the Legislative Assembly to enact laws on Community matters. This would obviate issues related to emphasis of sovereignty. It would also abridge the time involved between the process at the level of the Task Force and the implementation of decisions on harmonisation.

Fourthly, the Community ought to activate its synergies with other regional blocs for purposes of effective collaboration on the harmonisation of laws in areas of common interest. Other African regional organisations such as the ECOWAS and COMESA have had a relatively longer experience in this matter. The EAC could, therefore seek collaboration with COMESA on the harmonisation of trade and investment laws.

The EAC could also seek involvement in the L'Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA) Treaty framework: a Treaty for Harmonisation of

38 Article 9(1)(f)
39 Article 49(1)
40 Article 49(2)(d)
41 Article 14(3)(b)

African Business Laws. OHADA was signed on 7th October, 1993. According to respected scholars the OHADA Treaty is truly a legal revolution in Africa given the number of countries concerned, its scope and the matters at issue. The legal framework set forth by the OHADA Treaty is the third pillar of a regional economic policy, of which the two others are the West African Monetary and Economic Union (UEMOA) on the one hand and the Customs Union of Central African States (UDEAC), already in force, on the other hand. The aim of the OHADA Treaty is the implementation of a harmonised legal framework in the area of business laws, with the view of boosting economic activities and regaining the confidence of investors. The main means of achieving the objectives laid down in the OHADA Treaty consists of the elaboration of legislative texts termed "Uniform Acts" directly applicable and mandatory in the Member States "notwithstanding any previous or subsequent provision of domestic law". According to this Treaty, the scope of the OHADA arrangement is not limited to the member states of the Franc Zone.[42] Indeed, the OHADA Treaty provides that it is open for membership by any member state of the Organisation of African Unity which is not signatory to it, in prospect of better economic integration in Africa.[43] It will also be opened for membership to any non-member state of the African Union (AU) invited to join the OHADA Treaty with the common agreement of all the member states.

Collaboration with other regional blocs will also be in tune with the African Union's Strategic Plan for rationalising the plethora of regional economic communities which, in a number of cases, address similar issues from parallel positions thereby incurring unnecessary expenses. The Strategic Plan requires

42 Article 52
43 Article 53

the regional economic communities to seek integration of common projects and programmes in the short run.[44]

Conclusion

The process of harmonisation of laws in the EAC has not effectively facilitated the achievement of the objectives of the Community as intended. Obstacles stem from both conceptual straitjackets and practical limitations.

At this point in time, while the Partner States are assessing the integration process with a view to fast-tracking the establishment of a Political Federation, there is need to subject the harmonisation of laws to another and more productive approach. In this regard, a few basic proposals for dealing with the problems were presented.

44 Commission of the African Union 2004 Strategic Plan and Vision 2004 – 2007. Addis Ababa: AU Commission. p. 32.

3
Legal Sector Reform in Kenya

Jane Michuki

A Historical Background of Legal Sector Reform in Kenya

Introduction

This paper is divided into six broad sections. The first section gives a historical background of legal sector reform in Kenya, tracing the process from 1985, followed by long periods of no action, through to 1992 when it picked up speed, to the current momentum which is led by the MoJCA. The second section presents the challenges of reform institutions and programmes, while the third section deals with the Governance, Justice, Law and Order Sector (GJLOS) programme as the latest strategy in the process focusing on the short and long-term priorities of the programmes and their achievements. The fourth section dwells briefly on the philosophy behind legal sector reform, its goals and objectives and the linkages with other sectors. The fifth section traces the impact of the reform programme on the poor and marginalised and links legal sector reform with the Poverty Reduction Strategy Paper (PRSP). The final section makes recommendations and shares best practices which have worked well in Kenya and which can benefit other members of the EAC.

Background

The government of Kenya as well as other key stakeholders have acknowledged the need for reform in the legal sector in Kenya for over two decades. Since then, the government has undertaken several reform initiatives in the legal sector.

In 1982, the government established the Law Reform Commission. In 1992, the Attorney-General (AG) established 15 reform task forces and mandated them to review[45] and update various aspects of Kenya's laws in distinct sectoral areas. At the beginning of 1998, the chief justice (CJ) appointed a committee chaired by a Court of Appeal judge to review and report on the administration of justice in Kenya. Also in 1998, the Attorney-General and the chief justice instituted the Legal Sector Reform Programme and formed the Legal Reform Coordinating Committee to oversee the Legal Sector Reform Programme. In November 2003, the MoJCA launched the GJLOS, whose objective was to improve the quality of life of Kenyans and enhance effectiveness and efficiency in justice, human rights and governance. A critical ongoing initiative within the GJLOS Reform Programme is the formulation and development of a sectoral policy framework for the GJLOS. This important development reflects an emerging realization that the sustainability of GJLOS reform is predicated on its elevation from its current strategic intent (based on the ongoing Medium-term Strategy (MTS) which ends in 2009) to a long-term policy commitment that is responsive to the needs and rights of Kenyans. Equally, this initiative reflects the need to permanently integrate the work of GJLOS into the daily business of government, thereby making GJLOS reform more predictable within and across Government. The following paragraphs give highlight to the above initiatives for background information.

45 Harvey, W.B. 1975 *An Introduction to the Legal System in East Africa*. Nairobi: East Africa Literature Bureau. p. 5.

The Law Reform Commission (LRC)

The Law Reform Commission Act Cap 3 of the Laws of Kenya was enacted in 1982 to provide for the establishment of a commission for the purpose of promoting the reform of the law.[46]

Section 3(i) of the Law Reform Commission Act provides that:

> It shall be the function of the Law Reform Commission to keep under review all the laws of Kenya to ensure its systematic development and reform, including in particular the integration, unification and codification of the law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments and generally its simplification and modernization ... For that purpose, the Commission could receive and consider proposals for the reform of the law, prepare a programme for examination of different branches of the law for purposes of reform, draft bills, prepare a programme for consolidation of laws and reform or amend any branch of the law.

From the foregoing it is clear that the work of the LRC in Kenya was limited to reforming statute laws. The Kenya Law Reform Commission (KLRC) however, has not been able to carry out its mandate as envisioned by the Act due to some major hindrances. To begin, as a result of institutional and administrative dependence on the Attorney-General's office and the MoJCA, the funds allocated to the KLRC are under the control of MoJCA. These budgetary and disbursement arrangements hinder the KLRC in the performance of its duties since the body responsible for approving the KLRC's work programme (the Attorney-General) is not the same one responsible for the funds (MoJCA). The Commission therefore

46 The Law Reform Commission Act, Cap 3 of the Laws of Kenya, Section 2

lacks financial independence. Secondly, the Commission suffers perennial understaffing and lack of qualified researchers. As a department of the Attorney-General's Chambers, its members of staff are invariably on secondment from that office and may be called upon to perform tasks for the AG from time to time. This control has sometimes interfered with the Commission's work programme. Thirdly, the KLRC does not have a legislative drafting section with legislative drafting personnel. All its research work is invariably in the form of reports and recommendations. These are then submitted to the AG's Office, where the drafters are supposed to read, digest and reduce them to Bills.

Despite the fact that the LRC has existed for over two decades, Kenyan law is still wrought with outmoded laws, discriminatory laws and laws that generally have not kept in touch with changes in the rest of the world and with Kenya's development, especially in the areas of human rights and private sector concerns. However, the appointment of new commissioners by the current government under Kathurima has jump-started the law-reform institution. The Commission has made a notable contribution to the Political Parties' Bill that was passed into law in October 2007, and gender-responsive laws and laws relating to children, that culminated in the Children's Act. Other ongoing projects at the Commission include:

- Review of the Prisons Act in conjunction with the Kenya National Commission on Human Rights (KNCHR) and the Prisons Services Department.

- Enactment of an Elections Act in conjunction with the Electoral Commission of Kenya (ECK). This project seeks to consolidate the laws on elections which are presently scattered in various laws such as the Constitution, the

National Assembly and the Presidential Elections Act, the Local Government Act and the Election Offences Act.

- Refining the Media Council of Kenya Bill. This draft Bill was prepared in 1998 by a task force appointed by the AG. It seeks to set up a council to regulate the work of and accountability by the media. The Commission is consulting with stakeholders to make further recommendations on how the Council should be set up.
- Approximation of municipal laws of the three EAC countries. This project is being undertaken jointly with the Tanzanian and Ugandan Law Reform Commissions and reviews and makes recommendations on how to approximate the laws of the three countries.
- Enactment of a law on contempt of court. Presently the Judicature Act merely stipulates that the High Court shall enjoy power to punish for contempt, similar to that that enjoyed by the High Court of Justice in England. Other legal provisions on contempt of court are spread over the Penal Code, the Criminal Procedure Code and the case law.

Various Reform Task Forces

In 1992, to complement the work of the LRC and in view of the limited achievements of the KLRC, the Attorney-General established 15 reform task forces with the mandate to review and update various aspects of Kenya's laws in various sectoral areas. Some of these aspects were company law, laws relating to women, laws relating to public order and security, laws relating to auctioneers and court brokers and laws relating to

children. Most of the task forces had completed their work and submitted their reports by 1999, however much of the work was kept pending and was not implemented[47] while some of the reports produced by these task forces have not been made public to date. Some of the work however, has been activated and work is continuing at a much quicker pace after a legal reform docket was formed under the MoJCA. Some of the task forces' recommendations that have been enacted into law include those of the task force on the law relating to children and the task force on the law relating to auctioneers and court brokers.

The Kwach Report

Another initiative toward legal reform took place at the beginning of 1998, when the chief justice appointed a committee chaired by Honourable Justice Kwach, then a Court of Appeal Judge, to review and report on the administration of justice in Kenya. The report made several comprehensive recommendations, including improvements in the terms and conditions of employment of judicial staff, improvement of facilities available to the judiciary, increase in judicial personnel; and development and implementation of a code of conduct for judicial personnel backed by an inspectorate unit. In terms of management of cases, the report recommended reorganisation of case handling and management systems, separation of the High Court into four divisions (Family, Commercial, Civil and Criminal), simplification of court procedures and introduction of Alternative Dispute Resolution (ADR).[48]

The division of the High Court into four divisions; the Family, Commercial, Civil and Criminal; has since been implemented.

47 Kenya Law Reform Commission Annual Report 1997. pp. 12-13.
48 The Kwach Report 1998.

Simplification of court procedures and introduction of ADR has however remained elusive. Private lawyers have taken initiative in managing ADR and arbitration and a few offices are now available in Nairobi.

The Legal Sector Reform Programme

Reforms identified over the years including the need for a new constitution, reform in the judiciary and the AG's office, all crystallised in what became known as the Legal Sector Reform (LSRF). It was initiated in 1998 by the Attorney-General and the chief justice together with the Legal Reform Coordinating Committee, to oversee the Legal Sector Reform programme. The Committee was to undertake comprehensive reviews of the legal sector and propose appropriate measures to enable the sector to enhance its efficiency. The Legal Reform Coordinating Committee was to compile both short and long-term programmes for Kenya's Justice Law and Order Sector. Initially the programme addressed itself to the core institutions of the legal sector, focusing only on the State Law Offices and the Judiciary, which it regarded as the core sector institutions. In doing its work the Committee was to take a consultative approach that involved institutions in the public sector, private sector and civil society. In the year 2000, the Legal Reform Coordinating Committee, in collaboration with the core sector institutions, launched the Legal Sector Reform Programme.

By this time, it had become evident that improving public safety, pursuit of access to justice for the people and rule of law would involve reform across a wide range of institutions and players. It was therefore necessary for the sector to be located within a wider framework of institutional relationships and activities beyond the operation of traditional legal sector

organisations including key institutions that had been left out, and that it was necessary to take into account an expanded approach.

In May 2001 a technical committee was appointed and mandated to recast, amplify, consolidate, popularise and where necessary expand the programme and be responsible for implementation and financing. Thus the approach was expanded and other sector players were brought on board hence a new name "the Expanded Legal Sector Reform Programme" (E-LSRP).[49] The technical committee included the police, the prisons, the probation and aftercare service department, children's department and civil society, represented by the Federation of Women Lawyers (FIDA-K). In 2001 the technical committee prepared and presented to the government the Legal Sector Reform Programme (LSRP) that became the focal point for the reforms in the sector at that time.

Due to the prevailing political climate at that time, however, the discussions on corruption in legal sector institutions and maladministration of justice were suppressed; because the government then typified abuse of and lack of respect for human rights, systemic weakening of state institutions, institutionalised corruption and an entrenched neo-patrimonial system. Furthermore, under the circumstances, the E-LSRP did not include comprehensive and exclusive measures to combat corruption in legal sector institutions and, because of a combination of all these challenges, the implementation of the reform programme was hampered.

In September 2002, a validation workshop for all stakeholders was called. The programme could not be launched as several key stakeholders and potential development partners felt that the validation process had not been sufficiently and effectively

49 The Expanded Legal Sector Reform Strategy Paper 2002. Vol. 1, April. p. 2.

inclusive and participatory and, in addition, the national elections, which led to a new government, were due to take place in December of that year.

The elections of the year 2002 saw a new government elected into office on a campaign platform of enhanced good governance, restoration of law and order, fair and efficient administration of justice and a particular emphasis on the fight against corruption. The new government recognised that restoration of integrity and accountability in the management of public resources and administration of justice was critical to economic recovery. It therefore promised to embark on a reform strategy to dismantle networks of patronage, combat corruption and restore merit and integrity as well as to replace the institutionalised system with a sustainable democratic and meritocratic system of governance that operates in accordance with a well-defined and predictable legal environment.

It thus became necessary to subject the E-LSRP document, which had been compiled under the previous regime, to a critical review before it could be adopted by the new government as a blueprint for the reform of the legal sector. A re-evaluation and refinement of the Expanded Legal Sector Reform Programme was undertaken to address the issues of inclusiveness and participation which had earlier been raised, as well as to address some key weaknesses such as lack of clear strategies and measures to address corruption. There was recognition that administration of justice went beyond the judiciary and the AG's Office and hence the need to bring in other associated institutions. ELSRP also recognised the impact of law and the administration of justice on the government's much coveted Economic Recovery Programme and the fight against corruption and human rights abuses as pillars for reform. Many critics of the government feel that

the current government has made very few inroads in creating an environment for economic recovery or in fulfilling their campaign pledges to the people of Kenya. However, the economy has grown consistently since 2003 and recorded a growth of over 6% in the 2006/2007 financial year. Some notable gains include provision of free primary education; revival of the agricultural sector (e.g. the revival of Kenya Cooperative Creameries (KCC) and the Kenya Meat Commission) and greater access to affordable health care. Above all, the passing of the Constituencies Development Fund Act in 2003 has seen the inception and completion of a number of development projects all over the country.

Expanded Legal Sector Reform Strategy Paper

In 2000, the Expanded Legal Sector Reform Programme (E-LSRP) was launched within Government's broader reform and development agenda, as stipulated in the over-arching policy document - the Poverty Reduction Strategy Paper of June 2001 and the Economic Recovery Programme. The Economic Recovery Programme recognises that administration of justice, the rule of law and respect for human rights and fundamental freedoms form the foundations of renewed confidence in Kenya as a destination for local and international investment.

> It is now well understood that local and foreign investors can only have the much-needed confidence to invest in the country if there is a well-functioning and efficient legal and judicial system ... and a democratic society that protects and enforces human rights and fundamental freedoms [50].

The Economic Recovery blueprint is categorical that,

> in an effort to revive the economy and meet the expectations of Kenyans for better living conditions,

50 Poverty Reduction Strategy Paper, 2001 – 2002. June 2001.

> the starting point is better governance, improved security in the country and restoration of the rule of law ... bad governance, insecurity and breakdown of the rule of law have led to misappropriation of productive resources thereby undermining economic development by discouraging investors, both local and foreign, raising the cost of doing business and leading in the withholding of financial support by Kenya's development partners. [51]

The ELSRP sets out a long-term strategic framework for reform of the delivery of public safety, law and order and justice sector in Kenya as well as a medium-term (three year) costed and budgeted work plan in order to achieve this goal. The strategy paper noted that delivery of public safety, law and order and justice in Kenya is to a large extent embedded in institutions dating back to colonial days, constituting a legal system ill-equipped to deal with the rapid social and economic transformation that took place after independence.[52] This system marginalised and alienated ordinary people from the formal justice system, and in any event was poorly managed, under-resourced, poorly coordinated and susceptible to corrupt influences. It recognised that people were generally ignorant of their rights as well as the laws and procedures of the courts, that socio-political considerations rendered the justice system irrelevant to people's needs and further that there was a lack of resources for support of social services. It also noted that Kenya's formal legal system is predominantly adversarial with common law origins based on the English Law system dating back to 1897,[53] leaving no room for alternate dispute resolution.

51 Ibid.
52 Expanded Legal Reform Strategy Paper 2002, p. 2
53 Ibid.

As regards the public sector, law, order and justice and the poor, the paper noted that poor men, women and children are the key players in the justice system. The paper also took into account that women constitute the majority of the poor and that they are more vulnerable to poverty and injustice than men and concluded that political, legal, social, cultural and historical conditions combine to create poverty for marginalised and vulnerable groups.

The paper then looked at the sector institutions, including the police, Public Prosecutions, Prisons Department, Provision of After-care Services Department, the Children's Department, LRC, the Judiciary, the Office of the Attorney-General, Advocates, legal education institutions, Standing Committee on Human Rights, NGOs and community leaders as institutions that require holistic reform if they are to deliver services to Kenyans.

Challenges Facing these Institutions

The paper identified the key challenges facing the police as high rates of crime, poor statistics, low motivation, outmoded methods of handling crime, inadequate and inappropriate equipment to fight crime and lack of training in specialised areas, for instance for prosecution and investigation. Another problem identified was inadequate infrastructure, for instance police cells, vehicles, housing and fuel.[54]

With regard to prisons, the paper noted that although prisons are aimed at rehabilitating offenders, the problems identified for the Prisons Department include the pathetic state of the prison system, serious overcrowding, unhygienic conditions, and substandard buildings resulting in high infection rates for diseases including HIV/AIDS and death rates in the prison. It further noted that, under such circumstances, rehabilitation of offenders was not achievable.[55]

54 Ibid. p. 12.
55 Ibid. p. 13.

Regarding the Probation and Provision of After-care Programme, the key challenges identified were the absence of methods for providing effective rehabilitation services and lack of supervision, as well as lack of awareness by the public on the usefulness of community centres.

As regards to the Children's Department, shortage of staff, inadequate enforcement of laws relating to children, lack of support from security and conflict of laws[56] were identified.

Concerning the judiciary, problems were identified as delays and backlogs, lack of adequate facilities and accommodation, cumbersome laws and procedures, allegations and perception of corrupt practices.[57]

In respect to the Office of the Attorney-General, capacity was identified as the main constraint, particularly in the Department of Treaties and Agreements. Inadequate capacity to give good quality, effective and efficient service to other government departments was also recorded.[58] As regards the LRC, the key challenge was for it to synchronise its drafting programmes with priorities of the reform initiatives, particularly the PRSP.[59]

Concerning advocates, the key challenges were identified as falling standards of legal practice, poor preparation and presentation of cases in court, unethical conduct, lack of accountability and indiscipline.[60]

Concerning the Committee on Human Rights, the key challenge was for the Committee to establish itself as autonomous.[61]

56 Ibid. p. 16.
57 Ibid. p. 18.
58 Ibid. p. 20.
59 Ibid. p. 21.
60 Ibid. p. 22.
61 Ibid. p. 24.

Because of the locations of the courts and the expensive and complicated procedures, community leaders and groups often saw informal justice as the only option accessible to them. The key challenge therefore was seen as strengthening the informal justice system and linking it with the formal justice system.[62] In analysing the overview of the main issues and problems faced by the sector, the paper identified weak linkages and coordination between sector institutions, the vulnerability of the poor to insecurity and injustice, constraints in access to justice, human rights abuses, the constraints of weak legal and justice regimes on private sector development and complexities of implementing the reform programme.[63]

The paper noted that the poor are particularly vulnerable to insecurity and injustices and are disproportionately affected by it, and that access to justice was further constrained due to geographic distances, costs, complex, alien court procedures, and deficiency in traditional justice and discrimination, particularly gender discrimination.

The envisioned strategic response to the problems, issues and challenges facing the legal sector reform are identified as:

- Sector-wide approach
- Linking programmes to wider public sector reform programmes
- Strong coordination and cooperation of the sector institutions
- Improved public funding of the sector institutions
- Priority accorded to budget-neutral and low-cost interventions

62 Ibid. p. 27.
63 Ibid. p. 28.

- Maximum utility and value in resource use
- According special attention to the needs of the poor and disadvantaged and
- Prioritising through medium-term planning and budgeting.[64]

The paper envisioned a safe, secure, just and prosperous Kenya for all as well as a shared vision for the sector institutions, such as independence and integrity of the bench and the bar, speedy and fair dispensation of justice, affordable and accessible justice for all, respect for and due process of law by providers and users of legal services and sensitivity to the vulnerability of the poor to insecurity and injustice.

The paper identified the overarching programme goal and purpose between the legal sector programme and the poverty reduction programme as being "to make a real contribution to improving the quality of life for the people of Kenya especially the poor and vulnerable."[65] The paper saw the aim of legal sector reform as being "to enhance the effectiveness, accessibility, accountability and efficiency of the delivery of justice and the rule of law." Thus it provides for linking the legal sector reform programme with other public sector reform initiatives to achieve efficiency in benefits and funding and proposes an implementation management structure to implement the programme and also deal with the issue of monitoring and evaluation.

As regards the implementation approach, the paper sets out to address identified challenges in a phased manner based on medium and short-term detailed planning, a sector-wide approach with clear leadership; and effective coordination

64 Ibid. p. 38.
65 Ibid. p. 38.

and oversight of the programmes to ensure implementation consistent with PRSP; as well as effective sector-wide monitoring and evaluation. Capacity building of all institutions to ensure the success of expanded legal sector institutions is recommended.

Finally, the paper looks at the costs and financing of the reform programme, introducing the elements of government financing, donor financing and community and private sector participation.

The paper ends by identifying the following strategic objectives and interventions:

- Improve safety and security of people and property.
- Strengthen reporting, investigation, prosecution, access to defence and legal advice, court procedures and sentencing of crime, which is responsive to the needs of victims and respects the rights of suspects.
- A more humane and cost-effective penal system.
- Improved access to speedy and affordable civil justice including alternative dispute resolution.
- Enhanced protection of human and constitutional rights.
- Timely provisions of high quality legal advice; representation and services by the AG's office to other government departments.
- Strengthening the overall sector institutional framework.[66]

66 Ibid. p. 51.

Governance, Justice, Law and Order Reform Sector (GJLOS) Programme

After the general elections of 2002 and the coming to power of a new government, a re-evaluation and refinement of the Expanded Legal Sector Reform Programme was undertaken to address the issues of inclusiveness and participation and some key weaknesses; such as lack of clear strategies and measures to address corruption.

The government also placed economic recovery at the top of its policy agenda immediately after taking office and as a result it commenced an Economic Recovery Programme, focusing on reviving the economy and creating new jobs. The Economic Recovery Strategy for Wealth and Employment Creation (ERSWEC), launched in June 2003, has the objective of reducing poverty by promoting strong economic and employment growth. One of the pillars of the Economic Recovery Strategy is "strengthened institutions of governance", which includes *inter alia* "appropriate anti-corruption legislation and better rule of law via a strong judiciary".[67]

Within the context of the Economic Recovery Strategy and earlier attempts to reform the legal sector, the government and its development partners undertook a stakeholders' review of the Expanded Legal Sector Reform Strategy Paper in 2003. The result of this critical review was the formulation of the GJLOS Reform Programme as a blueprint for the reform of the sector. In November 2003, the MoJCA (which was created in 2003 and had the mandate of spearheading reforms in the Governance, Justice, Law and Order Sector) launched the GJLOS Programme whose objective was to improve the quality of life of Kenyans, and to enhance effectiveness and efficiency in justice, human rights and governance.[68]

67 Mid-term Review of the GJLOS Programme 2007. p. 15.
68 The Short Term Priority Programme (STPP) 2003. p. 6.

The GJLOS reform strategy assembles all the key institutions and players in the sector, like the judiciary, police, prosecutions, prisons, probation services, KACC, the KNCHR, the private sector and civil society. It addresses problems in human rights, respect for the rule of law, efficiency in administration of justice, greater access to justice for the poor, issues relating to women and children, good governance, security, law and order and the fight against corruption.[69] The GJLOS Reform Programme seeks to expand the legal reform sector further and adopts a sector-wide approach which:

- Enables systematic analysis of problems in entire sectors,
- Makes it possible to identify reform priorities across the sector rather than for a single narrow institutional base,
- Enables resource allocation on the basis of identified priorities,
- Enables more rational use of government and donor funds,
- Is all-inclusive and ensures enhanced cooperation, coordination and communication for policy formulation and implementation of activities between agencies in government, the private sector and civil society. [70]

The development of this strategy involved extensive consultations with various stakeholders in and outside Government, the private sector, civil society organisations, the legal sector and multilateral and bilateral development partners, so as to ensure understanding, acceptance and commitment to implementation of the Sector Reform Programme by all the key stakeholders. The Sector Reform Programme

69 Ibid.
70 Ibid.

was intended to be long term and comprehensive, entailing implementation for over five years, with participation of all GJLOS institutions.[71]

As the development of the plan came under way, the government undertook major reform initiatives in the sector institutions and allocated comparatively substantial resources to support implementation of certain activities in the sector, both for operations and maintenance and for the development of sector institutions. The more salient allocations in the government budget included costs for re-equipping the police and rehabilitation of buildings and other infrastructure facilities for police and prison services.

Other reform initiatives undertaken by the government under the GJLOS involved creating the MoJCA and establishing several task forces to review all contracts relating to jobs undertaken for the government for which payment was pending.

Other initiatives included the re-establishment of the Ndungu Commission on Land Tenure and Security and the Goldenberg Commission, to investigate and report on the Goldenberg scandal; a major financial scam involving billions of shillings, so as to lay a firm foundation for proper prosecution and recovery of the money.

In the judiciary the government arraigned judicial officers involved in corruption (this saw 18 High Court and Court of Appeal judges leave office) after they were named in the Ringera Report.[72] The process was widely criticised for its lack of procedure. Judges who were at risk of being suspended

71 Ibid.

72 The Ringera Report was the work of a committee headed by Justice Ringera, whose mandate included a report on corruption in the judiciary. The writers of the Report collected the views of Kenyans on corruption in the courts and listed all named judges and the complaints that had been leveled against them.

were not informed of the charges privately after the first investigation and only heard of the charges after the Report had been made public. Due process was not followed, although those who wanted to defend themselves were later given an opportunity to do so. The exercise was therefore seen as a public relations gimmick. Many felt that the judiciary was never actually cleansed and only a few people were sacrificed to enable the government to obtain international aid and to create space for the appointment of politically correct persons. The appointment of judges after the "radical surgery" was arbitrary, with the operative qualification being that of a lawyer of seven years standing. Neither the Law Society of Kenya (LSK) nor parliament was sufficiently involved in the vetting of the judges. The process and mechanism for appointment, discipline, promotion or removal of judges is still arbitrary, and the whole process should be institutionalised, standardised and implemented.

The government has maintained that the rationale of the process was solid, as the government wanted reformers with a reform agenda and a critical mass of reformers to carry out reforms. It is now conceded that the process might not have been correct and the judges should have been given time to defend themselves. Others argue that this reform of the judiciary should have been delayed until institution of the new constitution which would have included checks and balances for the judiciary. However, as the constitution has not seen the light of day for five years after the National Rainbow Coalition (NARC) government came to power, the argument becomes irrelevant.

Much criticism has been levelled at the way the "radical surgery was done," and the acquittal and restoration of Justice Waki, who was one of the judges named in the report, gives some

credence to the criticism. The overwhelmingly negative view of the radical surgery is revisionist. When the surgery happened, it was popular and at the time it was viewed as a difficult, but necessary step. Politically, there was fear that the Moi regime, that had been devastatingly rejected in the previous elections, would retreat to the courts and continue to have a backhanded hold on the people. So the radical surgery also served the ill-stated function of achieving political consolidation. Two things contributed to the revisionist view of the radical surgery as negative. First, the government has, in the long run, not risen far above the Moi government that it replaced, and so the view is that it replaced the past regime's appalling individuals with its own equally appalling persons. In addition, the surgery was not radical enough and allowed unresolved issues to fester on and develop into full-blown grievances.

In terms of legislation, recent reforms include the passing of the Anti-corruption and Economic Crimes Act (which created the Anti-corruption Commission with the responsibility to investigate corruption and economic crimes) and the Public Officers' Ethics Act (which provides for a Code of Conduct for all Public Officers including members of the Legislature, Executive and Judiciary and compels all officers to declare their wealth as well as that of their spouses and children) as well as programming for legislation of other governance-related Bills.[73]

The Kenya Anti-corruption Commission (KACA) has been accused of not living up to its mandate. Some of the criticism has that since its creation, it has not brought any of the bid wigs involved in corruption to court. For example, in 2007, there were heated exchanges between the AG's office and the KACA on prosecution powers (the AG Amos Wako and

73 The Short-term Priority Programme (STPP) 2003. p. 7.

KACA Director Aaron Ringera). In defence to charges of having no prosecutions, Ringera lay the blame on the AG's office for failing to act on the numerous files the KACA had forwarded to it for prosecution. While Ringera maintained that the files forwarded to the AG's office contained all the information necessary for successful prosecution, the AG sent the files back on grounds of incompetent, incomplete and shoddy work as well as insufficient evidence to sustain criminal charges. At the same time, the parliament in Kenya took certain measures that stripped the KACA of its powers. Most notable was the stripping of KACA of its power to investigate cases of recovery of assets suspected to have been acquired through corrupt deals before May 2003, through an endorsement by parliament of the Miscellaneous Statue Amendment Bill. The move by parliament attracted a lot of criticism from different segments of Kenya's population and was perceived as a plot to completely cripple and forestall the functions and authority of the KACA. Fortunately the bill never saw the light of day, when the president declined to sign it into law.

The government also revived the almost stalled constitutional review process which was a commendable initiative which would have gone a long way in providing a more effective political and institutional framework for governance. However, the government has not lived up to its campaign pledge to give Kenyans a new constitution within 100 days of coming to power and the process has been bogged down by one crisis after another. The crisis in the quest for a new constitution heightened in 2005 and culminated in Yes and No camps that saw the "Wako Draft" being subjected to a referendum in November 2005. The Wako Draft was the

proposed new constitution drafted by the Attorney-General after he had received the parliamentary report. In accordance with the Consensus Act it was the ratification of the proposed new constitution which Kenyans were to vote for or against in the referendum. The Wako Draft contained many progressive provisions and many that are not contentious by any standard. On the other hand, it contained some provisions that were very contentious and divisive. The challenge at that phase of constitution making was to isolate and safeguard the many non-contentious issues while subjecting the contentious issues to further discussion and referendum. However, this challenge was not overcome and the whole draft was subjected to the peoples' vote.

The Constitution of Kenya Review (Amendment) Act 2004 was enacted providing, among other things, for the holding of a referendum for the first time in Kenya since independence. The government-sponsored national referendum was intended for Kenyans to ratify the proposed new constitution. However, the draft was voted against by the people, with the No camp getting 3,579, 241 and the Yes camp 2,578,831 votes.

The crisis in the quest for a new constitution did not end with the referendum. The debate shifted its focus to a minimum reform agenda. This happened after certain parliamentarians proposed changes, dubbed "minimum reforms", because a wholesale review of the constitution was not feasible before the 2007 polls. The reforms include having the president stripped of his exclusive right to appoint members of the 21-person ECK. Another key demand was for presidential authority to be reduced, and for the head of state to share power, with newly-created posts of prime minister and two deputies. But the proposed changes were dismissed by civil society organisations

who argued that the clamour for minimum reforms was aimed at demobilising the national momentum for the long-desired comprehensive reforms. And with the December 2007 elections around the corner, the debate for minimum reforms took back-seat.

Generally, however, the amounts of money currently budgeted for the reform agenda are too limited to enable Government to push through its very ambitious programme of priority changes and reforms in the sector effectively and timely. Although some development partners have expressed willingness to support the government in pursuit of the identified priorities, pending completion of the medium to long-term strategies and programmes for GJLOS reform, the support has been slow in coming.[74]

The Short-term Priorities Programme

The Short-term Priorities Programme (STPP) is a "first aid" package for the first year of the proposed five-year GJLOS reform programme.[75] The aims of the STPP are to provide a strategic reform platform for ongoing government initiatives and to identify reform priorities for GJLOS institutions that development partners can in the short term support coherently with comparatively limited resources. STPP aims to rapidly mobilise additional resources from development partners that can complement the limited government resources to enable governance reforms take off in Kenya. The STPP builds on the results of previous efforts in many important aspects, especially the final draft of the ELSRP.[76]

74 Government of Kenya 2003 Kenya Economic Recovery Strategy for Wealth and Employment Creation. June 2003.
75 The Short-term Priority Programme (STPP) 2003. p. 7.
76 Ibid. p. 8.

The initiatives proposed under the STPP fall in two categories. The first category comprises those that would be substantially implemented within the first year of the programme. The second category is comprised of initiatives that would not be completed by end of the first year but would lay a firm foundation for launching the more comprehensive and long-term sector reform programme.

Some Key GJLOS Achievements in the Short-term Priorities Programme (STTP)[77]

- To build a partnership with local police to prevent the root causes of crime, a community policing framework was developed for the Administration Police and over 700 officers trained in this new approach. A further 2,400 Administration Police officers were trained on human rights, good governance, anti-corruption and customer initiatives and this should contribute to a more effective and friendlier service to local communities.
- Concerning domestic violence, a training curriculum on handling domestic violence was introduced at the Kiganjo Police Training College and 50 officers were trained on how to handle cases of gender violence in ongoing training.
- To increase police visibility and responsiveness, 28 highway patrol vehicles were delivered to the Kenya Police.
- About 6,000 chiefs and assistant chiefs were trained in basic management skills, reduction of crime, and customer service, which should facilitate better service delivery at grassroots level.

77 Governance, Justice, Law and Order (GJLOS) brochure year.

- About 600 district officers were trained in modern styles of management, performance management and improved administration skills.
- To facilitate inter-agency cooperation and to contribute towards the provision of more humane conditions for prisoners. In line with United Nations guidelines on the Treatment of Offenders, GJLOS supported the work of the vice president task force on prison decongestion through provision of resources to the Probation and After-care Department to conduct investigations and reviews of those who qualified for correctional supervision.
- To help decongest prisons through the Community Service Orders Programme, all judges and 222 magistrates were sensitised on the use and benefits of the Community Service Orders Programme.
- To enhance justice for all prisoners, 28 prison paralegal and liaison officers were trained by the Legal Resource Foundation (LRF) to help the prisoners defend themselves effectively in court.
- To facilitate more humane transport services to prisoners; 13 prison buses, 6 pick-ups, one minibus and one ambulance were provided to the Kenya Prison Service.
- To promote transparency in public governance, GJLOS supported the preparation of The Living Large Report by the Kenya National Commission for Human Rights (KNCHR) and Transparency International on wasteful government expenditure. Advocacy activities for the formulation of a Truth, Justice and Reconciliatory Commission were organised by KNCHR and held countrywide.

- To help sensitise leaders about the evils of negative ethnicity, GJLOS supported a study visit to Rwanda for 25 MPs, KNCHR staff and 4 media representatives.

The Medium-term Strategy

The Medium-term Strategy (MTS) is the "second aid" package covering four years of the proposed five year GJLOS programme. The MTS and its annual work plans commenced in January 2006 and will continue until 2009 with the emphasis intended to be on a progressive reform agenda for the sector. The purpose of the MTS programme is improved governance, justice, law and order. This purpose enumerates the core benefits around which the MTS is designed. Wider and better access to justice is at the core of the MTS, while law and order is central to the confidence that individuals and organisations seek as they go about their daily businesses in Kenya. Fundamentally, a long overdue focus on good governance, human rights and gender equity as core themes are introduced. This broad programme purpose seeks to integrate government-led supply side approaches such as access, with demand-side needs defined in a rights-based context.

The MTS applies a Sector-wide Approach (SWAP) to reforms in the GJLOS. The overall reform programme was designed and piloted as a thematic SWAP during the STPP phase, and will continue to be run as such through this medium-term phase. During the pilot phase, seven key result areas were selected for this programme, and seven cross-institutional Thematic Groups were established in line with the key result areas (KRAs).

The MTS builds on the experience of work on governance, justice, law and order reforms carried out in Kenya over the past decade. In particular, it builds on lessons and challenges

discerned by Government and participating stakeholders during the implementation of the short-term, "quick-win" based STPP.

The MTS refines and strengthens the results framework used in the pilot STPP phase. A review of the logical framework for managing the overall programme recommended that it be amended for the medium term, to reflect a greater focus on results and outcomes. In response, a new logframe – built around six key results - has been formulated. These result areas create a strategic focus on the programme without affecting the composition or structure of the Thematic Groups, still seven in number. A simple matrix structure will ensure that each Thematic Group tracks each of the six key results as they affect that particular theme.

Finally, the MTS prioritises "doing the right things" (effectiveness) over "doing things right" (efficiency). Note that efficiency improvements are not part of the reform strategy, instead all initiatives are subjected to prioritisation criteria that prevent the development of a "wish-list," by focusing on areas of greatest sector-wide impact, particularly in so far as such impacts are beneficial to Kenya's majority of poor, marginalised and vulnerable people.[78]

The Ideology/philosophy behind Justice, Law and Order Sector Reform in Kenya

In Kenya, the legal and judicial systems have not satisfactorily promoted the rule of law or promoted and protected human rights. Many obstacles block an effective and efficient legal sector, including limited independence of the judiciary, poor functioning of the court and justice system in relation to court procedures, case filing, law reporting, legal documentation,

78 The Medium-term Strategy (MTS) 2005. p. VII.

corruption as well as limited access to justice for poor people due to distant, expensive and complicated procedures and lack of knowledge of legal rights.

The thrust of the government is the pursuit of Governance, Justice, Law and Order sector (GJLOS) reform. In contrast, the previous regime's system of government was characterised by institutionalised corruption and lack of respect for human rights. This reversal necessarily entails undoing patronage and corruption networks, restoring merit and integrity and combating corruption, which are central to the sector reform initiatives.

The principles and imperatives justifying a sector-wide approach include the fact that many institutions are co-dependent in service delivery. The approach is intended to ensure the necessary coordination of both the government of Kenya and its development partners' as well as to ensure synergies and effectiveness through cooperation. The four major imperatives attributed to the approach are:

- Readiness and enthusiasm of sector stakeholders to cooperate and coordinate in programme/project planning and implementation. This component would entail the need for strong advocacy by the lead institution, MoJCA and demonstrated commitment to anti-corruption initiatives.

- Inclusiveness and participation of all stakeholders, which will entail a good representation of inter-agency fora. This means a readiness to embrace civil society and private sector organisations as well.

- A defined system for planning, budgeting, financing, implementation, monitoring and evaluation as well as reporting.

- Effective institutional mechanisms, for coordination of stakeholders and the development and adoption of an operations manual that will govern even the STPP phase.

In a nutshell, the GJLOS Reform Programme recognises that Kenyans deserve service delivery standards from the sector institutions that embrace good governance, equal access to justice, respect for human rights and observance of the rule of law.

The Goal, Objectives and Components of Legal Sector Reform in Kenya

The strategic objectives of the GJLOS Reform Programme reflect the key result areas (KRAs) (outputs and outcomes) that a sector-wide framework will respond to regarding specific sets of problems and challenges facing the Governance, Justice, Law and Order Sector institutions. The overall development objective is to improve quality of life of the people of Kenya, especially the poor, marginalised and vulnerable. This objective has witnessed the formulation of the Short-term Priority Programme (STPP) and the Medium-term Strategy (MTS). The STPP's strategic objectives were derived from the GJLOS strategic framework. These objectives were identified in the context of problem analysis, as well as the constraints that confront the sector institutions and opportunities available to the institutions. In this regard, seven key result areas were identified for the Sector Reform Programme namely:

- Ethics, integrity and anti-corruption;
- Democracy, human rights and rule of law;
- Justice, law and order;

- Public safety and security;
- Constitutional development,
- Quality of legal services to government and the public; and
- Capacity for effective leadership and management of change.[79]

For each of the KRAs, the sector stakeholders discussed the appropriate strategic interventions around which the specific activities were identified. On this basis, the main outputs and key actions in the STPP were identified and presented in a logical framework. As a first-year package of the GJLOS long-term reform programme, the STPP was grounded in the vision, mission, values and strategies of the planned sector reform programme, to the extent that a consensus emerged on these aspects of the sector programme. The sector's vision of the future is a safe, secure, democratic, just, corruption-free and prosperous Kenya for all. The Sector Reform Mission is to transform and strengthen the sector institutions for efficient, accountable and transparent administration of justice. In line with this is the GJLOS programme purpose of improving the quality of life for the people of Kenya, especially the poor, marginalised and vulnerable.[80]

The overall approach of GJLOS in achieving this programme purpose, for both the STPP and MTS phases, has been to strengthen the governance, justice, law and order sector institutions with the expectation that this will improve the quality of life of Kenya's citizenry. The approach to institutional capacity building by the ministries, departments and agencies participating in GJLOS was particularly pertinent at the time of programme formulation and the STPP phase.

79 The Short -term Priority Programme (STPP) 2003. p. 14.
80 GJLOS Information, Education and Communication Office 2005. GJLOS Update. p. 5.

As mentioned above, the restoration of the Governance, Justice, Law and Order Sector was a necessary first step. The intended approach of the MTS phases has been to build upon the improvements realised from the capacity initiatives of the STPP phase, to transition from infrastructure provision to skills development and initiating policy and legislative reforms. In regard to MTS, six key result areas were identified for the Sector Reform Programme namely:

- Responsive and enforceable policy, law and regulation;
- More effective GJLOS institutions;
- Reduced corruption related to impunity;
- Improved access to justice, especially for the poor, marginalised and vulnerable;
- A more informed and participative citizenry and non-state actors;
- Effective management of the GJLOS reform programme.

The key features of the strategic response to the problems, issues and challenges facing the GJLOS fall under the sector-wide approach, linking the programme to the wider Public Sector Reform (PSR), strong coordination and cooperation of the sector institutions, enhanced public funding for sector institutions and according special attention to the needs of the poor and disadvantaged.[81]

A Sector-wide Approach

This is a development approach to problem solving that recognises systemic interdependencies that cut across a sector.

81 The Short Term Priority Programme (STPP) 2003, p.11.

It moves from narrow institutional thinking to a more integrated approach to policy making and implementation across a sector. In preparing for and designing this reform programme, it became clear that there is widespread acceptance and understanding among each of the individual institutions in the sector regarding the need to address their problems on a sector-wide basis. It is critical to understand issues relating to the day-to-day experiences of staff in these institutions, as well as obtain an objective picture of the functional units of the broad machinery of justice. In the criminal justice system, for instance, for the Judiciary to function efficiently and effectively it needs the cooperation of the Prosecution Service, the Police and the Prisons Department. Many of the problems of the Prisons Department, for example congestion and unhygienic conditions, result directly from and project the inefficiencies of the rest of the criminal justice system, for instance a large proportion of prisoners are actually remand prisoners awaiting trial due to a backlog of cases. These types of experiences have necessitated the inclusion of all the institutions involved in the justice system in the problem-solving approach.[82]

This sector programme is intended to mark a significant shift from restricted institutional thinking to an integrated approach. It is recognised that there is scope for integration and coordination in many aspects of the sector, in policy making and implementation, staffing and formulation of terms and conditions of service, organisation within a common ministerial setting, information gathering and training. The activities in the sector programme will be designed to take this sector-wide and integrated approach forward.

A sector-wide approach goes to the centre of the way the sector operates, affecting its budget and expenditure; both

82 Ibid.

recurrent and non-recurrent, and will reflect all the activities and inputs into the sector, including wage expenditure. For example, sector-wide human resource planning and budgeting could, over the period, result in cross-sector reallocations in the wage budget.

In committing to a sector-wide approach, the leaders and manager of the GJLOS institutions, as well as other stakeholders in the sector reform, agree to share the above vision and mission. Further, they commit to the following shared values of independence and integrity of the Bench and the Bar: speedy and fair dispensation of justice; affordable and accessible justice for all persons; respect for due process of law by providers and users of legal services; and sensitivity to the vulnerability of the poor to insecurity and injustice.[83]

It has been suggested that the shared values should include sensitivity to the vulnerability of women and girls to injustice and their inability to protect and claim their rights, and respect for the rights of all with particular emphasis on women's rights.

The sector reform stakeholders also commit to the following shared implementation principles; committed orientation to serve the needs of Kenyans on matters of safety; security and justice; a holistic and integrated approach to sector reform; coordinated, consultative and participatory design and implementation of the reform programme; adapting best practices by an earnest search for and acquisition of relevant knowledge, technologies and skills; and efficient and cost-effective implementation of the reform interventions. It has been suggested that shared principles should include the principle of equality of opportunities and outcomes for women and men.[84]

83 The Short Term Priority Programme (STPP) 2003, p. 12.
84 Ibid.

Linking the Programme to the wider Public Sector Reforms

The GJLOS is only one of several components of a wider Government of Kenya public sector reform (PSR) initiatives. The other main components of the PSR are public service reform, parastatal reform, local government reform, and financial planning and budget reform. There are gains to be made by anchoring the legal sector reform in the PSR framework. For example, since Financial Planning and Budget Reform (FPBR) are spearheading the review and restructuring of public expenditure priorities through a Medium -term Expenditure Framework (MTEF), the sector Reform Programme should pursue the objective of increasing resource allocation to the sector in the context of the FPBR.[85]

Strong Coordination and Cooperation among Sector Institutions

The imperative that coordination and cooperation among sector institutions is inherent in the adoption of a sector-wide approach to the reform programme. However, to give effect to the coordination and cooperation, it is important that formal mechanisms are agreed upon among the sector stakeholders. Furthermore, it is important that the coordination and cooperation is not limited to monitoring and evaluating progress in the implementation of the GJLOS Reform Programme, but also to joint regular and consistent reviews of the problems and constraints in service delivery facing each of the sector institutions on a day-to-day basis.[86]

85 Ibid. p. 13.
86 Ibid.

Enhanced Public Funding of Sector Institutions

The GJLOS institutions in Kenya are suffering from decades of under-investment. Modernization and effectiveness of operations are needed in terms of working facilities and infrastructure, management and administration methods, procedures, practices and ethics. These require a substantial increase in the levels of budgetary allocations to the sector institutions. While Government is faced with budgetary constraints, there is consensus that, to achieve an acceptable level of improvement in safety, security and justice, Government must commit to improving funding of the sector institutions within the MTEF priorities.[87]

The Poor and Disadvantaged

In order to achieve sector reform in a way that benefits the poor and disadvantaged, it will be necessary to make sure that an appropriate approach is taken. The approach is made up of three strands. The strands will be reflected both in the sector programme and the STPP and include making the formal justice system more accessible to the poor and women; strengthening the informal/traditional justice system, including removing its discriminatory aspects; and strengthening the linkages and crossover between the two systems.[88] In addition, there is a need to improve the decentralization element of the programme to improve the capacity of ministries, departments and agencies at the provincial and district levels.

Governance

An effective and socially responsible government is a critical prerequisite for attaining sustained economic growth and

87 Ibid.
88 Ibid.

poverty reduction. During the PRSP consultative process at the district level, communities in nearly all the regions identified poor and unaccountable governance as a key contributor to the high incidence of poverty in the country.

Rigid and cumbersome laws and regulations are stated as major obstacles to the effective participation of small-scale traders and enterprises in the liberalised market economy. Existing commercial laws are biased against the small-scale trader and entrepreneurs, especially the kiosk owners in urban areas who are not accorded formal business and property rights. Harassment by law enforcement agents and frequent demands for payments for numerous trade and business licenses are seen as major stumbling blocks to the growth and vibrancy of the small-scale enterprise sector. Existing commercial and trade laws and licensing regimes are insensitive to the needs of the small-scale business and enterprise sector; and the few that are favourable to small enterprises are seldom implemented.[89]

During the consultative process, communities cited lack of access to socially responsive and affordable legal and judicial services as critical issues that need to be addressed by the government in the fight against poverty. It is the poor who suffer most from the effects of weak, unaccountable and insensitive legal and judicial systems. At the same time, lack of capacity and equipment in the legal and judicial system leads to delays in the administration of justice, and this mostly affects the poorer sections of the economy. Residents of remote rural regions, such as the pastoral arid zones, parts of Nyanza province (e.g. Kuria District) and the coastal region (Tana River, Kwale and Lamu districts), have to cover long distances in order to obtain access to proper legal and judicial services. Consequently, crime and cases of abuse of poor people's rights have soared, while

89 Poverty Eradication Strategy Paper (PRSP) 2001-2004. p. 28.

the need for a just and fair legal retribution has become more critical than ever. Lack of appropriate infrastructure, especially roads, makes certain areas inaccessible, seriously hindering the effectiveness of local and provincial administration.

Impact of the Reform Programme on the Lives of the Most Marginalised Sections of Society

The justice system in Kenya has been conceived to serve all Kenyan women, men and children equally. However, the poor have in the past been unable to access the justice system and hence their rights have continued to be violated with impunity. In Kenya, women constitute the largest proportion of the poor and their access to justice has been particularly questionable. It was therefore proposed that the sector-wide approach be expanded to include the Ministry of Gender, Culture, Sports and Social Services with a view to inform the sector through their grassroots data generated by Social Development officers throughout the country.

Poor people, particularly women, children and the disabled, are the most vulnerable to all forms of crime. Illiteracy and their inability to pay for services to protect them afford poor people, especially in Africa, little or no awareness of their legal rights and responsibilities. Corruption within the justice system is by far the most harmful, as the system is supposed to be the epitome of integrity and the last hope of those seeking justice. According to findings contained in the Poverty Reduction Strategy Paper (PRSP), access to justice has deteriorated in Kenya due to a number of factors, including poor access to and the high cost of legal services, lack of public awareness of people's legal rights, and high-level corruption among legal agents. The problems faced by the Justice Sector in Kenya are typical of those faced by many countries in Sub-Saharan

Africa. These countries inherited a legal system ill equipped to deal with the rapid social and economic transformation that took place after independence.[90]

It is widely recognised that the failure of states to provide protection from crime and access to justice impedes development. Poor people frequently point out that they cannot live in peace nor freely make choices and make the most of their opportunities if the institutions of justice and law and order fail to protect them in their daily lives. In addition, poorly functioning legal systems are unattractive to investors, resulting in a negative impact on the growth of the economy.

Women

The PRSP indicated that discriminatory policies and regulatory frameworks affect women, increase sexual harassment, general harassment, domestic violence and hinders access to services. Initially the language of the programme was gender neutral, as it was recognised that language is very important in reflecting and influencing how people think and design programmes. It was also recognised that the way language is used can empower or disempower and that there was an inconsistent gender approach in the short-term priorities of the GJLOS.

Children

One of the milestone achievements of legal reform in Kenya has been in regard to the passage of the Children's Act 2001 which was achieved after the work of the Task Force on the Laws relating to Children was set up in 1992. Although it took an unduly long time for the Task Force to complete its work (over six years), and for the Bill to be published and passed

90 Ibid.

(another three years), the Children's Act is now operational and the Children's Court has been established and magistrates gazetted to handle children's cases. There has however been poor popularisation and awareness creation in respect of children's rights. With regard to children, the GJLOS programme targets prisons, the Ministry of Health, the National Commission on Human Rights, police and civil society organisations as institutions that routinely handle child-related issues. The programme proposes reforms in the Children's Department with an outcome of a more conducive environment for the rehabilitation of child offenders. The programme proposes activities involving construction and renovation of remand homes and rehabilitation schools, procuring transport for child offenders, improving security of children before taking them to court, improving security and safety of children under detention and developing a communication strategy which involves sensitising the public about the Children's Act. [91]

Groups with disabilities

The PRSP identified the problems affecting groups with disabilities as lack of appropriate infrastructure; lack of access to education and employment, and discrimination against persons with disabilities.[92] One of the achievements of this legal reform is the enactment of the Persons with Disabilities Act No. 4 of 2003.[93] The Act was to provide for rights and rehabilitation, to achieve equalise opportunities for persons with disabilities and to establish the National Council for Person with Disabilities. The Act therefore sought to regulate and coordinate all affairs pertaining to disability concerns.

91 Ibid.
92 Poverty Reduction Strategy Paper , 2001-2002, op cit, footnote 6.
93 Kenya Law Reform Commission brochure.

Minorities

The PRSP identified the problems affecting the minorities as poor marketing opportunities, poor education and educational facilities, improper land tenure and natural resource management, inadequacy and inaccessibility of facilities, poor infrastructure, insecurity and discrimination.[94]

The Relationship between the Policy Programme and the Promotion of Civil Society Participation as well as Poverty Alleviation

The quality of governance is critical to poverty reduction. Since effective and efficient delivery of basic services by the public sector matters most to the poor, weak governance hurts them disproportionately. Good governance facilitates pro-poor sector reforms, state and local government policies as well as sound macroeconomic management. It ensures the transparent use of public funds, strengthens anti-corruption, encourages growth of the private sector and corporate governance, promotes effective delivery of public services, and helps to establish the rule of law. Good governance involves the poor and NGOs in the planning and implementation of programmes. It is closely linked to institutional and organisational capacity building and network relations.

The promotion of good governance is of major importance to Kenya's development. Rampant corruption and nepotism as well as a poor human rights record have marred the country's past. Progress has been made since the launch of GJLOS Reform Programme in June 2003, especially in the legal and institutional framework. However, much still needs to be done.

94 Poverty Reduction Strategy Paper , 2001-2002, op cit.

The ERSWEC stresses that "in an effort to revive the economy and meet the expectations of Kenyans for better living conditions, the starting point is better governance." The ERSWEC highlights the promotion of the rule of law and the control of corruption as key impact indicators and targets for improved governance.

Civil society represents a wide range of interests from think-tanks and human rights groups to non-governmental organisations that work to eradicate poverty and is sector-wide. The input of these organisations will particularly be seen at the thematic group level where, depending on the interest area, different organisations will contribute to the realisation of the overall key result areas.

Civil society in Kenya continues to play an active role in the promotion of human rights, democracy and good governance. The "watchdog" function with respect to transparency and accountability remains essential and contributes to keeping government and citizens alert about the necessary reforms. The operational framework for CSOs as well as the media has improved since 2002, but the need for continued awareness and strengthened capacity remains.

One of the fundamental tenets of the GJLOS Reform Programme is that it seeks to involve more closely non-state actors in both planning and implementation. Especially useful is the role of civil society, whose contribution can bring a demand-led balance and focus to the government's traditional service and supply-driven approach to reforms. Civil society organisations can be sponsors of the change in attitude that is necessary to enable the sector-wide reforms envisioned by the GJLOS reform programme.[95]

95 Cited at: www.gjlos.go.ke/gjinner.asp?pcat2=partners&pcat=nonstate&cat=civilsoc, accessed on 21 September 2007.

An effective partnership approach between civil society and GJLOS would typically apply principles of engagement that are mutually acceptable to all parties, including the principles of (a) transparency (b) accountability (c) equity (d) participation (e) value (f) social justice (g) pro-poor (h) respect for human rights (i) independence (e.g. separate GJLOS civil society basket fund).

Civil Society engages with the GJLOS Reform Programme governance framework at four levels. These are:

- Level 1: Representation at the executive committee of the programme known as Technical Coordination Committee (TCC).
- Level 2: Representation on the TCC's management committee.
- Level 3: Representation at the thematic group level.
- Level 4: Provision for funding of civil society programmes that meet qualifying criteria.

For a society in transition such as Kenya's, a programme such as GJLOS offers opportunities to reduce the antagonistic divide between the state and civil society, as part of a process of maturation into an "open society".

The Challenges

In Kenya, the legal and judicial system does not satisfactorily promote the rule of law and safeguard human rights. Many problems stand in the way of an effective and efficient legal sector. These include limited independence of the judiciary; poor functioning of the justice system in terms of court procedures, case filing, law reporting and legal documentation; increasing corruption and inefficiency of the court system.

There is limited access to justice for poor people due to distance, expensive and corrupt courts, complicated legal procedures and lack of knowledge about legal rights.[96]Although there has been recognition of the need for legal reform for many years, initially, there was lack of commitment and political will to carry out the reform and as a result the progress of the sector was extremely slow. Little was achieved from the time of establishment of the Legal Reform Sector to the year 2000. There was a lot of rhetoric without real political commitment to making legal sector reform work.

The problems identified prior to the Expanded GLOS Programme revealed that the entire system needed a total overhaul if the objectives were to be achieved, yet there was no will to do so; the government was simply overwhelmed by lack of resources, even when the new government came to power. It was very difficult to deal with institutions surviving past regimes, which had not been modified much since colonial days.

The pace of implementation of the reform process was extremely slow and this frustrated both the implementers and the funding partners, thus affecting the resources that the funding partners brought to the programme. The sector-wide approach was seen as complex and fraught with bottlenecks that frustrated progress and there was a need to be alert to that fact. Because there had been so much "rot" in the legal sector, there was an attempt to make very ambitious reform programmes that attempted too much too soon.

There was lack of capacity to undertake STPP among the sector institutions and there was a need to trim down the programme to a few action points that would ensure quality

96 Poverty Reduction Strategy Paper , op cit .

upon implementation. There was also a need to strengthen the public/private sector partnership for the programme to be truly participatory and to bring in government and private sector resources in order to avoid over-reliance on funding partners. [97]

In terms of specific institutions, the following was noted:

Penal Institutions

Because of many years of neglect and failure to keep up with population growth, the Prison Department suffered major constraints including congestion, poor diet for inmates and poor social and health facilities, all of which impacted negatively on human rights. Massive resources will be needed to rehabilitate the infrastructure, train personnel, and change attitudes regarding penal institutions in order to become a correctional services institution.[98] It is important to note that, in 2007 alone, major changes have been undertaken. Further, noticeable work was undertaken through the vice president's Office, with prisoners getting new uniforms, being availed the chance to air their issues and the provision of reading facilities, with a good number of prisoners sitting for primary school exams.

Internal Security

Internal Security, especially the Police Force, is challenged by high and increasing rates of crime, poor statistics and research in crime occurrence, low motivation; use of outmoded methods of handling crime and inadequate equipment to fight crime. The delivery of services by this department has not been satisfactory, as security personnel face a number of constraints in the course of discharging their duties. These

97 Expanded Legal Reform Strategy Paper April 2002. p. 10.
98 Ibid. p. 11.

include but are not limited to low staff motivation, inadequate skills and outmoded equipment and methods of fighting crime such as poor use of statistics and research. These, coupled with economic decline and rising poverty, the influx of refugees and proliferation of small firearms due to insecurity in neighbouring countries, have been identified as largely responsible for the high and increasing rate of crime.

The Police Department was considered a force rather than a service and there was a need to change it to reflect the service that it was offering. There was lack of capacity building and expansion of police investigating capacities and this was needed as a matter of urgency. The budgetary allocation to the Ministry was extremely low, yet there was a need for equipment, motor vehicles and communication facilities, as well as a need for expansion in numerical strength and modernisation of the Police Department. There was also a need for overall institutional restructuring.[99] In order to improve internal security, the government, in collaboration with various stakeholders, will implement the following measures to improve quality and speed of service delivery. These measures include:

- Improving terms and conditions of service;
- Modernising security equipment, in particular communication and vehicles;
- Providing for the achievement of a police/population ration of 1:605, with the long-term objective of reaching a ration of 1:450;
- Undertaking quality training of security personnel in diverse skills, especially those relating to handling people with disabilities, women and children;

99 Ibid. p. 12.

- Provision of additional physical facilities in police stations for people with disabilities, women and children;
- Developing special training curricula and entrance/ upgrading examinations for security personnel;
- Promoting indigenous conflict resolution methods in communities; and
- Promoting public awareness about security procedures and improving the involvement of communities, including the business community, in planning their security.

Legal Education

A further constraint related to legal education, particularly at the Kenya School of Law, which was said to be in "a mess" and needed support to transform it to a proper institution in instruction of law. There was also a need for public education on the tenets of law and procedural justice.[100] Some work has been done with an arrangement to move the Law School from its current location to enable it to expand, and the recruitment of a new director.

Attorney-General's Chambers

The AG had so far set up several task forces to review various aspects of the law but the work has been very slow. Many Bills were pending for a long time. There was lack of implementation of the work of the task forces. An enabling environment was absent. With the anticipated coming into force of the new constitution it would mean that the pending Bills will need to be amended even before they are passed in order to reflect

100 Ibid. p. 23.

the new realities and this would be an enormous amount of work. The prosecution functions were becoming increasingly diversified and there was need for training and capacity building for specialised personnel. Corruption cases and other similar cases have been on the increase, therefore the need for State Counsel to take over all police prosecution and the Prosecution Department would result in a need to increase the number of State Counsels.[101] The Office of the DPP (although contested) was also created to deal with prosecutions on behalf of Government. Recently, the Solicitor-General recruited two Deputy Solicitor-Generals to deal with the overload.

Legal Services and Administration of Justice

Challenges identified by stakeholders as adversely affecting legal service provision include poor access to and high cost of legal services, lack of public awareness about their rights, corruption and outmoded legislation.[102] There was also a need for legal aid in the country, which is presently largely undertaken by NGOs and only covers a small number of vulnerable groups. Proper administration of justice is challenged by corruption, delays in administration of justice, few specialised courts, lack of access to courts and inefficient keeping and handling of records.

New Challenges in Realisation of GJLOS Reform Programme

Making the Poor, Marginalised and Vulnerable Visible in Reform

There is much controversy and little clarity over a definition of "poor people". By national estimates, 57% of Kenyans

101 Ibid. p. 20.
102 Ibid. p. 21 - 22.

currently live below the poverty line. However, in the 2000-2002 Poverty Reduction Strategy (PRS) Process, a much wider definition of poverty was formulated. This definition includes groups of people who are socially or economically vulnerable (like children), disadvantaged (like women) and traditionally excluded from policies (like pastoralists).

Although these groups are cross-cutting, the overall group of "poor" people – by this definition of disadvantaged - is likely to account for 85% or more of Kenya's population. Simply, a GJLOS programme that is not pro-poor (by this definition) excludes this significant proportion from safety, security and accessible justice.

These poor men, women and children in Kenya are also key players in the justice system – mainly as suspects, perpetrators and victims of crimes. The poor and the disabled are the most vulnerable to all forms of crime, including domestic violence. Their vulnerability to violations and abuse arises from several factors, including their inability to pay for services to protect them e.g. lawyers, personal security and, of course, their literacy, which affords them little or no awareness of their legal rights and responsibilities.

Women are more vulnerable to poverty than men. The traditional male-female power imbalance makes it harder for women to own land and other assets, obtain adequate education, secure adequate livelihoods or move physically and socially to take advantage of opportunities. Further, women's experience of poverty is different and more acute than that of men because of gender-based forms of exclusion leading to their unequal access to economic opportunities. However, women's vulnerability cannot be isolated as a purely economic feature since its causes and effects are diverse. Political, legal, social, cultural and historical conditions combine to create poverty.

Not only are the poor vulnerable to crime and insecurity, but they are disproportionately affected by it. Thus, the ERSWEC identifies insecurity as a key cause of poverty. The causes of insecurity are numerous and complex and include banditry, hijacking, raiding and stock theft, robbery and looting, physical injury and mutilation, rape and murder. The immediate consequences are loss and destruction of material property, such as shelter, clothing and livestock. The loss of livestock, for example, means losing both a food source and capital. Insecurity is a disincentive to the operation of small-scale businesses. Many households have been rendered poor as a result of insecurity countrywide.

Factoring the Cross-cutting Impact of HIV/AIDS

While the rate of HIV/AIDS deaths has reportedly declined in recent years, it is estimated that about 150,000 people die of HIV/AIDS every year in Kenya**.** It is also estimated that AIDS deaths lead to as many as 10,000 new AIDS orphans per month, a staggering number that supports the view that up to 50% of Kenya's 1.35 million orphans are AIDS orphans. The loss of parents to HIV/AIDS increases the emotional vulnerability of children, and this may be exacerbated by prejudice, stigmatisation and social exclusion. With increasing numbers of children with fewer life chances and support, over-representation of youth in heavily affected populations, and desperation may provide an environment conducive to crime.

Immediate GJLOS challenges include the need for transparent inheritance, land tenure, civil registration, alternative care mechanisms and other coordinated protective legislation and institutional frameworks, including those outlined but not enacted/implemented under the Children's Act. These include provisions for adoption, fostering and other formalised care

processes which, nearly four years after the Act coming into force, are yet to be institutionalised or funded.

Further GJLOS challenges include transmission of AIDS through highly vulnerable groups such as prisoners, warders and police, increasing juvenile crime, requirements for the treatment of rape victims, and limited entitlement to land, property and other assets by women and children who lack legal rights or even, in many cases, proper identification.

It is for reasons and concerns such as those listed above that GJLOS has been targeted by the Kenya National HIV/AIDS Strategic Plan 2005/06 to 2009/10 as a sector through which HIV/AIDS mainstreaming will be pursued in its external and internal domains.

Understanding GJLOS Scope and Scale

In comparative terms, GJLOS is equal in scale of activity to Kenya's largest private corporations. According to 2004/05 national budget data, GJLOS represents a total expenditure of almost KShs 33 billion, comprising a wage bill of KShs 19 billion, operations and maintenance costs of KShs 10 billion and development costs of almost KShs 4 billion. In Kenya's public finances, outside the education sector, GJLOS is by far the most significant "entity". Considered as this single entity, and, again, using 2004/05 national budget data, GJLOS "employs" a total of 109,290 employees – over half of Kenya's traditional civil service, and almost one sixth of the entire public sector workforce. Put differently, one in six public servants in Kenya works in a GJLOS institution (by comparison, one in two public servants in Kenya is a teacher).

This sector-wide viewpoint is often masked by the prominence and status held by individual sector institutions in their own

right. From the Office of the President, GJLOS institutions include the Kenya Police, Administration Police and Provincial Administration; the Department of Governance and Ethics and National Campaign against Drug Abuse Authority (NACADA), and most recently the Ministry of Immigration and Registration Services, which houses the Immigration and Civil Registration Departments and the National Registration Bureau. In the Office of the Vice-President and Ministry of Home Affairs are found Kenya Prisons, Probation and After-care, Community Service Orders, Department of Children's Services and the National Youth Service. Each of these institutions is a significant actor within the sphere of public life in Kenya.

Added to this list are the Judiciary and the State Law Office, both important players in Kenya's chain of justice. Within the State Law Office are the Department of Public Prosecutions, the Public Trustee, the Registrar-General and the Legislative Drafting, Civil Litigation and Treaties and Agreements, as well as the Advocates' Complaints Commission. Since 2003, the MoJCA has added to this list of sector players, as have four semi-autonomous government agencies (SAGAs) – the Kenya Anti-corruption Commission (KACC), the Kenya National Commission for Human Rights (KNCHR), the Kenya Law Reform Commission (KLRC) and the Kenya School of Law.

Visualising Institutional Problems in Sector-wide Perspective

Since 2003, GJLOS sector institutions have, within Government's wider reform agenda, been busy preparing and finalising forward strategic plans as one step in a process intended to infuse results-based management into public service operations. Several of these institutional strategic plans have already been launched. An important notion informing

the GJLOS sector strategy is that such plans will need to be closely harmonised with the MTS in a manner that supports prioritisation of sweeping reforms on a sector-wide, rather than institutional, basis.

Quality, Sustainability and Replicability of the Programme

The issue of quality, sustainability and replicability of the programme is still in question.[103] This is due to the fact that the GJLOS programme is implemented within the context of an emerging democracy and a society in transition, characterised by a turbulent political environment, weak public sector institutions and growing demand for more effective public sector delivery. GJLOS will have to face several challenges within the next years.

Evidence for programme sustainability is the Government of Kenya's (GoK) political good- will to continue the reform agenda and the public demand for corruption-free institutions. An exit strategy should be developed in due time for the two external management structures currently used by GJLOS the Programme Coordination Office (PCO) and Financial Management Agent for GJLOS (FMA) provided that the GoK is progressively assuming a more active involvement in the implementation of the reform programme. There is a clear need to ensure that required GoK capacity and skills are steadily developed and consolidated to assume, in the short term, the roles currently performed by the PCO and the FMA. To achieve long-term sustainability, GJLOS should be fully incorporated within the GoK structures in the longer term.

While sustainability and replicability of the GJLOS Reform Programme remain foreseen challenges, a critical, ongoing

103 Mid-term Review of the GJLOS Reform Programme 2007. p. 9.

initiative within the GJLOS Reform Programme is the formulation and development of a sectoral policy framework for the GJLOS. This important development reflects an emerging realisation that the sustainability of GJLOS reform is predicated on its elevation from its current strategic intent (based on the ongoing Medium-term-strategy (MTS) which ends in 2009) to a long-term policy commitment that is responsive to the needs and rights of Kenyans. Equally, this initiative reflects the need to integrate the work of GJLOS permanently into the daily business of Government, thereby making GJLOS reform more predictably within and across Government.

The government has also embarked on a process of developing a National Policy and Action Plan (NPAP) for the Promotion and Protection of Human Rights. The process, being spearheaded by the MoJCA and the KNCHR, is based on the view that lasting improvements in the promotion and protection of human rights ultimately depends on policies adopted by the government. Once the NPAP is formulated, Kenya will join other nations who have adhered to the call made during the Vienna Human Rights Conference in 1993, that all states consider the desirability of drawing up a national action plan, identifying steps whereby the state would improve the promotion and protection of human rights.

Best Practices and Lessons

The Legal Reform Sector has taken off with great momentum since the entry of the NARC government and the location of the reform within the MoJCA as the lead ministry. Certain factors have contributed to this success.

- Government's commitment to the continued reforms in public sector, justice, law and order and support of the sector-wide approach in ensuring that the reforms benefit the public.
- The GJLOS Reform Programme sets out its own priorities in the short term and in the long term so as to strengthen the enabling environment for the success of the reforms.
- GJLOS has a well-designed management structure that is appropriately articulated for a large-scale, sector-wide, reform-oriented programme.
- The success of the reforms involves enhanced effectiveness, accessibility, accountability and efficient delivery of public safety, justice and the rule of law.
- The government, the private sector, donor community and civil society partnership supports and ensures the success of the programme, with each sector's obligations clearly articulated.
- Quarterly reports and semi-annual reviews are produced in time.
- A monitoring and evaluation framework for the reform programme, which includes milestones and indicators designed by independent technical consultants, is in place.[104]
- Initially the reforms were too narrow and some key institutions had been left out. This was recognised and the strategy was broadened and those institutions that had been left out were brought on board.

104 The Short Term Priorities Programme (STPP). p. 49.

- Although the programme was capital intensive and required careful planning and synergetic effort it has been recognised that there were some aspects that had zero monetary returns in implementation and could be undertaken immediately.

- Involvement of civil society was crucial to the success of the reform programme.

Recommendations

The following recommendations to enhance the Legal Sector Reform Programme are made:

- Delivery and access to adequate and quality legal services will ensure that individual and human rights are respected. This is particularly true in respect of vulnerable and disadvantaged members of the society. The legal service sub-sector has yet to perform in accordance with the expectations due to the poor access to and high cost of legal services, which is beyond the reach of most Kenyans. The government, in conjunction with other stakeholders, needs to institute a regulatory framework with a view to reducing costs, improving coverage, promoting public awareness on legal rights and encouraging a culture of seeking legal redress when necessary. There is also a need to train paralegals and employ additional legal draftspersons and provide civic education.

- Strengthen and streamline ongoing reforms in the provision of legal and judicial services.

- Provide adequate resource support to the subsector to bring legal and judicial services closer to the poor and the most vulnerable in society.

- Implement the recommendations of the Kwach Report on the problems bedevilling the judicial service, embracing creation of specialised divisions in the High Court, establishment of commercial courts (already done in Nairobi) and decentralization of administration of justice.
- Establish special court and police interrogation rooms for dealing with sensitive cases such as rape and other forms of violence.
- Recruit and appoint sufficient judicial staff and legal draftspersons to speed up administration of justice.
- Modernise the legal code and dismantle outmoded, repressive and inappropriate laws.
- Promote public awareness on matters relating to law and order to eliminate ignorance of the law and mitigate occurrence of petty offences.
- Promote alternative dispute resolution which, in judicial terms, can complement court procedures, circumvent ineffective courts, cut losses and delays and enhance user satisfaction as well as improve access to justice for marginalised sectors.[105]
- Promote programmes to resolve conflicts that threaten the well-being of communities, enhance the ability of the marginalised communities to achieve quick and cost effective settlements and improve productivity by releasing monies, which would otherwise be spent on litigation, for investment within the communities.

105 Ibid. p. 22.

- Provide internal security to the general citizenry, which is necessary for creating a conducive environment for sustained economic growth.
- Development of the legal framework should follow extensive consultation to ensure public awareness, input and acceptance.
- Consultation within existing departments should be encouraged to ensure that infrastructure is cross-sectoral, efficient, cost-effective and implementable.
- The current framework developed by GJLOS can be considered as an interim framework and can be implemented while the final framework is being modified or developed.
- Implementing the framework should be facilitated by capacity building.
- There is a need to deepen the technical/programmatic dimension. Broadly, this means using the Sector Strategy better to identify "pro-poor" and "pro-people" reform initiatives; as well as crosscutting initiatives around HIV/AIDS, gender, children and the environment. It also means moving from "visible" reform to "sustainable" reform across the country, outside Nairobi. In simple programme management terms, the challenge is to move from Inputs to Activities to Outputs to Results to Outcomes. Finally, the over-arching challenge is to move from Sector Strategy to Sector Policy.
- Moreover, there is need to build a sustainable institutional framework for managing this complex, multi-ministry SWAP. This will require alignment of programme

structures with government structures, especially for technical assistance. It will also be manifested in three ways. First, a shift from interagency dialogue to interagency problem solving. Second, a move from donor-led donor coordination to government-led donor coordination. And third, effective non-state actor participation, partnership and engagement.

- Finally, there is a need to secure firm donor commitments i.e. to transform donor pledges into commitments, at appropriately early stages in the GJLOS work planning and budgeting processes. The predictability of development partners' funding flow can also be improved by providing multi-layer projections and agreements for their contributions.

Conclusion

The GJLOS has recognised that efficient and easy access to timely, efficient and affordable legal and judicial services encourages the culture of law-abiding citizenry, which is a requisite for social, political and economic development. Corruption, poor attitudes towards work, high costs and lack of judicial and legal services were mentioned as principal areas of concern in the fight against poverty in Kenya. Over the years, administration of justice has deteriorated, resulting in delays in administration of justice and lack of access to courts. This has created an uncertain environment for investment. This is coupled with a mismatch between personnel and responsibilities, both in terms of skills and numbers, inappropriate training, unattractive terms and conditions of service, use of outdated laws, corruption and inadequate resource allocation. For the justice and order sector to work effectively and efficiently to provide services to the Kenyan

people, there has to be a holistic approach to the concerns raised by Kenyans and involvement of all concerned sectors.

The other important area of concern was identified as security and maintenance of law and order. Every sovereign state has the responsibility of maintaining security, law and order. The major objective of the law and order sector is to ensure that lawful institutions apply the rule of law fairly and firmly. This sector has not performed well, owing to many cited problems, some of which go beyond the sector's control. The decline in service delivery in this sector is manifest in increasing incidences of various crimes, including violence against women and children and other forms of violence, discriminatory practices in law enforcement, corruption and maladministration of justice. Deterioration of service delivery in the Law and Order Sector has contributed to a decline in economic activity and investments as commercial courts become bogged down with the inadequacies of the sector.

Legal Sector Reform has been an ongoing process from early 1985, but was drawn out during the Moi Government when there was a lack of political will to carry out reforms. There was no respect for democracy, rule of law or respect for human rights. This period also saw an increased number of Kenyans rising up and fighting for democracy through civil society organisations and reform activism that culminated in the election of a reform government in 2002. There is serious concern in civil society and other stakeholders that the current "reform" government does not have the political will to carry out the necessary reforms, especially on the issue of corruption. Several major scandals have been associated with the current government which causes serious concern about their reform agenda. However, since the NARC assumed power the Legal Sector Reform Programme has been expanded and some

elements of reform achieved. As an ongoing process, much still remains on paper. The implementation of the reform programmes is critical to the administration of justice and the search for economic recovery. To achieve this, civil society and other stakeholders must continue their roles as watchdogs and make sure that the government accounts to the people of Kenya.

4
Legal Sector Reforms in Tanzania: An Examination of Development and Status

Benedict T. Mapunda

Introduction

A number of African countries including Tanzania are involved in reforming their political, economic, and legal frameworks with a view to improving the well-being of their people. The extent of these reforms varies from country to country. Ordinarily the extent of the reform process depends on the material conditions of a particular country.

This paper is an attempt to examine Legal Sector Reform (LSR) taking place in Tanzania. In order to understand the basis of the reforms the paper begins by highlighting historical developments in the country. The paper then highlights the philosophical basis of the legal sector reforms, outlining the principles guiding the reform process, the mission, vision and its objectives; the link between the reform programme, the civil society and poverty alleviation; and the impact of the reforms on marginalised sections of society. Further, the paper draws lessons and challenges from legal sector reforms taking place in Tanzania. Lastly, it reaches conclusions and makes recommendations.

Historical Background

The nature of law, its origins, development and reform cannot be understood if the law is considered in isolation of the economic, social and political life of the particular community

examined. In that sense, it may be argued that understanding law and any legal reform process needs to be viewed in its historical context.

Tanzania was a British colony since the end of the World War I. She gained her independence in 1961. In the 1960s, a good number of African countries had a strong belief in state-dominated development as a strategy to build their countries after years of colonialism. The strong feelings of economic independence and nationalism led some countries to emulate socialist countries by introducing centralised planning, corrective interventions in resource allocation and industrial development.[106] For Tanzania one key step in that direction was the proposal to adopt a one-party system in 1963, which was legalised in 1965.[107] In the same context, in 1967, Tanzania adopted a policy of "Socialism and Self Reliance" through the Arusha Declaration, under which she nationalised all major means of production in 1967.[108]

A few years later, this political-economic set-up faced a number of problems. It became apparent that it was impracticable for the government to single-handedly provide in basic services for the ever-growing population in the country. Excessive intervention in the market and strong centralised power resulted in inefficiency and, more importantly, it left the private sector and other institutions weak and underdeveloped.[109] This led

106 World Bank, 1997, *World Development Report: The State in a Changing World*. New York: Oxford University Press for the World Bank. p. 32.

107 Tanzania Interim Constitution of 1965, Article 3(1).

108 Cliffe, L. 1972. *Tanzania – Socialist Transformation and Party Development*., in Cliffe, L. and Saul J.S. Socialism in Tanzania: An Interdisciplinary Reader, Vol. 1. Nairobi: East African Publishing House. p. 266.

109 Aron, J. 1996, *The Institutional Foundation of Growth*. In: Elis, S. (Ed.) *Africa Now*, Directorate General for Institutional Development. London: James Curry. p. 101.

to poor productivity in both the public and private sectors and a decline in state revenues. The oil crisis of 1973 and 1979 exacerbated the situation. External government debt to donor countries and institutions increased. Apart from these internal problems there was also pressure from the donor community, led by Bretton Woods institutions: The World Bank (WB) and the International Monetary Fund (IMF), for economic liberalisation that embraces free-market economies. Like other states in the developing world, Tanzania had to accept strict conditions, including changing the political and economic framework, to obtain structural adjustment loans.

Accordingly, President Mwinyi, who assumed office in 1985, abandoned socialist policies and negotiated a structural adjustment programme with the Bretton Woods institutions under the Economic Recovery Programme (ERP) in 1986.[110] Most significant of the changes brought by the ERP were the introduction of market economic policies and multiparty politics in 1992. It has been argued that the introduction of multipartism was caused by pressure from western (capitalist and donor) countries; the influence of reformers from outside the single-party system; the influence of the late Mwalimu J.K. Nyerere and the Nyalali Commission.[111]

Due to the changed political-economic context, the government realised the need to undertake reforms to improve the welfare of its people. The main focus was on strengthening the economy and speeding up the recovery programme adopted in 1986.[112] In

110 Ntukamazima, D.A. 1998. Civil Service Reform in Tanzania: A Strategic Perspectivei, in Rugumamu, S.M. (Ed.) *Civil Service Reform in Tanzania. Proceedings of a National Symposium*, Dar-es-Salaam. p. 45.

111 Mmuya, M. 1994 *Government and Political Parties in Tanzania*. Dar-es-Salaam: Dar-es-Salaam University Press. P. 6 - 7.

112 Ntukamazima, op. cit. p. 45.

order to reduce drastically government's direct involvement in the national economy and facilitate an enabling environment for enhanced private sector participation in the provision of economic and social services, government launched the Civil Society Reform Programme in 1991, and it became officially operational in 1993.

In April 1993, recognising the need for serious reforms in the law, to guide the economic and political reform process, the government pronounced the establishment of the Legal Sector Task Force to carry out comprehensive review of the problems and issues in the sector and suggest solutions. The Task Force found that:

> ... [It] has become increasingly clear that a major area of deficiency that is bound to undermine these radical reforms is the legal sector, which includes the judiciary and quasi-judicial institutions, the various agencies of the government that provide legal services, autonomous public-legal institutions, the private bar and centres of legal education and training ... Nor can market-oriented economic reforms be implemented in the absence of a sophisticated, legal or regulatory framework, installed and administered by competent institutions capable of meeting the exacting challenges of a modern market economy.[113]

The Bomani Report, which presented challenges facing the legal sector and made recommendations on the way forward, was presented to the government in January 1996.

The Report noted the many problems facing the legal sector, outstanding of which were: inordinate delays in resolving disputes and dispensing justice; limited access to justice and legal

113 United Republic of Tanzania 1996 Bomani Report: Financial and Legal Management Upgrading Project, Legal Sector. Dar-es-Salaam. p.1.

services and justice for the majority of the people; corruption and other unethical conduct of officials in the legal system; outdated systems, which were incompatible and irresponsive to emerging social, political, economic and technological developments; limited public trust in the legal system; low competence and morale of public sector legal personnel; inadequate numbers of professionally-trained personnel; and poor provision and maintenance of a work environment for most public institutions in the legal sector.[114] Additionally, the Bomani Report defined the programme for the reform of the legal sector. Subsequently the government endorsed almost all the recommendations and directed its implementation.[115]

A pertinent question to be asked in this case is: why should the government focus on legal sector reforms now? Obviously, the main reason is the fact that there was substantive change in the material conditions on the ground. The old legal framework was no longer suitable for the changed political-economic conditions of the country, requiring new settings to ensure justice, law and order, as a bedrock for a stable nation and a catalyst for economic development. Needless to say a country in which no one is sure of getting justice, and where lawlessness or disorder prevails cannot promote development, or worse, would breed chaos.

Philosophy Behind Legal Sector Reform in Tanzania

Legal sector reforms are an important element of preserving law and order in any legal system. All societies are dynamic. Where there is law and order people in any society are ensured of steady and undisturbed development. In addition, citizens expect to get prompt justice whenever they present their complaints/problems to justice-dispensing institutions. The

114 Ibid.

115 Medium- term Strategy and Action Plan (MTS), 2004, p. 1.

word "justice" is common in any society although it is defined in different ways. According to Chakravarti, Plato (429 - 399 BCE) focused his discussion on an ideal society and sought to justify the division of society in "natural" classes, while his disciple Aristotle (322 - 284 BCE) and subsequently, Thomas Aquinas (1226 - 1274 AD), elaborated the term using two concepts, namely distributive and corrective justice.[116]

The debate as to what justice means has continued to date. A simple dictionary meaning of the term "justice" is the quality of being or doing what is just: right in law and equity.[117] However, the encyclopaedia definition does not help much in understanding the concept justice. Likewise, English courts have developed a narrow conception of justice in the context of administrative law, focusing on what is normally termed as "natural justice." Natural justice consists of only two main principles, namely the right to be heard (*audi alteram partem*) and the requirement of an impartial tribunal (*nemo judex in causa sua*).[118] Related to this issue is the debate on the link between law and justice. A number of people contend that justice is not always achievable in cases where the law is applied strictly. On the other hand, the late Justice Nyalali of Tanzania believed that where true law is administered, it is possible to administer justice in every situation and according to law. According to Nyalali "true law" means the law that is consistent with the constitution, equity and natural justice. He emphasised that "true law" can never be in conflict with justice.[119] Suffice it to say it is easier to recognise the existence of justice than to define it because it is dependent on the law and material conditions in which it operates.

116 Chakravarti, K.P. 1989. *Jurisprudence and Legal Theory*. Calcutta: Eastern Law House. pp. 393 - 405.

117 Encyclopedia Britannica, 1960, Vol. 13, p. 207.

118 Twaib, F. 1997. *The Legal Profession in Tanzania. Dar-es-Salaam:* Dar-es-Salaam University Press. p. 44.

119 Ibid. p. 45.

Another relevant concept is "law and order", which is related to the whole question of governance. The constitution establishes the rule of law, clarifying the roles and responsibilities of the arms of state. Normally, where there is rule of law there is "law and order." The constitution also provides for minimum safeguards. Such safeguards include the fact that, in a civilised society, human beings must not be restrained in the enjoyment of their rights and freedoms, save where it is necessary to promote law and order, security of the nation, health and morality.[120]

In order to ensure that justice prevails at all times, the law and legal framework must be responsive to the needs of the society it serves. Indeed, Professor Mwaikusa commented in 1995:

> That the law in Tanzania is not at pace with the demands of a growing market economy should not, in itself, be surprising at all. What should not be allowed, though, is for the law to stand as a hindrance to progress.[121]

This necessitated changes in the legal sector. While explaining the philosophy behind legal sector reforms in Tanzania, the Minister for Justice and Constitutional Affairs opined:

> It is a cardinal principle of the Constitution of the United Republic of Tanzania to unflinchingly uphold the rule of law. In a developing state like ours, this can be secured only if there is established and maintained in the country an efficient, fair and transparent system for the administration of law and justice ... Such system is crucial for securing and perpetuating an enabling environment for the peaceful and dynamic social and

120 URT, 2004, Legal Sector Policy Concept Paper, p. 7.

121 Mwaikusa, J.T. 1996. *Facilitating a Free Market Economy*: Some Issues in the Current Regulatory Law. Un-published papers presented at a Seminar, "Legal Framework for a Free Market Economy in Tanzania". p. 11.

> political development and prosperity of the nation. This is the main reason why the government is unequivocally committed to institute and expeditiously execute the reform and development of the legal and judicial services in the country and to rapidly enhance access to these services to all people without discrimination of any sort. [122]

From the foregoing it is clear that reforms are carried out in furtherance of the principle of rule of law.

Legal Sector Reform Mission, Vision and Objectives

Background to the Reform Project

The need for reform of the legal sector was realised immediately after independence. The first president of the country, the late Mwalimu J.K. Nyerere, emphasised that:

> All aspects of our national life are changing very rapidly and it is important that all responsible servants of the people should be clear about their duties and opportunities for services in the developing nation ... It is impossible for the judiciary to continue to operate in the colonial tradition when everything else in the society is changing. What is necessary, instead, is for the basic purposes of our judicial system to be understood so that the implementation process of those basic purposes can be adopted to the new society and the fundamental principles thus observed.[123]

This statement clearly indicates the quest is maintaining the practice of making changes aimed at improving services to the people. Substantive actions intended to reform the legal sector began with the decision by the government in November 1974

122 Statement by Minister of Justice, 2003, p. 1. The statement was made while making general reflections on the Legal Sector Reform programme in 2003.

123 Msekwa, P. 1977 *The Report of the Judicial System Review Commission*. Dar-es-Salaam: Government Printer. p. iii.

to appoint a commission, popularly known as the Msekwa Commission, to review the working of the judicial system and examine the following issues: Whether the structure and the system of operation of courts of Tanzania; the Department of Public Prosecution (DPP), the Criminal Investigation Department (CID), and the defence advocates were satisfactory; whether the various procedural laws which regulate the hearing of cases are good and adequate for dispensing justice; and to examine any other matter that could assist to improve the administration of justice in the country.[124]

Given that the Msekwa Commission's mandate was confined to the improvement of the processes of the courts, it was not a comprehensive review of the legal sector. Subsequently, government appointed the Legal Sector Task Force, chaired by Mr. Mark Bomani, in 1993, commonly referred to as the Bomani Task Force. The Bomani Report proposed a programme for the reform of the legal sector, including the provision or improvement of facilities; provision of training; modernisation of information systems; a wide range of institutional and structural reforms and the injection of substantial resources.[125]

The Bomani report noted that:

> ... [It] has become increasingly clear that a major area of deficiency that is bound to undermine these radical reforms is the legal sector, which includes the judiciary and quasi-judicial institutions, the various agencies of the government that provide legal services, autonomous public-legal institutions, the private bar and centers of legal education and training ... Nor can market-oriented economic reforms be implemented in the absence of a

124 Ibid. pp. 1, 2.
125 Bomani Report, 1996, Ch. 1.

> sophisticated, legal or regulatory framework, installed and administered by competent institutions capable of meeting the exacting challenges of a modern market economy.[126]

The Bomani report was presented to the government in January 1996. It documented the various problems and issues in the Legal Sector and recommended ways to solve them.

The Report noted many problems facing the legal sector. The key problems included: inordinate delays in resolving disputes and dispensing justice; limited access to justice and legal services and justice for the majority of the people; corruption and other unethical conduct of officials in the legal system; the system was, in significant ways, outdated and not responsive to emerging social, political, economic and technological development; limited public trust in the legal system; low competence and morale of public sector legal personnel; inadequate numbers of professionally-trained personnel; and poor provision and maintenance of work environment for most public institutions in the legal sector.

The Bomani Report also proposed a programme for the reform of the legal sector. In summary it recommended the provision or improvement of facilities; the provision of training; modernisation of information system; a wide range of institutional and structural reforms and the injection of substantial resources.[127] Subsequently the government endorsed almost all the recommendations given in the report and directed its implementation.[128]

126 Bomani Report, op. cit. p. 1
127 Bomani Report, Ibid. Chapter 1.
128 MTS, op. cit. p. 1.

The Bomani Report further recommended an injection of substantive resources for the implementation of the reform process totalling $ 266 US million for both Tanzania Mainland and Zanzibar. On realising the difficulty of mobilising such huge financial resources, the government formulated the Medium-term Strategy (MTS) and Action Plan based on the recommendations of the Report, at a reduced cost of $ 41,430,663 US. The MTS and its Action Plan was launched in December 1999 as a flagship for legal sector reform in the country and a reflection of the priorities of Tanzania.

Vision, Mission and Objectives

The Vision of the MTS is "Timely Justice for All" based of the following characteristics: speedy dispensation of justice; affordability and access to justice for all social groups; integrity and professionalism of legal officers; independence of the judiciary and a legal framework and jurisprudence of high standards that are responsive to social, political, economic and technological trends at both national and international levels.[129]

The shared Mission of all institutions in the legal sector is, "the development of social justice, equality and rule of law through quality and accessible legal services."[130]

The shared mission is underpinned by the shared values of fairness, basic human rights, equality and social justice; rule of law and integrity of legal professionals and the principles of inalienability of basic human rights; equality before the law; separation of powers; protection of public interest; ethical conduct of legal officers; accessibility and affordability of

129 Ministry of Justice & Constitutional Affairs, 2004, Institutional Assessment and Development of a Program for the Establishment of the Proposed Law School of Tanzania and Time Bound Action Plan, p. 8 – 9.

130 Ibid, p. 6

legal services for all citizens; timely resolution of disputes; efficiency in the discharge of functions; and transparency and accountability in dispensing justice.[131]

The MTS was first revised in 2003 to reflect two main developments: the setting of MTS objectives within the framework of the Poverty Reduction Strategy and the introduction of activities from the Ministry of Home Affairs.[132] The MTS was revised again in 2004, in line with broad suggestions given by the joint appraisal team and views of stakeholders.

Parallel to the MTS, a sister project known as the Quick Start Project (QSP) was launched in October 2000. The QSP was meant to kick-start the MTS by creating a favourable ground for the implementation of the MTS. While initially intended to last for only 20 months, it extended to 31 December 2004.

In 2002, the government and donors appointed a team of experts to undertake an independent technical appraisal of the Legal Sector Reform Programme (LSRP). The objectives of the appraisal were to examine the relevance of the LSRP and the QSP *vis-à-vis* national policies and priorities, its soundness from the perspective of economic, technical, financial social and institutional aspects as well as appropriateness of the implementation and financial arrangements.[133] The experts pointed out a number of weaknesses and proposed ways to rectify the situation.

131 MTS, op.cit. p. 8.

132 Government of the United Republic of Tanzania: Joint Legal Sector/Partners Appraisal of the Legal Sector Reform Program Report, 2003, p. 30.

133 Legal Sector Reform Program: Comments of the Steering Committee on the Draft Joint Appraisal 2003, p.1.

A Bird's- Eye View of the Objectives of the QSP and the MTS

a) Objectives and Progress on the QSP

The Quick Start Project (QSP) was set in motion by a Memorandum of Understanding between the government of Tanzania and donor countries in May 2001, to kick-start the implementation of the legal sector reform programme by executing key projects that would facilitate its smooth take-off. The QSP had six components, also referred to as objectives, namely:

(i) Providing a new legal framework for legal sector institutions. The main purpose of this objective was to update and harmonise the legal framework of legal sector institutions to match the social and economic developments of the country.[134] A survey on the laws needing amendments and options of harmonisation had already been carried out.

(ii) Enhancing administrative support, division of work and supervision mechanism, in order to relieve judicial officers from administrative duties.[135] Initial studies carried out show that administrative support staff were inadequate and lacked the requisite skills.

(iii) Enhancing delegated authority (retention schemes). This was intended to identify inadequacies of existing retention schemes and suggest improvement measures.[136] At the time of the study, experts were still studying the issue with a view to making appropriate proposals.

134 Quick Start Project , 2001, pp. 6 - 12
135 Ibid. pp.13 - 22
136 Ibid. pp. 23 - 29.

(iv) Training needs assessment for public legal institutions. The purpose of this component was to identify training needs in public legal sector institutions and develop a training programme.[137] Needs assessment has been done in some institutions and improvements needed in such institutions have not yet been implemented but the ideas have been taken on board in the planned implementation of the MTS. One example is found in the plan to bridge the knowledge gaps among academic staff members of institutions of higher learning, by presenting specialised/ tailored courses.

(v) Strengthening juvenile justice: The purpose of this objective was to address the priority issues of strengthening juvenile justice, including building of juvenile courts and training of magistrates to handle juvenile justice.[138] The cost of the construction of the proposed courts and basic reference materials for training had already been identified at the time of this study.

(vi) District-based support to the judiciary: This involved a pilot scheme in Arusha and Manyara regions. To date, the needs have already been identified and the nature of the support profiled.[139]

(vii) The QSP officially closed on 31 December 2004. Despite the good intentions of the QSP, nothing substantive had been accomplished. Little of what was intended initially, had taken off. A report by a very responsible officer in the judiciary showed that even the material contributions of people to the pilot projects of Arusha and Manyara regions are now in bad shape and it may

137 Ibid. pp. 30 - 36.
138 Ibid. pp. 37 – 49.
139 Ibid. pp. 50 – 67.

be difficult, as a consequence, to convince people to continue participating in the project. In short, the QSP, which was meant to kick-start the MTS, substantially failed to kick-start itself.

b) Objectives of the MTS

Regretfully, the main legal sector reform document, namely the Medium-term Programme (MTS) was not yet operational at the time of writing of this paper. Officials of the Ministry of Justice and Constitutional Affairs (MoJCA) informed the author that the revised MTS has already been endorsed by the Steering Committee, as the highest organ overseeing the reform process. It was adopted and inaugurated by the government in 2004.

The MTS consists of six strategic objectives, also defined as key result areas, as outlined below:

(i) National Legal Framework: This component is intended to achieve four key outcomes namely: improved legal environment for enhanced social justice, safety and economic development; enhanced independence of the legal sector institutions; streamlined and strengthened prosecution and investigative systems; and strengthened capacity for research of the national legal institutions. Preliminary studies on this component have been carried out under the QSP.[140]

(ii) Access to justice for the poor and the disadvantaged: This component seeks to achieve the following four outcomes: improved access to justice for persons in remand homes and prisons; enhanced legal aid for disadvantaged and poor persons and dissemination of legal information;

140 MTS, op. cit. pp. 15 - 16.

improved access to justice in rural areas and improved custodial and court facilities for juvenile offenders.[141]

(iii) Human rights and administration of justice: Target results for this component include law enforcement agencies that observe human rights; strengthened Commission for Human Rights and Good Governance; transparency and reduced corrupt practices in the legal institutions; and coordinated and organised administrative justice system.[142]

(iv) Knowledge and skills of legal professionals: Key target results for this component are legal education and training institutions poised to deliver quality legal training; improved practical training skills for law graduates and improved capacity of legal training institutions to offer continuing legal education for lawyers.[143]

(v) Service delivery capacity in key legal sector institutions: Key target results include, enhanced management and coordination in the sector institutions; enhanced competence, motivation and integrity of personnel; enhanced autonomy in the recruitment of judicial officials and other legal professionals; and improved working environment for key legal sector institutions namely the judiciary, MoJCA, legal registries, police and prisons.[144]

(vi) Programme management, coordination, monitoring and evaluation: This component aims to ensure effective implementation by, among other actions, effective implementation of reforms by key legal sector institutions; ensuring effective coordination, monitoring

141 Ibid. pp. 23 - 24.
142 Ibid. pp. 33 - 34.
143 Ibid. pp. 39 -4 0.
144 Ibid. pp. 48 - 50.

> and evaluation; enhancement of policy and strategic leadership in legal sector institutions; enhancement of information, communication and education on the legal sector reforms and developments, and enhancement of capacities for change management in the legal sector institutions.[145]

Various institutions have been assigned responsibilities as the implementing agencies of the envisaged reforms. The implementation clusters are determined by the key result areas/components.

c) Key Developments in Legal Sector Reforms and the MTS

It is noteworthy that legal sector reforms in Tanzania are not confined to the MTS. The MTS is simply a strategy intended to make the legal sector collectively improve itself. What is currently happening is that the implementation of the MTS is proceeding hand in hand with other departmental or institutional reforms, some of which have been made possible by bilateral arrangements with development partners. The reason for this is that the government decided that the MTS reform objectives should be mainstreamed within the strategic plans of each institution. It is conceded that such a step cannot be achieved overnight. All the same the reforms are now taking shape, at varying paces, within the sector institutions, partly as developmental matter in such institutions and partly as components of the wider reforms taking place in the sector. In this regard, we highlight the key developments that have taken place so far.

In regard to the first key result area, namely National Legal Framework, the Bomani Report noted the extent to which the legal and regulatory framework was outdated and it impeded

145 Ibid. pp. 58 - 59.

the speedy dispensation of justice. It was also found that the legal system was fragmented. The focus of the reform exercise in this aspect is to establish a harmonised legal framework in the country. Earlier efforts include the enactment of a new Companies Act in 2002, amendment of the Land Act of 1999 and related laws to govern mortgages and lending practices. The government has also initiated efforts to review the labor laws of the country. Government is working on the review of a number of laws, including the Civil Procedure Act; Evidence Act; Advocates Act, Magistrates' Courts Act etc. to harmonise the laws with the constitution.[146] However, these efforts are still in their infancy and are fragmented. More work has to be done to achieve the intended objectives.

In order to give the reform agenda a stronger base, efforts have been made to strengthen the Law Reform Commission (LRC) that is instrumental in the review of laws in the country. In that direction the Commission has employed more research staff, and a law professor from the University has been, for the first time, appointed to head the institution.

Another important element under this objective is the plan to streamline and strengthen the prosecution and investigation system. The current position is that prosecution of cases in the regional and district courts, except for a few serious crimes, is normally done by the police, who also have the duty to investigate these cases. The reform agenda aims to civilianise the prosecution of cases in the country, in order to have civilian professionals undertake the prosecution of cases, while the police concentrates on their traditional role of investigation of crimes. The decision to separate the two functions has already been made, and recruitment of staff commenced in

146 Ministry of Justice & Constitutional Affairs, Budget Speech 2007/08, para 49.

the 2006/007 financial year.[147] In addition, regulations to govern the new framework in the prosecution of cases are being prepared. Reports from the Ministry indicate that the programme will be implemented in phases and will start with a pilot scheme in selected regions of the country.

The second key result area is "Access to Justice for the Poor and the Disadvantaged", to address the little or no access to justice by a majority of Tanzanians. A number of activities have been undertaken to remedy the situation. A number of NGOs are assisting in legal aid and literacy and have trained a considerable number of paralegals to serve the common people. Research done by the Law Reform Commission (LRC) has proposed that a cadre of paralegals, currently operating informally, be established formally and allowed to represent people in the Primary Courts.[148] However, a decision on this is pending. There have also been efforts to strengthen juvenile justice in Tanzania. The QSP has supported the training of judges, magistrates and police, prisons and welfare officers on best practices for the administration of juvenile justice. Furthermore, an action plan for enhancing juvenile justice in Tanzania was adopted at a stakeholders' workshop held in July 2004.[149]

The third key result area is "Human Rights and Administration of Justice", to address the inadequacies in the constitutional safeguards against violation of basic human rights and lack of harmonisation in administrative tribunals. Accordingly, the Commission for Human Rights and Good Governance (CHRAGG) was established in 2002; the Police General Orders and Prison Orders revised, human rights courses conducted for prison and police officers; and lastly, people were sensitised

147 Ibid. para 27.

148 Law Reform Commission 2004 Scheme for Provision of Legal Services by Paralegals. Dar-es-Salaam. Un-published discussion paper presented in a stakeholders' workshop in May 2004. p. 44.

149 MTS, op. cit. p. 22.

on corruption through mass media and workshops. NGOs have also launched campaigns for promoting human rights, gender equality and good governance practices.[150]

The fourth key result area is "Knowledge and Skills of Legal Professionals" and it addresses the low supply of law graduates, lack of adequate staff in legal sector training institutions, absence of an effective practical training programme for law graduates and others. Government has therefore established the Institute of Judicial Administration (IJA) in Lushoto; permitted the establishment of private universities; identified training needs for legal sector training institutions[151] and human rights training needs of magistrates, state attorneys and public prosecutors.[152]

Another key development is the effort to establish a law school in Tanzania. Consultancy work on the design and establishment of a law school and a time-bound action plan was adopted by stakeholders in 2004.[153] Legislation establishing the Law School of Tanzania has already been passed by the parliament (Act of 2007) and an agreement has been reached between the office of the AG and the University of Dar-es-salaam, for the Faculty of Law at the University, to host the Law School temporarily until it secures its own premises. A plot for the school and the budget for the first phase of its construction have already been secured. In addition, preliminary activities related to the construction procedures have already started. Academic programmes for the school are expected to begin this year, in 2008.[154]

150 Ibid. pp. 32 - 33

151 REDMA. 2004. Training Needs Analysis in Legal Sector Institutions. Unpublished Consultancy Report submitted to the Ministry of Justice and Constitutional Affairs.

152 Kamanga, K.C. and Peter C.M. 2004. Training Needs and Existing Capacities on Human Rights for Magistrates, State Attorneys and Public Prosecutors. Unpublished Consultancy Report submitted to the Ministry of Justice and Constitutional Affairs.

153 Information from MJCA. 2004. Programme Coordination Office, September 2007.

154 Ibid

One of the targeted outputs related to the improvement of Knowledge and Skills for Legal Professionals is the plan to establish national curricula on all law courses (degree and non-degree) in the country.[155] Preparatory meetings for the development of the courses have already been done and plans are under way, in the 2007/08 financial year, to contract experts to design the curricula and have it adopted by the relevant bodies in the country.

The fifth key result area is "Service Delivery Capacity in Key Legal Sector Institutions", to address the problematic service delivery to the public including poor facilities, lack of skills, under-funding, low remuneration of personnel and weak human resources management systems, among others. Further, a skills gap has been identified and a training programme designed. Other remedial steps include the development of an action plan for the establishment of an integrated management information system; the purchase and rehabilitation of court buildings in Mbeya, Sumbawanga and Moshi, as well as the rehabilitation of High Court buildings in Iringa and Mwanza and the construction of district court buildings in Kongwa, Rujewa and Mbarali; application of higher salary scales for public legal sector personnel and creation of specialist divisions at the level of the High Court to enhance efficiency.[156] In addition, the government has created more specialised divisions in the High Court. These are discussed under departmental interventions. Concurrently, a higher salary scale for public legal sector personnel has been established to enhance efficiency.[157]

The last key result area is "Programme Management, Coordination, Monitoring and Evaluation", aimed at promoting cohesion, collaboration and coordination with

155 MTS, op. cit. pp. 36, 38.
156 Ibid. pp. 47 - 48.
157 Ibid. pp. 47 - 48.

a view to attaining effective and efficient implementation of the MTS. The Ministry has formally created a Programme Coordination Office (PCO) as a unit in the Department of Policy and Planning, which is headed by a Director. The unit is headed by a coordinator assisted by a number of specialists in project management.

Link between the Programme, Civil Society Participation and Poverty Alleviation

Undoubtedly, in any country, important reforms can only be carried out effectively with the active participation of civil society, as a useful link between government bodies and the common person. To this end, the Legal Sector Reform Programme has embraced civil society as key stakeholders and actors. In addition, the legal sector reform process has taken on board the national policy on poverty alleviation. The following section explores the links between the legal sector reform programme, civil society participation and poverty alleviation.

Civil Society Participation in the Programme

Civil society is a key stakeholder and player in the Legal Sector Reform Programme in Tanzania. Civil society is fully involved in designing and revising the MTS and is expected to play a big role in the implementation process of the programme, particularly in the key result area of "Access to Justice for the Poor and Disadvantaged". Civil society organisations (CSOs) are coordinated through the Legal Aid and Human Rights Network, established with financial support of the Danish International Development Agency (DANIDA) and managed through a code of conduct approved by the members. The network is comprised of the Legal and Human Rights Centre (LHRC), Women Legal Aid Centre (WLAC), Tanganyika

Law Society (TLS) and the Legal Aid Committee (LAC) of the Faculty of Law, University of Dar-es-Salaam.[158] The MTS plans to use these civil society organs for legal aid and literacy programmes, cooperate with them to train paralegals and strengthen juvenile justice, to mention a few activities. The key outcomes envisaged in the MTS include improved access to justice for persons in remand homes and prisons; enhanced legal aid for disadvantaged and poor persons and dissemination of legal information; improved access to justice in rural areas and improved access to justice for juvenile offenders.[159]

To facilitate implementation of the reform agenda the NGO's were recently requested to choose their representatives who will be working with the judiciary to implement relevant activities in the MTS that require their participation. However, this has not been done, thereby delaying incorporation in the planning and execution of the reforms directly related to their work. Their role in this aspect, in our view, is very important for successful implementation of the programme.

Apart from the question of access to justice, these CSOs have played an important role in shaping human rights and administration of justice. They have been involved in the articulation of human rights to improve the human rights record of the country, as well as strengthening human rights capacities. Their traditional role in human rights literacy, legal aid and anti-corruption campaigns has been relied on to ensure that human rights are observed and justice administered.

Link Between the Programme and Poverty Alleviation

Among the critical links between governance and poverty reduction is the availability of a legal system to facilitate rather than hinder poor people's access to timely justice.

158 Ibid. p. 22.
159 Ibid. pp. 23 – 24.

The rule of law, which is one of the cardinal attributes of democratic governance, has a profound impact on creating an enabling environment for the poor to realise their rights. The Constitution of the United Republic of Tanzania (URT) provides that all people are equal before the law and are entitled, without any discrimination, to protection and equality before the law.[160] For the principle of rule of law to operate without hindrance, independence of the judiciary, respect for the rule of law, availability of adequate facilities for law enforcement agencies, availability of legal aid schemes for the poor and accessibility of the courts to the poor, etc. are essential.[161]

In order to strengthen democratic governance and equal enjoyment of rights by its people, the two governments of Tanzania namely the Union and Zanzibar governments, have proclaimed their policy visions for the country - the Tanzania Development Vision 2025, and in Zanzibar, the Zanzibar Vision 2020. This paper will confine its analysis to the Mainland. The processes that culminated in the Mainland's Vision 2025, proclaimed in 1999, were mainly influenced by outcomes of economic reforms implemented, especially after 1986, which introduced market-related economic policies in the country. In general, the Vision aspires to achieve high-quality livelihoods, free from poverty, by 2025. In order to realise the Vision, the government began to design poverty reduction strategies. Experts classify the poverty in two generations: First-generation poverty reduction strategies focus on the priority areas of basic education, primary health, water, rural roads, agricultural research and extension, judiciary and HIV/AIDS. This was basically embodied in the Poverty Reduction Strategy Paper (PRSP) crafted in October 2000.[162]

160 URT 1977, Constitution Art. 13.

161 URT, Poverty Report 2003, p. 113

162 Mbelle A.V.Y : Macroeconomic Policies and Poverty reduction Initiatives in Tanzania: What needs to be done?, A paper presented at ESRF Policy Dialogue Seminar, May 2007.

The PRSP was part and parcel of the government's effort to implement its first three-year Poverty Reduction Strategy (PRS), set to operate in the 2000 - 2003 period. Initially the government began by drawing the second Poverty Reduction Strategy (PRS II) which was expected to last for five years.[163] However, it was later thought prudent to design a broader strategy that would have a bigger impact on poverty reduction. On that account the second generation of poverty reduction strategies was born. The government adopted a new strategy named the National Strategy for Growth and Reduction of Poverty (the NSGRP) (or MKUKUTA, its Kiswahili acronym) set to be operational in 2005 – 2010. The programme is aimed at achieving and sustaining high economic growth and substantial poverty reduction. In summary, the strategy is set out in three clusters, namely growth and reduction of poverty; quality of life and social well-being and finally governance and accountability. At international level, the international community also renewed its commitment towards poverty reduction, as exemplified in various declarations including the Millennium Development Goals and Highly Indebted Countries Debt Relief Initiative.[164]

The nexus between legal sector reform and poverty reduction was first affirmed in the PRSP by showing the relationship between poverty and poor's access to justice.[165] The 2000 PRSP states that the well-being of the poor is also dependent on personal security afforded by the state. The paper captured the importance of personal safety, access to justice and overall efficiency, fairness and transparency of administration. The PRSP viewed the justice system as part of the social well-

163 United Republic of Tanzania : Vice President's Office, Poverty Reduction Strategy II, RS II 2004. First Draft, August 2004, p. 1.

164 Kessy , F., Moving Out of Poverty: Understanding Growth and Democracy from the Bottom Up, unpublished Regional Synthesis Report, p.vii.

165 MTS, op. cit. p. 3.

being of the people and, on that basis, it emphasised the need to reform the administration of justice and improve the performance and integrity of legal sector institutions for the benefit of the poor.[166]

The government of Tanzania, through the PRSP, committed itself to strengthening justice and governance by both short and long-term measures. The PRSP, as an interim measure, stipulated the following steps: To speed up the settlement of cases in primary courts by, among others, reducing the estimated shortage of magistrates by half; promoting community-based security arrangements; rehabilitating buildings and other facilities in the Primary Courts; and lastly, addressing the key issues in combating corruption in the legal sector institutions.[167] Other measures include speeding up court decisions, reducing the time taken to settle commercial disputes and increasing the sessions of the Court of Appeal.[168] Obviously, because the MTS predated the PRSP, the MTS is not properly aligned to the Poverty Reduction Paper. This warranted the re-examination of the MTS in order to align the Legal Sector Reform Programme in the context of the PRSP in the revision that took place in 2003.

As indicated above, the government has now adopted the wider MKUKUTA with a view to reduce poverty and promote the well-being of the people. In the new strategy the legal sector falls in cluster three, which relates to Governance and Accountability. This cluster focuses on four broad outcomes:

(a) Good governance and rule of law;

(b) Accountability of leaders and public servants to the people;

166 Appraisal Report 2003 , opcit footnote No.27, p. 14.
167 MTS, op. cit. p. 4.
168 Appraisal Report 2003, op cit, p. 15.

(c) Deepening democracy, political and social tolerance; and

(d) Cultivating and sustaining peace, political stability, national unity and social cohesion.

One key aspect emphasised in the form of cluster three is the promotion of human rights; a fair justice system and people's participation in decision making. That is why, since the strategy was adopted, the involvement of stakeholders has increased greatly in many matters affecting the public in general. It is expressly noted in the MKUKUTA document, and rightly so, that this cluster is the bedrock of the first two clusters, as good governance is key to the development of any country in the world.

What is important to note is that the thinking of the government in the earlier Poverty Reduction Strategy II was embraced in the MKUKUTA. In that regard the contents of MTS, built on PRSP II, are more or less the same as those in the MKUKUTA. In addition it is the policy and directive of the government to plan and implement all development programmes in the country in the context of MKUKUTA. Currently officials in the Ministry of Justice are also making plans to up-date the MTS.

Impacts of the Reforms on Marginalised Sections of Society

Status of the Reform Exercise

A discussion on the impact of legal sector reform on marginalised sections of society presupposes the existence of a reformed or partly reformed sector and its operation for a reasonable time to measure such impact. Tanzania has not yet reached that stage. Although a number of activities have started to take place, the reform process is still in infancy. In fact, despite the

fact that the MTS was officially inaugurated at the end of 2004, more serious action only commenced in the middle of 2007. The main reason for delays has been funding and, to a greater extent, the government' excessive dependence on donor funding for more serious reform projects; this funding took time to negotiate. The first batch of donor funds was released for use in May 2007. On account of the foregoing it is too early, in the authors' view, to make a meaningful assessment of the impact of such reform in the country.

Initial Achievements based on Particular Interventions

Despite the general delay in the implementation of the reform projects a number of developments have already taken place in the country. These have, mostly, been the result of particular interventions by government departments, intended to improve the functioning of the sector. To a limited extent some developments are the result of the implementation of the QSP. The achievements of institutions given below were selected according to their relative effect on ordinary people.

a) The Judiciary Department

The Judiciary Department is the key organ entrusted with the duty to dispense justice. In order to ensure that justice is dispensed with the necessary dispatch the department has done various activities:

(i) It has introduced an Alternative Dispute Resolution (ADR) system that has contributed to a significant reduction in the backlog of pending civil cases in the High Court and Resident Magistrates' Courts. The government extended this system to all Resident Magistrates' and District Courts in April 2002.[169]

169 United Republic of Tanzania: Poverty Reduction Strategy: The Third Progress Report , Dar –es Salaam, Government Printer, 2003. p. 43.

(ii) In the financial year 2002/03, two judges of the Court of Appeal, six judges of the High Court, seven resident magistrates and 84 Primary Court magistrates were recruited. Later, five more High Court judges were appointed. In the financial year 2006/7 two Court of Appeal judges, 21 High Court judges, 77 resident magistrates and 46 Primary Court magistrates were employed. This historic recruitment (in terms of numbers) has facilitated the rapid disposal of cases in courts, especially the Primary Courts, where the majority of the people send their cases.

(iii) Conducting special refresher courses/seminars on constitutionalism and human rights for 600 Primary Court magistrates, 300 resident magistrates and 34 judges of the High Court and the Court of Appeal. This knowledge has helped to equip judicial officers with a human rights approach.

(iv) The establishment of the Institute of Judicial Administration (IJA) in Lushoto (Tanga region) has contributed to the increase in the number of magistrates serving at Primary Courts, and other court officers. As already mentioned above, and as stated in an interview with the IJA Director of Studies, the Institute has steadily increased its intake, from 153 in 2004 to 630 in 2007. This has had the direct effect of addressing the deficit of magistrates in Primary Courts and thereby increased accessibility of justice and improved the delivery of justice.

(v) Establishment of three fully-functioning divisions of the High Court, namely the Land Division and the

Commercial Division in 1999, and the Labor Division in January 2007.[170]

(vi) Establishment of Disciplinary Committees in the regions and districts to monitor the conduct of judicial officers.

(vii) Introduction of Case Flow Management Committees (these Committees involve the DPP's department, the Police Force, the Prison Service and the judiciary) and other administrative measures to reduce the backlog of pending cases.[171]

(viii) Computerisation of the judiciary has been initiated at the Court of Appeal and the High Court in Dar-es-Salaam and a local area network is under implementation. This would, *inter alia*, facilitate the production of proceedings, judgments and other court records in good time.[172]

(ix) Preparation for printing of the long overdue series of *Law Reports of Tanzania* for the years 1998 - 2006. The existing series reports cases up to 1997. This work is jointly done by the judiciary, the Ministry of Justice and Faculty of Law, University of Dar-es-Salaam. According to the editor of the Reports, the series is expected to be on the market during the 2007/08 financial year.

b) The Ministry of Justice and Constitutional Affairs (MoJCA)

(i) Compilation and re-printing, in a series of volumes, of all laws in Mainland Tanzania. This has improved the availability of statutes to law enforcement organs and the public at large.

170 Ministry of Justice Budget Speech 2007/08, op cit.

171 Hon. Mwapachu, B. 2004. Opening Address at the Stakeholder's Workshop to Consider the Final Draft of the Medium Term Strategy. 11 August 2004. p. 2.

172 Hon. Mwapachu, B. : Opening Address at the launching of the Legal Sector Reform Programme in 1999, reprinted in The *Lawyer*, 2000, Dar –es-salaam, Azania Graphics Ltd,. p. 34.

(ii) Establishment of an autonomous agency in June 2006, replacing the traditional Administrator-General's Office (RITA) to improve efficiency in the registration of births, marriages, deaths and THE administration of deceased estates.[173]

(iii) Hastening the process of formulating a Legal Sector Policy. Latest information obtained from interviews with Ministry officials indicate that the process that began sometime in 2004 is almost complete. While it had been anticipated that the Legal Sector Policy (Draft) of 2006 would be adopted in 2007, this was not achieved. The policy is expected to be adopted in 2008.

c) The Commission for Human Rights and Good Governance (CHRAGG)

One of the important government interventions in the area of human rights is the establishment of the CHRAGG by law in 2001 (Act No 7 of 2001). The CHRAGG became operational in March 2002. As a watchdog of human rights in Tanzania, the Commission has already handled a number of human rights complaints and is becoming increasingly popular among the general public. For example, in the 2006/07 financial year the Commission received 4,523 human rights breach complaints and so far it has already dealt with 3,149 of them.[174]

In order to get close to the people, the CHRAGG, which initially had only one office in Dar-es-Salaam, has opened two branch offices, in Mwanza and Lindi. In addition, the Commission currently operates in Zanzibar. So far about 195 human rights complaints from Zanzibar have been dealt with.[175]

173 Ministry of Justice Budget Speech 2007/8, op cit, para 41.
174 Ibid. para 38.
175 Ibid.

d) Ministries of Home Affairs and National Security

It has to be noted that, when the fourth-phase government took over leadership of the country in 2005, the former Ministry of Home Affairs was split into two parts, the Ministry of Home Affairs dealing with immigration, prisons and fire services and the Ministry of National Security focusing on police and internal security matters. However legal sector reform aspects that were taking place under the MTS continued unchanged as the various departments falling under the Ministry were, from the start, involved on an individual basis.

A training strategy for the Tanzanian Prison Service had already been compiled under a project for Strengthening Capacities Strategy for improving Human Rights Standards in the Prison Service.[176] A similar exercise has been undertaken for the Police Force. In addition, the Faculty of Law of the University of Dar-es-Salaam has conducted seminars for the Police Force and Prison Service.

e) Other General Changes in Sector Institutions

In a bid to facilitate easy access to justice for the poor, the government, among others, increased the budgetary allocations for recurrent expenditure to the judiciary by about 40% in the financial year 2001/02. Apart from this a Public Expenditure Review (PER) of the Safety, Security and Justice Sector was carried out in the 2001/02 financial year. During the review of the MTS, the need to enhance and sustain the allocations of its budget resources, and balance budget allocations to the key institutions of the Judiciary, Attorney-General's Chambers, the Law Reform Commission, the Commission for Human Rights and Good Governance, the Police and Prisons Service, was raised.[177]

176 Prison Service 2004: Training Strategy for the Tanzania Prison Service, unpublished
177 MTS, op. cit. p. 4.

Lessons and Challenges in Reforming the Legal Sector

Lessons from the Reform Process of Tanzania

The current attempt to institute reforms in Tanzania began by launching the first Medium-term Strategy (MTS) in 1999, which was meant to cover the period, 2000-2005. However, a paucity of resources and changes in socio-economic trends delayed its implementation, necessitating that the strategy be revised. In order to set out an appropriate and relevant strategy the revision was conducted through comprehensive consultations, including a technical appraisal on the efficacy and adequacy of the 1999 MTS. It is in that context that the current Medium-term Strategy, adopted in 2004, was established.

As pointed out above, not much has been achieved to date, even on the 2004 MTS, on account of a paucity of resources. Hence, the reform exercise is still in its infancy. Nevertheless, a few lessons can be drawn from the experience in Tanzania. The first key lesson relates to the difficulty of carrying out reforms efficiently in the absence of a legal sector policy. A well-focused reform of any sector requires the foundation of a clearly-defined sector policy to guide the exercise. The earlier QSP and the MTS were formulated only on the basis of the findings of the Bomani Report that was confined, we contend, to the prescribed terms of reference. It is conceded, however, that efforts to articulate a legal sector policy are at an advanced stage.

The second lesson that can be learnt from Tanzania relates to the negative effects of donor dependence for funding the reform exercise. The total cost of reforming the legal sector in Tanzania, as suggested in the Bomani Report in 1996, was estimated at $ 266, 000,000 US, an enormous sum to a small economy like that of Tanzania. Accordingly, the MTS only

addressed a fraction of the suggested reforms, budgeted at $ 41,430,663 US.

The above notwithstanding, lack of sufficient funds is often mentioned as a major reason for the delay in implementing the MTS. Apparently donors have played a very crucial role in ensuring that the reform exercise takes off and, in fact, without their assistance the progress of the reform would have been even slower. However donor funding has not been disbursed in a timely manner. For example, donors began releasing promised reform funds in last two months of the 2006/07 financial year. This underlines the need to re-examine the funding problem and develop local sources of funds to speed up the exercise.

The third lesson drawn from the Tanzanian experience is the need for adequate and in-built expertise for implementing a sector-wide reform programme. At the time the programme was launched there were few people in the relevant departments/institutions with the know-how of implementing the reforms. For the most part these institutions were and are manned by legal and related experts in the field who had little knowledge on areas like project planning and management. The proposal to hire such expertise was rejected, and rightly so, on the ground that it was more beneficial and sustainable to recruit such people from among employees of the sector. The government had to invest a lot and, in fact, spent the first two or so years training its staff on a number of key skills, such as project planning and management, procurement, etc.

Challenges Faced

No sector reforms are free of challenges. Legal Sector reforms in Tanzania are no exception. The challenges faced by the reform programme of Tanzania form the basis of the following discussion.

The first challenge is effecting sector reforms in an atmosphere of scarce financial resources. However there is an additional challenge linked to implementing the MTS on priority basis. At present there is no way the government can implement all the planned activities in a short span of time. To be successful the government will have to prioritise the implementation of the activities planned.

Rapid expansion and the institutionally complex nature of the private sector led market economy and globalisation also pose a challenge. From 1967 to 1985, Tanzania adopted socialist economic policies, under which the public sector was a dominant actor. Free market economic policies were adopted in 1985, after which the private sector became a key player, and it changed the socio-economic context of Tanzania substantially. In addition, the growth of globalisation has increased the complexity of building a legal framework responsive to the demands of the new economic setup.

The third challenge is the imperative to adapt to rapidly increasing E-commerce in the country. The introduction of E-commerce raises many new legal issues, including those relating to taxation, contracts, liability, patents, data protection, and many others.

In order for Tanzania to achieve its own National Development Vision planned for achievement in the year 2025, popularly known as Vision 2025, reform of the legal sector is essential. Further, Tanzania's legal sector reforms must accommodate the new pluralistic democratic environment coupled with the movement towards participatory management of legal and social economic development. One key component of this

process is reorganising the law, which is not a simple exercise. In addition, it has to be done without compromising the key democratic rights of the people.

The last challenge is that of mainstreaming gender and HIV/AIDS issues. It is no secret that women are not on an equal footing with men in any sphere of life. Progressively, the Constitution of Tanzania contains clear provisions meant to promote gender equality. In order to realise gender equality, deliberate efforts need to be made to ensure gender mainstreaming, as well as to respond to the rights issues relating to AIDS/HIV.

Conclusion and Recommendations

Conclusion

This paper sought to examine the development, status and success of legal sector reforms in Tanzania. The quest for reforms in the legal sector started as early as the 1970s, with the Msekwa Commission's examination of the efficacy of key departments and laws in the administration of justice in the country. However, most substantive reforms are those planned on the basis of the Bomani Report.

Government efforts to implement the planned reforms are hampered by the absence of a legal sector policy to serve as guide and a scarcity of training resources. The government has already initiated the process and the preparation of a policy document is in an advanced stage. However, there is a need to craft the policy carefully so that it does not impede, but instead facilitates, existing efforts to improve the sector.

The reform exercise also faces a number of challenges, including scarcity of financial resources, expansion of E-commerce, the expanding role of the private sector and the need to involve it in decision making, etc. It is apparent that, for varying reasons, the implementation of the reform agenda has been delayed unduly and consequently it is unrealistic to make any assessment about its impact on the common person in the street at this early stage. Nevertheless, the reforms are very important, and ignoring them would definitely jeopardise the current politico-economic development of Tanzania. In order to achieve this, a very strong political will is required, otherwise it would take a long time to achieve the vision of accessible and timely justice for all.

Recommendations

In order to successfully carry out reforms in the country there are certain pre-conditions that have to be met.

(a) Expedite the ongoing processes of articulating the Legal Sector Policy to guide the reform process.

(b) Make adequate budgetary arrangements on the basis of a clear priority list for the reform exercise. In this regard the government should articulate a clear yearly reform schedule, based on a predetermined priority list, and allocate a budget for each such item. Financial assistance from development partners should be supplementary to the national legal sector reforms budget.

(c) Ensure democratic participation in the planning and execution of the intended reforms. This would ensure that the people own the reforms, thereby ensuring continuity and sustainability, instead of reforms being seen by the people as something handed over by the government.

(d) To be worth its name, the reforms must take into account all the key challenges of the day.

If the recommendations are carried out, the goals of the reform would begin to be realised by the common people in the near future.

5
Legal Sector Reform Review in Uganda

Frederick W. Jjuuko

Introduction

While legal reform in Uganda has involved both legal, institutional and substantive reforms, this research addresses the more specific reforms and programmes involved in the Justice Law and Order Sector (JLOS) whose mission statement is, "to enable all people to live in a safe and just society."[178] The expected outcome of the reform strategy is the improved safety of the person, security of property and access to justice that ensures a strong economic environment to encourage private sector development and benefit poor and vulnerable people.[179] The Justice, Law and Order Sector comprises various institutions, including the MoJCA, which is the lead institution, the Ministry of Internal Affairs (which includes the Government Chemist, Immigration Department and Community Service Programme), the Judiciary, Police, DPP, Prisons, JSC, Ministry of Local Government involving Local Council Courts, and the Ministry of Gender - the Probation Department. The JLOS was formally launched with the adoption of the JLOS Strategic Plan in November, 2001.

History of and Philosophy underlying the JLOS

The history and philosophy of the JLOS is to be found in the neo-liberal economics of SAPs: privatisation and reliance on market economics. It is also associated with the phenomenon of the failing state and therefore the idea of civil society participation as well as that of the minimalist state provision

178 JLOS Sector PEAP Revision Strategy Paper FY 2004/2005-2006/2007. p. 8.
179 Ibid.

of public goods, which will be elaborated upon further on. More specifically the JLOS is linked to the PEAP, first launched in 1997, revised during 2000 and republished in 2001. It is supposed to be Uganda's national planning framework in which the overall goals of government policy and programmes are set out. The PEAP is meant to fight poverty and "calls for a good institutional framework for delivering public goods and services ... efficiently (and) fairly... sets out the public and private sector can tackle the complex causes and dimensions of poverty."[180] The PEAP has five pillars, namely: rapid and sustainable economic growth; good governance and security; increasing the ability of the poor to raise their incomes; enhancing the quality of the life of the poor and human development.[181]

The PEAP, being a national framework for planning and budgeting, is supposed to be implemented through sector-wide approaches. The national goal and priorities in the PEAP are translated into plans for each sector and for local governments. SWAPs are supposed to bring together activities of government, donors and other stakeholders into a simple strategy and to be implemented through Sector Investment Programmes and policy, institutional and budgetary reforms. Apart from the government, NGOs, the private sector and multi-donor subsector programmes support service delivery and capacity building.[182] SWAPs are said to be more efficient than investing in many single projects. SWAPs are said to clarify sector objectives, priorities and strategies and link spending with the necessary policy, institutional and budgetary reforms.[183] It became clear from the interviews that it is possible to fund vital

180 Ministry of Finance, Planning and Economic Development. PEAP, a Summary Version 2002. p. (iii).
181 Ibid. p. 6.
182 Ibid. p. 31.
183 Ibid.

links that, on their own, could not attract funding – as was the case with the police before JLOS. The process of developing and monitoring SWAPs is said to enable stakeholders to be more involved and able to influence priorities and spending plans – hence building local commitment and ownership of the strategy.

The JLOS is one of those areas where PEAP goals have been translated into sector plans.[184] The 1997 PEAP located the JLOS under Pillar Two – "Ensuring Good Governance and Security." "Good Governance" focuses on accountability, transparency and predictability amongst other things. JLOS is also linked to Pillar One – in as far as the enforceability of contracts is concerned, and therefore the promotion of private investments.

JLOS adopted a mission, "to enable all people to live in a safe and just society" and set as its expected outcome, "the improved safety of the person, security of property and access to justice that ensures a strong economic environment to encourage private sector development and benefits poor and vulnerable people". The purpose of the JLOS reform strategy is to promote the rule of law and increase public confidence in the Criminal and Commercial Justice Systems in the medium term; whereas the JLOS policy objectives are to maintain law and order and increase access to justice for all persons through infrastructure reform, law reform, improved legal services and civic education.

184 It is stated in PEAP (op.cit. p. 10) "A study of the legal system has shown that businesses find it very difficult to enforce contracts or the payment of debts through the courts. Perceived causes of the difficulty range from corruption among staff in Magistrates' Courts and the Commercial Court to inefficiencies in the registries and lack of transparency in the legal system. A programme of reform is now being planned which will address these concerns."

In terms of its immediate and internal history the JLOS was adumbrated by earlier bilateral efforts as well as studies. These include, on the one hand, bilateral institutional support in the sector such Department for International Development (DFID) support for the Police, Danish International Development Agency (DANIDA) for the Judiciary, by Austria for the Uganda Law Reform Commission, Norway for the Legal Aid Project of the Uganda Law Society (ULS), Netherlands for DPP and Germany for Prisons (Community Service). The uncoordinated institutional approach gave way to *ad hoc* consultation that resulted in the Chain Linked pilot whereby the Prisons, DPP and Judiciary coordinated their energies. This was eventually to lead to the introduction of a coordinated approach to planning and budgeting on a national level for JLOS.

As regards studies, there was the Commission of Inquiry into the Judiciary, 1995; The Crown Agents Report, 1997 and The World Bank follow-up to the Crown Agents Report 1998 – 1999. These identified the problems bedevilling the various institutions in the sector and pointed to solutions, although not in a sector-wide manner. The 1997 World Development Report of the World Bank, which coincided with the inauguration of PEAP programmes in Uganda, brings out clearly the philosophy and history of JLOS.[185] The report focused on the role of the state and also examined the phenomenon of the failed state.

> Focusing limited state capacity on the basics is a badly needed first step in a wide range of countries especially Africa ... Matching role with capability must come first. In many parts of the world the state is not even performing its basic functions: Safeguarding law

185 The indirect acknowledgement of the World Bank inspiration is to be found in JLOS, op. cit. p. 4 – 7.

> and order, protecting property rights, managing the macro-economy, providing basic social services, and protecting the destitute. In some cases the state has been over-regulating the economy, even though it lacks the capability to enforce regulations systematically.[186]

The report then focuses on this minimalist state role and the need for partnership:

> In many areas the state will only be able to improve its effectiveness by forging new partnerships with other organisations of civil society. In other instances it will become more effective only if its decisions and actions can be contested – if people and business have choices and if the state's monopoly is broken.[187]

Equally important in appreciating the nature of JLOS in Uganda is the World Bank's typology of failed states:

> Three broad and overlapping pathologies of state collapse can be identified.
>
> - States that have lost (or failed to establish) legitimacy in the eyes of most of the population notionally under their authority, and are therefore unable to exercise that authority.
> - States that have been run into the ground by leaders and officials who are corrupt, negligent, incompetent, or all three.
> - States that have fragmented in civil war, and in which no Party is capable of re-establishing central authority.

186 World Bank 1997 World Development Report 1997: The State in a Changing World, London: Oxford University Press. p. 158.
187 Ibid.

> What all these states have in common is a fundamental loss of institutional capability ... at a minimum the state must perform the most basic functions of maintaining law and order, providing national defences, and establishing a framework for managing economic transactions. [188]

The report specifically identifies a clear crisis of statehood in sub-Saharan Africa: "The result of eroding civil service wages, heavy dependence on aid and patronage politics."[189]

"Typically the reach and effectiveness of the state have withered away and perforce the state has withdrawn... An institutional vacuum of significant proportions has emerged in many parts of sub-Saharan Africa leading to increased crime and an absence of security, affecting investment and growth."[190]

The report then identifies priorities:

> Strengthening the rule of law must be a vital first step. Another is to strengthen the capability of legislative oversight of the executive. But strengthening the executive – particularly the central government's capacity to formulate macro-economic and strategic policy and its incentives to deliver core public goods efficiently is also a key priority.[191]

Finally the World Report in its discussion of external intervention in the process of reconstruction cites the clear example of Uganda, therefore underlining its nature as a "failed state."[192]

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188 Ibid. p. 162.
189 See also JLOS Sector PEAP Strategy Revision Paper FY 2004/2005-2006/2007. p. 16.
190 World Bank, op cit. p.158
191 The discussion therein on Small Arms Trafficking in the Great Lakes and Horn of the failed state in Uganda and elsewhere.
192 World Bank, op. cit. p. 161.

> The choice of strategy for external actors will differ according to the particular pathology of state collapse involved... there is an increasing awareness of the role the external donors and agencies may need to play in future to allow for the process of reconstruction and rehabilitation... The end of civil war does not lead automatically to the end of insecurity. Fear of personal violence or theft may actually increase after the war ... Well-designed demobilization programmes like that in Uganda...are a priority. Also essential will be efforts to strengthen local police forces and tighten enforcement of criminal laws and other measures to reduce the risks of banditry and criminal enterprise. The long-term response, however, must address the socio-economic roots of the conflict. [193]

We quoted *in extenso* The World Development Report 1997 because, in fact, it represents the philosophy, as espoused by the World Bank, of the reforms in the JLOS. It explains more than that. The identification of the strategies, the focus on commercial laws and criminal law to the exclusion of other areas falls in place; the role of donors also becomes critically clear; the inspiration for the partnership between government, business and civil society is clear. It then becomes possible to assess the Ugandan legal sector reform programme in a wider perspective, especially with regard to the sustainability of such reforms. In large part therefore it must be said that these reforms are aimed at something very basic: restarting the dysfunctional states, which apart from anything else is acutely dependent – with over 50% of the national budget being externally funded.

The objective of reconstructing the state must really be viewed as a basic modest objective that can hardly address more grand purposes, such as poverty eradication, hence the link

193 Ibid.

between JLOS and poverty eradication may appear contrived, since especially the reconstructed state is perceived to be non-interventionist and minimalist. The earlier state that preceded the failed state was indeed functioning – but could hardly be said to have addressed the issues of poverty eradication in any adequate, consistent manner. It can hardly therefore be expected that a fledgling state can begin to address the matter in any serious way either. The reforms therefore reflect no fundamental rethinking about the law, the legal system and machinery of justice which is operated and which have always marginalised the people, especially the poor. There is no exploration, for example of the potential that endogenous systems have to offer. Indeed it can be stated accurately that these reforms are donor-driven, as will be shown, with their sustainability in doubt.

The envisaged partnership is one in which the private sector is likely to dominate and benefit most while poverty eradication is entrusted to the trickle-down effect under the logic of neo-liberal economics.

Structure of the Sector

It had been proposed that there would be at the lead of JLOS a National Council consisting of members of the Steering Committee, heads of the various institutions such as permanent secretaries/accounting officers, the chief justice, CSOs and academics. In the event the National Council was not established.

Instead, a Leadership Committee consisting of the chief justice, Minister of Internal Affairs and Minister of Justice and Constitutional Affairs is in place. It is meant to provide political support to the sector programme. It does not appear to meet frequently and formally except in conjunction with

the Steering Committee. Hence the Annual Progress Report that was envisaged to be presented to the National Council is presented to the Cabinet and Parliament through the Ministerial Annual Policy paper.

Below the Leadership Committee is the Steering Committee whose role it is to guide the implementation of the sector programme, to monitor policy coordination across the sector and confirm annual priorities targets and their budgets. It comprises officials at the highest level of JLOS institutions: permanent secretaries, and accounting officers and is supposed to be chaired by the Solicitor-General. The Legal Committee is the operative senior decision- making level. It makes policy decisions but also monitors policy coordination and directs and guides the Technical Committee. However, there are sector institutions that are not represented on the Steering Committee – such as Company Registry, Land Registry, and commercial lawyers.

Below the Steering Committee is the Technical Committee and Working Groups. The Technical Committee is meant to implement the JLOS programme and consists of representatives from all JLOS institutions as well as Ministry of Finance, Planning and Economic Development (MoFPED). It consists of some 40 members such as under-Secretaries and senior persons from policy and planning units.

In reality, there are two sub-committees of the Technical Committee through which the Technical Committee operates: These are the Criminal Justice Sub-committee and the Commercial Justice Sub-committee. The MoFPED and donors with bilateral programmes are represented on the Technical Committee by technical advisors.

In addition there exists a Commercial Users' Committee which meets separately from the Commercial Sub-committee four times a year. Such meetings are attended by a range of persons including lawyers, donors, academics, International Monetary Fund (IMF), etc.[194]

In contrast there is no presence of stakeholders such as victims of crime on the Criminal Committee. Although the Uganda Law Society (ULS) is represented, it is conceived as an implementer of the legal aid programme, but not as a user. There are five Working Groups for the Technical Committee, mostly on criminal matters which address issues emerging from the sector. These include the Budget Working Groups and the Local Government, Prisons and Police Working Group.

Lastly, the Secretariat of JLOS is housed in the MoJCA. The Secretariat consists of a senior technical advisor, a resource person covering all JLOS-wide issues and criminal reform aspects, and three technical advisors on the commercial side.

The responsibility of the Secretariat includes the day-to-day promotion and management of the JLOS programme covering criminal and commercial justice reform; providing the Steering Committee, Technical Committee and Donor Liaison Committee with quarterly reports on progress; ensuring donor coordination and liaison with the SWAP Donor Group of the JLOS, with the Ministry of Finance in attendance.

There are also supposed to be in existence Policy and Planning Units in each JLOS institution – some of which have already been put in place. These are supposed to deal with planning and development at the institutional and sectoral levels but seem to be preoccupied with financial matters. All activities

194 Interviews conducted with Commercial Justice Programme personnel on 13 January 2005.

in the sector are based on the five-year Strategic Investment Plan. A programme evaluation and monitoring mechanism has been developed in the form of sector-wide process and outcome indicators and institutional short and medium-term output indicators for the reform period. Monitoring tools to measure progress include:

(a) Bi-annual commercial and criminal justice statistical and end user surveys to measure both public perception on the impact of reform and case management outputs against defined targets;

(b) Commercial Reform Programme random user studies, used by the Commercial court in particular;

(c) Quarterly progress reports indicating achievements and constraints in programme implementation at institutional level;

(d) Two semi-annual reviews between the Government of Uganda and donors where an annual progress report is considered, the work plan for the next financial year approved, and a financial audit report is submitted by the sector in regard to the programme fund management.[195]

This sectoral edifice outlined above is designed to initiate and operationalise reform in the sector. The various degrees of success achieved in the establishment and operationalisation of the structure described above constitutes reform and is a significant achievement with regard to the realisation of a sectoral approach: promoting coordination and synergies in the sector, eliminating duplication, unnecessary competition and wastage and rationalising the financing of the sector.

195 JLOS op. cit. p. 9.

Nonetheless, questions arise about the issue of a holistic approach to reform in terms of both inclusion and exclusion of certain institutions which have a significant role to play in the objectives of the sector. For example, the exclusion of the Uganda Human Rights Commission (UHRC) creates a serious gap while the inclusion of the Land Registrar, Immigration and even the Company Registry is regarded as an anomaly. There are also questions about inter-sectoral approaches on such issues as gender mainstreaming. The sectoral approach may also pose problems of liaison with institutions outside the sector, such as Parliament and the office of the Inspectorate of Government (IGG), that have important bearing on sector activities.

Questions relating to the reality of the sector as an integral unit, the holistic approach to reform and intersectoral relations received interesting responses in interviews with actors in the sector.

It was pointed out that the JLOS was unique in that it consists of diverse, discrete units, compared to other sectors such as health, water, agriculture and, to a great extent, education. Further, most respondents recognised the positive achievements of the sector. They appreciate the high level of cooperation and coordination amongst the units and the interconnectedness of the functions and activities of one unit to another. This occurs to the extent that units will make a case for the funding of another unit because they appreciate that it is vital to their own work.[196] It is also appreciated that, before JLOS, certain units, like the Police, could not easily attract funding[197] and that working together has strengthened all components of the sector and promoted the collective voice when making a case for resources *vis-à-vis* other sectors.

196 Interview with personnel of the Commercial Justice Programme on 13 January 2005.
197 Interview with Law Reform Commission on 30 September 2004.

Challenges

Historically, institutions such as the Judiciary have a high sense of their own independence and autonomy within JLOS.[198] Cobbling institutions together in one integrated approach was bound to take some effort and time, particularly because the sector has been built in an incremental way, adding institutions without a commensurate increase in funds.[199]

However, it is also appreciated that priorities differ, resulting in competition for resources, with each unit endeavouring to make its own case. Indeed, one should not lose sight of the fact that much of this coordination and cooperation is very much driven by funding and is forced upon the units, since JLOS funding can only be directed to sector-wide activities. Moreover, certain unit programmes are funded from outside the JLOS arrangement on a bilateral basis. These aspects pose a challenge to the sector-wide approach.

There is also the clear perception that the sector approach is undermined by the reality that the Technical Committee effectively operates through its two sub-committees, the Criminal and the Commercial Justice Sub-committees. It appears that each of the programmes run by these sub-committees has gone its own way with little knowledge about what happens in the other.

Further, there is a perception that the Commercial Programme receives more funding and emphasis than the other programme. Indeed, it appears that Commercial Sector Reform has a

198 Interviews 10 and 13 January 2005.

199 Interview on 30 September 2004 with personnel of the Law Reform Commission cf : International Human Rights Network 2004 Re-invigorating JLOS: Human Rights at the Core Mid-term Evaluation of Implementation of Justice, Law and Order Sector Strategic Investment Plan (2001/2 - 2005/06). p. 53. "Other than funding, the criteria for inclusion in JLOS is unclear and there is no clear process by which strategic input from other relevant actors is sought."

longer history involving a commercial sector study as well as reforms funded by the World Bank that preceded the JLOS reform programmes.[200] From the interviews it emerged that the holistic approach was indeed an afterthought after realising the commercial sector could not be successfully reformed in isolation: issues of civil procedure and capacity building for lawyers cropped up, underlining the necessity to strengthen the whole justice system involving criminal justice; access to, and quality of justice.

In spite of this, JLOS has no programmes outside the commercial and criminal justice areas. Hence civil matters such as the family, land, etc. have received no attention. It cannot therefore be said that a holistic approach has been adopted, or that the mission "to enable all people to live in a safe and just society" can be accomplished without addressing these aspects. Indeed, a focus on poverty would be equally difficult without addressing the totality of the context in which the people live, as the present fragmented approach attempts to do.

On the issue of the inclusion or exclusion of certain units, a respondent in the Commercial Justice Programme thought that, although the Land Registry does not strictly fall under JLOS since the Ministry of Lands is outside the sector, there cannot be successful reform of commercial justice without reform in the land registry, which is an important aspect of commercial and financial transactions.[201] Respondents in the Law Reform Commission and Commercial Justice Programme expressed disillusionment about Parliament being outside the JLOS, which frustrates the proposed bills for law reform. There were suggestions that a new sector, the Accountability Sector, was

200 For example the Uganda Commercial Justice Study by Justice Odoki, Clare Manuel and Richard Hooper, 1999. This preceded the formation of JLOS.

201 Interview with Commercial Justice Programme on 13 January 2005.

about to be created, to which the Inspectorate would belong;[202] as well as the Uganda Human Rights Commission, which had hitherto been under JLOS.

There is no real intersectoral cooperation, in spite of the noble intention. In all probability such cooperation would have been initiated at a very high level in the structure of the sectors but this has not happened, in spite of clear needs and opportunities for cooperation, for example on civic education with the education sector, or HIV programmes with the health sector or prisons programmes with the Ministry of Agriculture.[203] However, there was an undertaking at one of the biannual donor review meetings to develop linkages with the Health Sector. The sectoral approach poses other problems relating to the way it was initiated and its operational structure.[204]

The Ministry of Finance and donors play a very significant role in the sector. The sector is conceptualised in the context of PEAP and is supposed to be linked to poverty reduction. This may, at times, appear contrived and may distort the efforts at genuine reform in the institutions. As a consequence, in many cases, levels like the Technical Committee appear to be preoccupied by financial matters. Indeed, there appears to be much reporting and paperwork at various levels emanating from financial issues, result-oriented management and a value for money approach to reform. It has also been stated that reporting is focused on reporting to donors, rather than between the various JLOS institutions. Likewise, the perception of

202 This is to promote accountability under the Inspector-General of Government Act Capt. 167, Laws of Uganda Revised Edition 2000, and the Leadership Code Act Cap. 168.

203 Interviews with staff if the Criminal Justice Programme on 10 January 2005.

204 For example, the dean of the Faculty of Law, Makerere University, requested that all JLOS institutions be permitted to use the Faculty's Law Library. This request was rejected, the reason given being that the Faculty fell under the Ministry of Education, a non-JLOS institution.

many actors in the sector is that their activities are focused on attracting funding for their institutions.

In the long run, there are serious issues of sustainability. The programme is donor dependent, not only in financial terms but also in terms of oversight and accountability. It has been observed that there is little peer accountability or accountability to stakeholders and civil society. The external financing and externalised accountability may not be sustainable in the long run.

Donors and Ministry of Finance

The initiative for the JLOS sector originated from the Ministry of Finance. The orientation of programmes towards poverty eradication underlines this.[205] But this link is a tenuous one and is based on the assumed validity of market economics: macro-economic stability, an appropriate legal framework, security of property and hence opportunity for investment by individuals and then, inexorably, private-sector driven growth, and therefore eradication of poverty.

The focus on poverty is questionable. Some actors in the sector see their role in the poverty focus frame as merely an academic exercise, yet to be appreciated in the sector.[206] Moreover many are not sure how often, as a sector, they refer back to the Strategic Investment Plan, questioning whether it is a real guide to the actual work on the ground.

Instead, what is happening is that units reach out for funding wherever it is available. An example is the Global Funding for HIV. Units were told that there would be no funds from that source unless they developed an HIV programme. So

205 Although the "Mamba Point" meeting of the justice sector took the decision in 1999 to orient the sector to PEAP, the real motive force originated in the Ministry of Finance, for purposes of rationalising the funding of related units.

units contrived programmes, which are not organic and well thought through.

Behind the Ministry of Finance are the donors. Donor domination is underlined by actors in JLOS. In the first place, the sector approach was adopted because of Uganda's critical donor dependence. Questions arose about the uncoordinated approach by donors, with units receiving independent funds from the same donors. As a result, donors have an overwhelming influence. An example is cited of a case where, in preparation for the biannual sector review, people were told to change the language and touch up a report so that it sounded more positive and did not create a negative impression on donors.

Likewise, at pre-review meetings made up of Technical Committees and donors before the biannual reviews, donors rather than government do the talking, raising important issues and problems such as torture, prison conditions, etc. This underlines not only the passive attitude of the government but it also means that there is no real peer review, as is supposed to be the case, but it is "a donor affair... what donors want and how they want it, goes. And donors can be forceful," as one respondent put it.

Key Areas of Reform

The medium term, 3-5 year focus of reform is on two areas: Criminal Justice Reform and Commercial Justice Reform. Both institutional reform and legal reform takes place in the two areas. It appears that Commercial Reform is aimed at providing the appropriate legal framework for private investment, while criminal law provides the public good, for general conditions of security from crime.

The Criminal Justice Reform Programme has undertaken many reform activities at both institutional and at the level of the law.

The Chain Linked Initiative, first piloted in Masaka District, demonstrated scheduling of criminal cases in consultation with the police – to ensure investigations were complete, to ensure preparedness by the DPP to proceed with prosecution, with the Prisons Department to ensure that the prisoner was available for appearance in court, which considerably reduced case backlogs in the Masaka High Court. This resulted in the establishment of Case Management Committees. The Chain Linked Initiative has therefore yielded "best practice" principles which have been issued and disseminated to the participating institutions. To date the project has been rolled out in all 29 magisterial areas.

This, together with the Criminal Case Backlog Project, has resulted in a faster disposal of cases and a unified case backlog data base has been developed under the MoJCA. Performance targets and best practice guidelines have been instituted to ensure speedy trials and, as a result, the remand period has been reduced from an average of 5 years to 2 years for capital offences.

Community Service Sentences as an alternative to imprisonment was also introduced in 2001 in a pilot in Masaka, Masindi, Mpigi and Mukono districts and although initiated before the PEAP, has been oriented under JLOS.

The relevant law was enacted.[207] In addition to decongestion of prisons, community service also saves costs, and results in poverty reduction for families whose incomes may be affected by custodial sentences. Furthermore, the community gains

207 Community Service Act Cap. 115, Laws of Uganda Revised Edition 2000.

from services that would otherwise have been paid for.[208] Other reforms in this area have involved training in financial management, computerisation of case management systems by the DPP and Judiciary, the development of a crime statistics data base, a prison census and annual reports with statistics by the DPP, and the Judiciary training and attachment of DPP and Criminal Investigation Department (CID) staff with specialised squads in South Africa, United Kingdom (UK) and United States of America (USA) have taken place.

Legal reform which has been enacted into law (including the amendments to various laws): the Local Council Courts Act to increase the jurisdiction of the courts; amendment to the Magistrates Courts Act and the Trial on Indictment Decree, to give jurisdiction over defilement to Chief Magistrates' Courts; amendment of the Penal Code, to comply with the 1995 Constitution; decriminalisation of petty offences; principles and guidelines for sentencing and prosecution guidelines, and reform of criminal trial procedures.

Under the Commercial Justice Reform Programme, the key areas of reform have included the Commercial Registries (Company and Land Registries), law reform and strengthening the legal profession. A commercial Justice Baseline Survey of 2001 was produced. A Commercial Court was created in 1996 to ensure fair adjudication of disputes with minimum expense and delay. The court moved to its own premises with a library, with computerised systems, including a system for case management. A Commercial Court Users' Committee was established, comprising private sector professional and business organisations to provide a forum for information exchange and learning. A Commercial Users' Guide is being developed. Another significant reform has been the establishment of a

208 JLOS, op.cit. pp. 51 - 52.

Centre for Arbitration and Dispute Resolution (CADER) with enabling legislation: The Arbitration and Conciliation Act. The Judiciary has approved the Rules and Practice Directives of Alternative Dispute Resolution (ADR) Pilot Project.

The Case Backlog Clearance Programme has resulted in a faster disposal of cases, from an average of 12 months to 9 months. Multiple adjournments have also been reduced. However, for a number of reasons, such as the increase in the number of cases registered and a decrease in the number of judges, there is an actual increase in the case backlog and the number of pending cases.

Law reform is aimed at overhauling commercial laws which are generally outdated and inadequate and thought to pose constraints to investments. The Advocates Act has been amended to strengthen monitoring systems and training of commercial lawyers and to develop a resource centre at ULS headquarters for use by the lawyers. Over 18 laws have been prepared by the Law Reform Commission and these include: Chattels Securities, Companies Act, Competition Act (proposed), Contract Act, Cooperatives Act, Copyright Law, E-Commerce (Electronic Transactions), Insolvency Act, Mortgages Act, Patent Statute of 1991 (to become Industrial Property Statute to cover Patents, Trade Secrets, Industrial Designs and Technovations, but not integrated circuits, Sale of Good Act, Special Economic Zones Act, Trade (Licensing) Act, Trademarks Act and lastly the Uganda Consumer Protection Bill (1999).

Involvement of Civil Society and Stakeholders

JLOS was conceptualised as a tripartite partnership between the state, the private sector and civil society. However, this partnership has not been realised yet.[209]

209 JLOS 2002 Report on the Partnership Strategy for Legal Aid Service Providers.

Under the Commercial Justice Programme, the Commercial Court Users' Committee, consisting of the business community, lawyers and the Attorney-General's Chambers, meets once every three months. The Commercial Court Users' Committee has ensured the participation of stakeholders in the programme. The Committee is able to meet judges (over lunch) for very frank discussions, to point out possibilities of corruption so as to forestall it. For example, the Commercial Users' Committee advocated for the drafting of a bill on the issue of bailiffs. The interaction has also yielded a new image of judges as approachable.

However no equivalent of such committee exists in the Criminal Justice Programme. For example, people like crime victims have not been able to participate in the programme. The participation of the ULS is in its capacity as provider of legal aid rather than user. Although complaints desks have been established in the judiciary and the police, this is a *post-facto* approach to the involvement of stakeholders, but even then, these matters are left to member institutions of JALOS, and are not brought to the attention of the JLOS committees, thus discounting peer review of such matters.

While the private sector has been able to take care of its interests to some extent, this has not happened with civil society organisations.[210] The establishment of a Basket Fund on legal aid is in place so that a consortium approach towards legal aid can be adopted by these providers, who receive funding from this common basket. In 2002 legal aid service providers established a Civil Society Partnership of seven key NGOs

210 It should be noted that while JLOS has developed strategies to address such issues as HIV and gender, outstanding issues are ethnic minorities, migrants, the internally displaced persons and persons with disabilities. See also JLOS 2002 A Desk Review of Gender Access to Justice in Uganda. March. The National Union of Disabled Persons of Uganda has approached the Criminal Justice Programme to object to this approach because it may prove to be at the expense of persons with disabilities.

and identified their areas of geographical coverage and service delivery nationally.[211] The attempt to involve civil society organisations in the programmes was useful in tracking and monitoring the sector to ensure that users benefit from the sector.

For example, the Gender Working Group, set up to ensure gender mainstreaming, has consistently invited the Uganda Association of Women Lawyers (FIDA) but FIDA has not attended these meetings. One of the problems might be the level of participation, which is really not sorted out in terms of whether CSOs should participate collectively or as individual organisations.

A similar situation pertains in the Law Reform Commission. The Commission has tried to involve civil society organisations in its task forces. But civil society involvement was described by an official of the Commission as disappointing: their attendance is erratic and inconsistent; they choose to participate in some activities and not others. Even where they attend they tend to be passive. It was said that they lack capacity to participate meaningfully in activities, and those who may have the capacity get involved selectively. Neither are they united. The official thought this had a serious negative effect on the JLOS programme.

The view was that civil society needs to organise itself, and develop its own independent agendas, instead of foreign ones. For this to happen, it was suggested that these organisations needed to be funded, possibly even by government.[212]

211 JLOS, Sector PEAP Revision Strategy Paper, op. cit. p. 44.

212 Interviews with staff of the Law Reform Commission and Criminal Justice Programme. These views do not seem to support the criticism of International Human Rights Network (op. cit. p. 42) namely that, "The input of CSOs in the management structures is viewed

Success and Challenges[213]

The outputs mentioned in the foregoing section represent achievements in both the JLOS specific sector as well as those of member organisations of JALOS, before they were eventually incorporated into JLOS. In the beginning there was bound to be visible success from the point of view of the actors in the sector. The infusion of funds was a departure from abysmal levels of dysfunction of the state, whereby things as mundane as stationery presented serious bottlenecks in the justice delivery system.

The JLOS actors also appreciate the fact that they can now plan and know that for the next three years there will be funding. There is discipline in the sense of spending only on planned activity; the budgets are not overshot and all this promotes planning and accountability.

Because of the span of the work plans- 3 years, 5 years and annual plans - as well as the 6-monthly and quarterly reviews, each institution can assess its achievements and challenges and work out how to tackle the latter and develop a sense of direction. They cite training in computer programmes, short-term attachments and developmental attitudes amongst lawyers as advantages derived from the programmes.

The success in coordination, communication and cooperation is regarded as a remarkable achievement that is more sustainable than others that are directly linked to financing. Other specific achievements are in the areas of effective data collection and management.

(emphasis added) exclusively in terms of whether they are being funded through JLOS, not in terms of whether they have policy insights to share, regardless of whether they are funded through JLOS e.g. as legal aid providers."

213 The International Human Rights Network, in its work (pp.8 - 9), summarises the successes quite concisely and clearly.

The computerisation of systems, for example in the Commercial Court, has undermined corrupt practices such as the stealing or alteration of court files. Capacity building amongst lawyers, the establishment of the Resource Centre at ULS offices and the Commercial Court Mediation Pilot project are all seen as tangible achievements by actors in the sector.

Most of these achievements however are to be found in institutional and process reform or what has been described as the "supply side". It is difficult to link this to impact in terms of access to justice and poverty reduction or eradication. In spite of the development of baseline statistics it is still difficult to measure the impact of reform programmes. And as it is, little has so far actually been done on the "demand" side. For example, no civic education has been seriously mounted to enable the population to take advantage of the legal and institutional reforms.

So, most of the reforms are in the institutions and have not trickled down to the ordinary person; but even these institutional reforms have not moved down to the lower institutions in the sector. Many of the significant developments in the Commercial Justice Programme are confined to the level of the Commercial Court, including the Mediation Pilot project; lower level courts, where the majority of the commercial disputes are in fact dealt with, have not been touched by such reforms.

The JLOS reform programme also faces more specific challenges. Too much information and too much report writing is required, which can be distracting. The need has arisen to orient actors in procedures and terminology. Fitting the programmes into the PEAP pillars has been cited as problematic, although the establishment of planning units which have been created in all units has been seen as positive. But this may not be merely

a technical problem but it may reflect the more fundamental issue of the way neo-liberal economics treats issues of poverty and development. Do the actors see the overall picture or are they moving in darkness?

Other challenges stem from inter-sectoral relations - which are practically non-existent. The inability to see the Legal Reform Process right through to the point of enactment of legislation in Parliament highlights this issue.

Lastly, the issues of a holistic approach and the sustainability of the reform programmes pose challenges that have been alluded to before. The latter revolves around the acute donor dependence of the sector reform programme, especially in terms of funding and oversight. This is a general problem but one which also manifests itself on specific levels, for example the hiring of court clerks on contract terms in the Commercial Court. This is supposed to eliminate corruption but would be unsustainable unless government was to take over these responsibilities. At the moment there is a consultancy on the sustainable financing of the Commercial Court, presumably on the basis of the money that it generates.

However, the concept of public goods provision by the state must be recalled here so that the medium and long-term nature of the problem is appreciated. There remain the challenges of recruitment, training and retention of personnel to accept a poverty focus, and to be sensitive to human rights and gender which are important policy objectives set out in the Strategic Investment Plan.

Many of these problems and challenges have been identified by the actors and the plan was to address them in the second Strategic Investment Plan. However, the point here is to realise that some of these problems are of an inherent and structural

nature and may not be amenable to resolution at the sectoral or unit levels where solutions might be proposed.

The Second Strategic Investment Plan (SIP II)

In August 2006 the Second Strategic Investment Plan (SIP II) was adopted to continue reform in the sector.[214] The Plan was largely informed by the mid-term review of the first strategic plan in 2004. It responds to justice-specific challenges, law and order issues, as well as sector-wide challenges.

Challenges to justice include providing services that are affordable, physically closer to the people, including especially areas afflicted by conflict; the incomplete process of reform of commercial and criminal justice laws due to the fact that parliament is outside the JLOS sector's control, the abuses and violation of human rights by JLOS institutions; the accumulation of case backlog at a rate unmatched by the disposal rate, leading to the violation of the right to a speedy trial; overcrowding and poor living conditions in prisons, the raised costs of doing business in the commercial area and the need to demonstrate the sector's impact on eradicating poverty.

Law and order challenges were identified as the increase in reported crime, absence of a holistic approach in addressing the causes of crime, such as weak immigration control, porous borders and lack of public participation in crime prevention. Sector-wide challenges include the need to actualise through enhanced coordination the sector approach among the ten

214 JLOS Strategic Investment Plan 2006-2011. Abridged Version; Butera, R. 2007 D.P.P. Highlights of the Second Strategic Investment Plan. Paper presented to the Second National Justice, Law and Order Sector Forum, Entebbe, 19 February 2007. Between them the two documents outline the challenges faced by JLOS as well as the strategies adopted by the sector. See also Othembi, F.N. JLOS Workshop FY 2007/2008. Presented at JLOS 12th GOU/Donor Review.

diverse institutions which have different and competing interests and needs and with discrepancies in levels of development and growth, which impact on their capacity to deliver services and implement reforms.

The poor terms and conditions of service, poor staff retention, and the low levels of staff awareness and participation in JLOS activities, resulting in low levels of ownership of the programme and its implementation, were the challenges relating to human resources. Lastly, the expansion of the reform scope from two to four focus areas, that is, from criminal and commercial justice to include land and family justice, without any increase in resources, posed a challenge, especially that of raising resources, especially in competition with other sectors.

The Key Areas

The strategic interventions of SIP II mapped out on the basis of the challenges identified include the following areas.

(a) The Promotion of Rule of Law and Due Process

This entails the completion of the amendment and revisions of the law generally. It is also intended to publish law reports and make them available to judicial officers, officers of the courts and the public. Accountability will also be promoted in order to stem the perceptions of corruption in JLOS.[215]

(b) Fostering of a Human Rights Culture in all JLOS Institutions

This key area will focus on upholding international human rights standards that have been incorporated into the constitution, laws and policies. These standards will be incorporated into

215 See Adonyo, P.H., JLOS Progress Report, 2006/2007. June. The report outlines some of the achievements in this key area. See also the JLOS Progress Report presented to the 12th Joint GOU/Donor Review, June 2007.

JLOS policies, programmes and budgets. The strategy will also involve training staff in human rights and the adoption of a rights-based approach to service delivery, amongst other things.[216]

(c) Enhancement of Access to Justice especially by the Poor and Marginalised

The strategy involves the deconcentration of JLOS services with special emphasis on conflict areas. This aims to reduce physical distance to JLOS institutions, ensuring faster disposal of cases, the use of alternative dispute resolution and chain-linking the activities of JLOS in relation to justice.

There is emphasis on addressing the "demand side" by supporting and improving legal services and providing structured civic education programmes. In this way the public will be sensitised, informed and educated to reduce language and attitudinal barriers that inhibit the public.[217]

(d) Reduction in the Incidence of Crime and Promotion of Safety of Persons and Security of Property

There are two main aspects to this strategy. One relates to crime prevention through involving communities in policing, strengthening immigration and border control and increasing the conviction rates through improved capacity to investigate and prosecute crime. The other is the reduction of recidivism through the support of correctional services and offender

216 On the progress in this area see JLOS Progress Report, June 2007, pp. 6 – 7 and Aliro, O. 2007, Rebalancing the Justice System in Uganda: A Focus on Witness Care and Victims of Crime. February 2007.

217 See JLOS Progress Report, June 2007, pp.8 - 12; Odwedo, M. 2007 The Peace, Recovery and Development Plan (PRDP) for Northern Uganda. Opportunities and Challenges for JLOS. February 2007. Karugaba, P. 2007 How to Address Case Backlog in the Justice System. Paper Presented at the 12th Joint GOU-Donor JLOS Forum. February 2007; Muyanja, J. 2007 Alternative Dispute Resolution and the Link to Restorative Justice in Criminal and Land Justice. Presentation at National JLOS Forum, February 2007.

rehabilitation programmes, including the use of non-custodial sentences.[218]

(e) Enhancement of JLOS contribution to Economic Development

The strategy is designed to provide an environment conducive to business to enable business to compete at domestic, regional and global levels. To do this, the sector will provide efficient and timely delivery of services and quicker settlement of disputes, amongst other things. Public/public and public/private partnerships will be fostered for this purpose. There will be conscious targeting of small and medium-scale businesses, which will entail, amongst other things, gender parity in the provision of JLOS services.[219]

The JLOS structure that runs this programme is supposed to be located at both national and district levels. In its operations, the JLOS is supposed to be participatory, including government, civil society and the private sector. The reform programme receives significant collective funding from "development partners".

To achieve sustained reform, the sector will strengthen institutions and the monitoring and evaluation framework which requires periodic reporting and review against agreed indicators so as to demonstrate progress. In this regard accurate and reliable information on progress is vital.

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218 Kkaya, E. 2007 Community Involvement. In Justice Delivery System: Local Council Courts, Crime Prevention And Recividism. Paper Presented at National JLOS Forum, February 2007.

219 Ngategize, P. 2007 Competitiveness and Investment Climate Strategy (CICS): Implications for JLOS. Paper Presented to National JLOS Forum, February 2007; JLOS Progress Report, op. cit. pp. 15 – 18.

Conclusion

JLOS under SIP II has recorded achievements that include the expansion of its coverage beyond criminal and commercial justice, paying attention to the "demand side", developing standardised reporting formats and better measurement instruments. Further achievements include laws enacted, Bills under consideration and those approved by cabinet as well as completed studies and consultations in progress. The same report records other achievements, such as increased confidence in the justice system, and positive perceptions by the public of the performance of various institutions in JLOS.

However, it is admitted that a host of problems and challenges still face JLOS. These range from inadequacy of resources to institutional inability to provide accurate or reliable data, discrepancies between progress and decisions at sector level and practice at institutional level.

Case backlog is a problem that still haunts JLOS: "There is a cumulative growth of backlog because the case disposal rate does not match the growth rates of new cases into the system."[220] It has also reported that JLOS coordination committees at district level are yet to be constituted.

The nature of the achievements and problems faced point to more fundamental issues, such as the inadequacy of funding, the sustainability of the programmes, delayed disbursements by the Ministry of Finance and the creation of new districts.

Finance or lack of it is also likely to distort programmes, which are likely to be turned primarily into money-generating activities.[221] This is detectable from a statement by the permanent secretary of the Ministry of Finance,

220 JLOS Progress Report June 2007. pp. 4 - 5.
221 Ibid. p. 11.

> The Sector also needs to consider ways of increasing non-tax revenue. While it is appreciated that the motive of the sector is not to collect revenue, in the course of administration of justice and keeping law and order, fines, penalties and other costs are awarded. The current charges on some of these items are very low and need to be revised upwards to reflect value. Revision of these fees will enable the sector to collect more tax revenue and hence increase the revenue base ... Increased revenue collection in broader terms implies more resource provision to improve/streamline the system and processes. There are other areas, which can increase the revenue collection or reduce the cost borne by the sector ... These include prison farms, court awards and compensation, police fleet management, express penalty schemes, etc. I urge the sector to critically look at all areas which can increase the revenue collection or reduce the cost as one way in which the sector can be able to increase its funding.[222]

JLOS was created in the context of the PEAP. But poverty eradication is premised on the assumption that it will be driven by private investments; hence the preponderance of the Commercial Justice Programme and security of property within JLOS. What this has done is place both poverty and justice in the market place where the poor, the marginalised, victims and witnesses will always give pride of place to business, the commercial users' forum, etc. In this context the emphasis of SIPII on the poor and marginalised may not mean much.

Hence the business of justice is reflected in the terminology of the sector: investment plan, supply/demand side, sector's competitiveness for resources *vis- a -vis* other sectors, value for

222 Kassami, C. 2007, On Deepening Justice Law and Order Reforms for the Marginalised: Options for Financial Sustainability. Paper Presented to National JLOS Forum, February 2007; JLOS Progress Report,

money. Even where used metaphorically it affects attitudes and approaches to problems. The successes recorded are largely institutional and quantitative in measure. Hence the emphasis is on the quantity of justice rather than its quality.

The emphasis on the "demand side" in SIP II cannot alter this reality, because it is not a fundamental shift. "Demand" is indeed very much shaped, if not determined, by what is supplied. It is looking at the same thing. Moreover, the outputs are considered in quantitative terms: disposal of cases, increase in efficiency, reduction in prison congestion; disposal of cases through ADR – without inquiring into the bargaining power of the parties and the justice of such procedures or measures.

This in part explains why an undertaking such as JLOS has not seriously explored traditional justice systems and other parallel ways of accessing justice, especially by the poor and marginalised.

The crisis of the state and of democracy in Uganda continues. In a sense many of the problems JLOS faces are "external" to it and beyond its powers to deal with. Such is the case with terms of service of personnel and retention levels.

Many of the issues relating to the independence of the judiciary and the rule of law are not primarily legal issues. They are issues that are intimately connected to the crisis of democracy and of the state and are generally of a political nature, including the militarisation of the police. These, as well as issues of resources, are matters that JLOS as such may have little influence over.

A state that cannot ensure quality social services such as health and education or approximate towards social justice can hardly provide legal justice and security.

6
Legal Sector Reform in Zanzibar[223]

Chris Maina Peter

Introduction to the Legal Sector in Zanzibar

> On the face of it Zanzibar appears to be an idyllic island in the Sun. One observer wrote that Zanzibar had tremendous potential as a political entity. Tribalism is not a problem; the people are united by the common language of Kiswahili; and over 95% of them are Muslim, which should make for a more harmonious society. And yet, its history over the past four decades has been anything but harmonious.
>
> Prof. Abdul Sheriff 1 June, 2000[224]

Reforming the Zanzibar Legal Sector within the United Republic of Tanzania

In 1993 the government of the United Republic of Tanzania (URT) decided to upgrade its legal sector as part of its wider strategy of creating an enabling environment for private economic activity and generally enhancing the role of the private sector. A Legal Task Force (LTF) was appointed to undertake

223 The author would like to sincerely thank Mr. Ahmed Masoud Miskiry and Mr. Abdulla Mohammed Juma, both of Zanzibar, for their assistance in the process of preparing this work and all the participants from Kenya, Tanzania Mainland, Uganda and Zanzibar who attended the Workshop on Legal Sector Reform in East Africa organised by Kituo Cha Katiba and held at Impala Hotel, Arusha, Tanzania on 10 December 2004, where work was originally presented and discussed.

224 In the preface to the book *The Democratisation Process in Zanzibar: A Retarded Transition* by Dr. Mohamed Ali Bakari and published by the Institute of African Affairs, Hamburg in 2001. Professor Sherrif is a renowned Zanzibari historian who, for many years, taught in the Department of History of the University of Dar-es-Salaam. He is the immediate former principal curator of the Zanzibar Museum and currently the executive director of the Zanzibar Indian Ocean Research Institute (ZIORI). For his public engagement, particularly in the preservation of the history of Zanzibar, he was awarded the prestigious Prince Clause Award for 2005. He is also the author of many internationally acclaimed works on the history of Zanzibar and the East African coast.

an in-depth study of the legal sector in the country.[225] This is a project which came to be known as Financial and Legal Sector Management Upgrading Project (FILMUP) and which formed the genesis of the legal sector reform in Tanzania.

In the initial phase, although the decision to form the Legal Task Force was made by the prime minister of the URT, whose portfolio does not cross the Indian Ocean to Isles, Zanzibar was represented in the Task Force[226] and the terms of reference given to the Task Force touched the legal sector in Zanzibar.[227] It was thus safely assumed that this project would cover the whole of the United Republic, notwithstanding the fact that the legal sector is not one of the Union Matters under the Constitution of the United Republic of Tanzania of 1977.[228]

225 The Legal Task Force was chaired by Mr. Mark D. Bomani, a prominent lawyer and former Attorney- General of Tanzania. Other members were Hon. Pius Msekwa, then Speaker of the National Assembly; Hon. Mr. Justice Barnabas A. Samatta, then principal judge (now retired chief justice of the URT); Hon. Mr. Justice Raymond J.A. Mwaikasu, then chairman of the Law Reform Commission of Tanzania; Mr. F.C. Mrema, then Deputy Attorney-General (now MP for Arusha) or in the alternative the late Kulwa S. Massaba, then DPP; Prof. Josephat L. Kanywanyi of the Faculty of Law, University of Dar-es-Salaam; Mr. Ahmed Masoud Miskry, then Principal State Attorney, Zanzibar; the late Eliuther Kapinga represented the Tanganyika Law Society. The secretary of the LTF was Hon. Lady Justice Mary H.C.S. Longway, then principal resident magistrate, and the coordinator of the project was Mrs. Carol Mdundo.

226 Zanzibar was represented by Mr. Ahmed Masoud Miskry, who was then a Principal State Attorney in the Attorney-General's Chambers in Zanzibar.

227 The whole of Chapter IX of the FILMUP Report was devoted to Zanzibar. See United Republic Of Tanzania 1996 Financial and Legal Sector Management Upgrading Project (FILMUP) – Legal Sector Report. Dar-es-Salaam: The Legal Task Force. pp. 180 - 199.

228 On the Union between Tanganyika and Zanzibar, see Volume 3 of the Journal for International Legal Materials, 1964, p. 763; Bakari, M.A. 2000 The Union Between Tanganyika and Zanzibar Revisited. In Engel, U. et al (Eds), Tanzania Revisited: Political Stability, Aid Dependency and Development Constraints. Hamburg: Institute of African Affairs. p. 133; Fengler, W. 1995 Tanzania at Cross-roads: The Conflict of the Union, its Reasons and its Consequences. Munich: University of Augsburg; Jumbe, A. 1994 The Partnership: Tanganyika Zanzibar Union - 30 Turbulent Years. Dar-es-Salaam: Amana Publishers; Shivji, I.G. 1990 The Legal Foundations of the Union in Tanzania's Union and Zanzibar Constitutions. Dar-es-Salaam: Dar-es-Salaam University Press; Vonhoff, Y. 1987 Union Without Unity: The Case of Tanganyika and Zanzibar. Master of Law Dissertation, University of Leiden, The Netherlands; Bailey, M. 1973 The Union of Tanganyika and Zanzibar: A Study in Political Integration. New York: Programme of Eastern African Studies of the Maxwell School of Citizenship and Public Affairs of Syracuse University. The issues which have listed as Union Matters are found in the First Schedule to the

Things changed dramatically after the general elections of 1995. Most observers and monitors of these elections were of considered view that the elections were not conducted well in Zanzibar.[229] As a result, the majority of donors withdrew aid and assistance to Zanzibar. It is therefore not surprising that when the proper Legal Sector Reform began, as recommended by the Legal Task Force, it began in one part of the United Republic only – Tanzania Mainland. Zanzibar was left in the cold.

Therefore, whatever has happened in Zanzibar in the legal sector in terms of reform is very recent. The 2000 general elections - which were worse than those of 1995 - were neither condemned nor openly given the green light by the donors.[230]

Constitution of the United Republic of Tanzania (under Article 4). These are: 1. The Constitution of Tanzania and the Government of the United Republic; 2. Foreign Affairs; 3. Defence and Security; 4. Police; 5. Emergency Powers; 6. Citizenship; 7. Immigration; 8. External Borrowing and Trade; 9. Service in the Government of the United Republic; 10. Income Tax Payable by Individuals and by Corporations, Customs Duty and Excise duty on Goods Manufactured in Tanzania Collected by the Customs Department; 11. Harbours, Matters Relating to Air Transport, Posts and Telecommunications; 12. All Matters Concerning Coinage, Currency for the Purposes of Legal Tender (Including Notes), Banks (Including Savings Banks) and all Banking Business; Foreign Exchange and Exchange Control; 13. Industrial Licensing and Statistics; 14. Higher Education; 15. Mineral Oil Resources, Including Crude Oil and Natural Gas; 16. The National Examinations Council of Tanzania and all Matters Connected with the Functions of that Council; 17. Civil Aviation; 18. Research; 19. Meteorology; 20. Statistics; 21. The Court Of Appeal of the United Republic; 22. Registration of Political Parties and Other Matters Related to Political Parties.

229 The 1995 General Elections were highly contested in Zanzibar, with the alleged winner receiving less than 1% of the votes (actually 0.4%). There were so many irregularities that many donors threatened and actually discontinued their economic and other support to the Isles. See, for instance, Eastern Africa News 1996 Norway Cuts Off Aid for Zanzibar. 24 April 1996; Rawlence, B. 2005 Briefing: The Zanzibar Elections. African Affairs, Volume 104, p. 515; Zanzibar Elections Monitoring and Observer Group 1995 Uchaguzi wa Zanzibar 1995: Taarifa Kamili ya ZEMOG. Zanzibar: ZEMOG; Mohammed, F.S. 1999 Does Conditionality Work? The Study on International Pressure and the Political Impasse after the 1995 General Elections in Zanzibar. Oslo: University of Oslo; Kweka, A.N. 1997 The Pemba Factor in the 1995 General Elections. In Omari, C.K. (ed.) The Right to Choose a Leader: Reflections on the 1995 Tanzanian General Elections. Dar-es-Salaam: Dar-es Salaam-University Press. p. 128; Martin, D. 2000 Zanzibar Elections: A Close Call. Southern Africa News Features, No. 18, 20 September 2000.

230 Election observers characterised the 2000 elections in Zanzibar as "an admitted failure." On these elections and aftermath, see the Southern African Development Community

However, bilateral donors are not as yet comfortable in dealing with the Revolutionary Government of Zanzibar. Therefore, aid and assistance is trickling in by small doses, mainly from multilateral donors. It is these donors who aid the legal sector. In this work, the author therefore does not attempt to explain what has been achieved in terms of Legal Sector Reform (LRS) - because there is more or less nothing. This work attempts to indicate the state of the Zanzibar legal sector today and the mammoth task confronting the government when reform begins. At the end, the author indicates the modest work being done with the little assistance that has been received by the sector.

Legal Sector in Zanzibar

The legal sector in Zanzibar is that sector that deal with the administration or implementation of the law either directly or indirectly. In its own peculiar way this sector has not been static but dynamic. In particular, the shift of the ideology and political outlook in the country also meant a serious change in how people relate to each other.

(SADC) Parliamentarians in Zanzibar. See Southern African Research Documentation Centre (SARDC) 2000 SADC Parliamentarians Call for a Fresh Look at 2000 Polls. 31st October, 2000. See the same views from Commonwealth Observer Group 2001 The Elections in Zanzibar, United Republic of Tanzania. 29 October 2000. London: Commonwealth Secretariat and International Foundation For Election Systems (IFES) 2000 IFES International Observer Report: The October 29, 2000 General Elections in Zanzibar. Washington, D.C.: IFES. On the atrocities which followed the 2000 elections in Zanzibar, see the November 2002 Report of the Presidential Commission to Investigate what happened on 26 and 27 January 2001. This Commission was chaired by former Tanzanian High Commission to Zimbabwe, Brigadier-General (rtd) Hashim I. Mbita. See also African Watch 2002 Tanzania: The Bullets Were Raining – The January 2001 Attacks on Peaceful Demonstrators in Zanzibar. New York: African Watch; International Federation For Human Rights And Legal And Human Rights Centre 2001 Zanzibar – Wave of Violence: A Fact Finding Report on Police Brutality and Election Mismanagement in Zanzibar. Paris and Dar-es-Salaam: FIDH and LHRC; and Ahmed, N.M. 2001 Suppressing Dissent: The Crackdown on Muslims in Zanzibar. Wembley, United Kingdom: Islamic Human Rights Commission.

In the period immediately after the Revolution of 12 January 1964[231] and later during the one-party political system in the country,[232] law regulations and rules in general played a very insignificant role. They were not important at all. What mattered at that point in time, was the policy of the ruling party. That is what carried the day notwithstanding the existence of laws in the statute books.

The introduction of multiparty democracy in the early 1990s opened a completely new chapter in the Isles - together with a new outlook.[233] At economic level the meeting of different contending viewpoints became the market, and at political level the meeting point was no longer the party policies but the *law*.

231 The Zanzibar Revolution of 1964 is well documented. See, inter alia, Al Barwani, A.M. 2002 Conflicts and Harmony in Zanzibar – Memoirs. Dubai; Ayang, S.G. 1970 A History of Zanzibar: A Study in Constitutional Development 1934 – 1964. Nairobi: Kenya Literature Bureau; Lofchie, M.F. 1965 Zanzibar: Background to the Revolution. Princeton: Princeton University Press; Mapuri, O.R. 1996 Zanzibar - The 1964 Revolution: Achievements and Prospects. Dar-es-Salaam: TEMA Publishers; Martin, E.B. 1978 Zanzibar: Tradition and Revolution. London: Hamish Hamilton; Okello, J. 1967 Revolution in Zanzibar. Nairobi: East African Publishing House; Petterson, D. 2002 Revolution in Zanzibar: An America's Cold War Tale. Boulder, Colorado: Westview Press; Babu, A.M. 1991 The 1964 Revolution: Lumpen or Vanguard. In Sheriff, A. and Ferguson, E. (Eds) Zanzibar Under Colonial Rule. London: James Curry; Rey, L. 1972 The Revolution in Zanzibar. In Cliff, L. and Saul, J.S. (Eds) Socialism in Tanzania (Volume One – Politics): An Interdisciplinary Reader. Dar-es-Salaam: East African Publishing House. p. 29. See also New Left Review, No. 25, May-June 1964, p. 29.

232 Tanzania officially became a one-party state in 1965, following the adoption of the interim constitution of 1965. However, two parties ruled the two parts of the United Republic, Tanganyika African National Union (TANU) on the Mainland and the Afro-Shiraz Party (ASP) on the Isles.

233 Multiparty democracy in Tanzania was introduced in 1992 through the 8th Amendment to the Constitution of the United Republic of Tanzania of 1977 and the enactment of the Political Parties Act, 1992 (Act No. 5 of 1992). On this epic political movement in Tanzania see Government of the United Republic of Tanzania 1992 The Report and Recommendations of the Presidential Commission on Single Party or Multiparty System in Tanzania, 1991 on the Democratic System in Tanzania, Dar-es-Salaam: Dar-es-Salaam University Press; Msekwa, P. 1995 The Transition to Multiparty Democracy. Dar-es-Salaam: Tema Publishers and Tanzania Publishing House; Peter, C.M. 1996 Determining the Pace of Change: The Law on Pluralism in Tanzania,. In Oloka-Onyango, J.; Kivutha K. and Peter, C.M. (Eds) The Law and the Struggle for Democracy in East Africa Nairobi: Claripress., p. 511; Tambila, K.I. 1995 The Transition to Multiparty Democracy in Tanzania: Some History and Missed Opportunities. Verfassung und Recht in Übersee, Volume 28 No. 4 1995. p. 468.

This had the effect of enhancing the importance of the law as a facility for adjudicating disputes and misunderstandings.

However, the highly underdeveloped legal sector in the Isles was not ready for this vital role to be placed at its door by changing fortunes in the political sphere. The problems facing the sector affect both quality and quantity of the legal services. That is to say, academically how many people are there in the sector and are fit for the job? In order to appreciate the situation facing the legal sector in Zanzibar a little history is necessary.

Background to Legal Sector Development in Zanzibar

The Zanzibar legal sector is underdeveloped. However, it is important to add that this has not always been the situation. For many years Zanzibar had developed and maintained an admirable legal order.[234] As early as 1914 the Isles had a comprehensive and peculiar legal system. As former chief justice of Zanzibar Rt. Hon. Sir Sidney Abrahams observes:

> Zanzibar presents a number of extremely interesting legal features. It is a Protectorate since the Sultan still maintains administrative sovereignty. Thus there exists a duality of legislative authority and a dual jurisdiction. The King (of England) has authority to legislate for British subjects by Order in Council, which, together with any Acts of Parliament applying to Zanzibar, are declared by Imperial Enactment (Application) Decree, 1939, to be applicable to subjects of the Sultan. The Sultan himself retains legislative power over his own

234On this see, inter alia, Bierwagen, R.M. and Peter, C.M. 1989 Administration of Justice in Tanzania and Zanzibar: A Comparison of Two Judicial Systems in one Country. *International and Comparative Law Quarterly*, Volume 38 Part 2, April 1989, p. 395; and Read, J.S. 2007 Justice on Appeal: A Century Plus of Appeal Courts and Judges in Tanzania. In Peter, C.M. and Kijo-Bisimba, H. (Eds) *The Law and Justice in Tanzania: Quarter a Century of the Court of Appeal*. Dar-es-Salaam: Mkuki na Nyota Publishers. p. 55.

> subjects, which is exercised by Decree passed by the Legislative Council. Justice is administered by the courts of his Britannic Majesty (ordinarily known as British Courts) wherever either of the parties to the case is a British subject and by the courts of Sultan where both parties are subjects of the Sultan.[235]

The 1923 Courts Decree implemented a major reorganisation of the court system and assimilated the courts system. Under this Decree, His Highness the Sultan's Court for Zanzibar (Zanzibar Court) was established[236] with its subordinates courts.[237] One of the interesting features of this court was that the same judges of the British Court presided over it[238] and the chief justice of the British Court had power over this court.[239] The subordinate courts of this court were also subordinate courts of the British Courts.[240] Appeals from this court went to the East African Court of Appeal (EACA) and then to the Privy Council.[241] The Decree was repealed by Decree No. 22 of 1963.

At independence on 10 December 1963 Zanzibar began with a common law tradition entrenched in the constitution. Chapter VI of the Constitution of the State of Zanzibar, 1963[242] provided for the judicature. This chapter dealt with three issues, namely,

235 Abrahams, S. 1941 Conflict of Laws in Zanzibar. *Journal of Comparative Legislation and International Law,* Volume XXIII.

236 1923 Courts Decree, Section 8.

237 Ibid. Section 10.

238 Ibid. Section 83.

239 Ibid. Subsections 8 (4) and 8(5).

240 It is important to note that there were also Kadhi's Courts which exercised a limited range of civil litigation relating to personal matters such as marriage, divorce and inheritance among Moslems. See Cotran, E. 1965 Integration of Courts and Application of Customary Law in Tanganyika. *East African Law Journal*, Volume 1 1965. p. 108.

241 Before this period, appeals from Zanzibar used to go to the High Court in Bombay, India. On this see Read, op. cit.

242 See Legal Supplement (Part I) to the Official Gazette of the Zanzibar Government, Volume LXXII No. 4320 of 5 December 1963.

the establishment of the High Court and tenure of its judges; appeal to the then Court of Appeal for Eastern Africa; and the establishment of the JSC, which dealt with the appointment and discipline of other judicial officers including *Kadhis*.[243]

However, everything fell asunder on 12 January 1964 following the Revolution. The constitution was abrogated, the Sultan of Zanzibar ousted as head of state and the People's Republic of Zanzibar was established. Laws in force prior to the Revolution were maintained through the Existing Laws Decree, 1964.[244] Legislative power was vested in the president and subsequently the Revolutionary Council (which was also the cabinet). The court system remained as that established by Courts Decree, 1963.[245]

The High Court was specifically established vide the High Court Decree of 1964.[246] The rest of the court structure was retained as it was under the Independence Constitution. This set up remained in place until 1966, when the completely new judicial structure was established. This was made of the following subordinate courts below the High Court:

(a) District Court;
(b) Primary Court;
(c) Kadhis Court; and
(d) Juvenile Court.

Appointments to these courts were made by the president after consultation with the chief justice. A fundamental change in the judiciary in Zanzibar came in 1969 following the establishment of the Peoples' Courts,[247] which came into force with effect from 1 January 1970.

243 See Articles 92 to 99 of the 1963 Constitution of the State of Zanzibar.
244 Decree No. 1 of 1964.
245 Decree No. 22 of 1963.
246 Decree No. 2 of 1964.
247 These courts, which replaced all other courts save for the High Court, were established through Decree No. 11 of 1969.

Under this Decree the following court structure was put in place:

(a) The Supreme Council;
(b) The High Court;
(c) People's District Courts; and
(d) People's Area Courts.

On the ground nine People's Area Courts were established in Zanzibar (six in Unguja and three in Pemba). Every court was presided over by a chairman, where members and chairmen were lay people and some of them completely illiterate. The Court was not bound by rules of evidence and procedure, and had to formulate its own regulations of the proceedings. Moreover, representation by an advocate, or any lawyer for that matter, was not allowed. Appeals were to the High Court and appeals from High Court went to the Supreme Council, which was the final appellate body. The Supreme Council was also composed of lay people.[248]

The Kadhis Courts were more or less parallel to the People's District Courts. The Supreme Council towered above all as the court of last resort. All matters, criminal and civil, save for murder, attempted murder and manslaughter (which were handled solely by the High Court), went to the People's Courts.

Adjudication in the People's Courts was done by lay persons and no lawyers were allowed to appear. The state, on the other hand, was always represented in these courts by the Attorney-General (AG). The chairman and the eleven members of

248 On how the legal system functioned during the Peoples' Courts era see Ramadhani, A. Judicial System of Tanzania: Zanzibar. *Eastern Africa Law Review*, Volumes 11-14, 1978-1981, p. 225. Due to its importance, this article is also reproduced in Peter, C.M. and Immi, S. (Eds) 2006 The Judiciary in Zanzibar. Zanzibar: Zanzibar Legal Services Centre. p. 90.

the powerful Supreme Council were also appointed by the president. The chief justice of Zanzibar, who was an appointee of the president was the only lawyer in the whole judicial system in Zanzibar under the People's Courts.

Logically, rules of procedure and evidence as they are known under the common law tradition were not applicable in the People's Courts, only "common sense" prevailed. Given this development, there was no alternative for lawyers in Zanzibar but to flee and emigrate to other places, including Tanzania mainland, where they could practice law.

This development had serious repercussions for the development of the legal sector in Zanzibar. The law was not taken seriously, nor was legal training seen as a priority by the Revolutionary Government of Zanzibar.

The legal sector began to pick itself up from the rumbles of post-revolution confusion in the 1980s following the enactment of the first post-revolution constitution in 1979. The institutions of governance and checks and balances were re-established; the court system and the Zanzibar House of Representatives removed some of the powers monopolised for years by the Revolutionary Council; the Executive. In the judiciary the People's Court system continued until 1985 when it was replaced by the existing Magistrate Court system. It is this post-revolution court system that undermined the legal sector in Zanzibar. No development of the law was encouraged. Private legal practice and rule of law and good governance as we understand it today were viewed as problems hindering the government to do what it wanted.[249]

249 For a thorough treatment of the development of the legal sector in Zanzibar, see Masoud, O.M. 2005 The Zanzibar Judicial System,. In Peter, C.M. and Immi, S. (Eds) Justice in Zanzibar: The Judiciary and the Constitution, Zanzibar: Zanzibar Legal Services Centre (forthcoming).

Advancement in the legal sector was checked again in 1990s with the introduction of multiparty democracy, which polarised the political system in Zanzibar and did not spare this sector. This was due to the emergence of two equally contending political parties on the Isles – Civic United Front (CUF) and *Chama Cha Mapinduzi* (CCM).

The signing of the Accord (*Muafaka*) between the ruling party CCM and the main opposition party CUF in 2001 and the translation of this agreement into law through constitutional amendments[250] is the new life-line for rule of law and good governance and therefore the legal sector in Zanzibar.

The Status of Manpower in the Legal Sector

In order to appreciate the real situation the Zanzibari legal sector, it is necessary to investigate each office of the sector. These include the Judiciary - all levels; the Office of the Attorney-General; the Law Review Commission; the Office of the Director of Public Prosecutions (DPP); the Office of the Administrator General; the Zanzibar Bar; Zanzibar Law Society (ZLS); and Zanzibar University, which is supposed to be a source of future manpower to the legal sector. These are the offices discussed at length in *seriatim*.

250 See the 8th and 9th Amendments to the Constitution of Zanzibar of 1984 passed by the Zanzibar House of Representatives in 2002/2003. On the struggle to sort out the electoral mess in Zanzibar see Anglin, D.G. 2000 Political Impasse and Commonwealth Mediation. *Journal of Contemporary African Studies*, Volume 18 No. 1. p. 39; and Oloka-Onyango, J. and Nassali, M. (Eds) 2003 Constitutionalism and Political Stability in Zanzibar: The Search for a New Vision. Kampala: Kituo Cha Katiba.

The Judiciary

> Under the Constitution of the United Republic of Tanzania, Zanzibar has a separate judicial system with its own chief justice, judges, magistrates and courts. I have observed, however, and sadly too, that very few lawyers are aware of the system. The few whom I have talked to and explained to them the system could not hide their amazement. They had never before thought that there is due process of law in the Isles.
>
> Hon. Mr. Justice Augustino Ramadhani[251]

Introduction

The judiciary is one of the three pillars of the state, the others being the executive and the legislature. Although strictly legally speaking, Zanzibar is not a state as such[252] it happens to have all three attributes of a state namely, a chief justice representing the judiciary,[253] a president symbolising the executive,[254] and a speaker representing the Zanzibar House of Representatives - the legislature in Zanzibar.[255]

Access to justice for the common man requires the existence of an independent judiciary. This point is made so well by the chief justice of Zanzibar, Hon. Mr. Justice Hamid Mahmoud Hamid, who says:

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251 See Ramadhani, op. cit. p. 225. Justice Ramadhani was for many years the chief justice of Zanzibar and until recently vice chairman of the Zanzibar Electoral Commission (ZEC). He was also a judge of the East African Court of Justice based in Arusha. He is currently the chief justice of the United Republic of Tanzania.

252 On this highly charged issue see the Constitution of the United Republic of Tanzania – Article 2 (1) and the decision of the Court of Appeal of Tanzania in the case of *S.M.Z. v. Machano Khamisi Ali & 18 Others*, Court of Appeal of Tanzania at Zanzibar, Criminal Application No. 8 of 2000.

253 The current chief justice of Zanzibar is Hon. Mr. Justice Hamid Mahmoud Hamid.

254 The president of Zanzibar is Hon. Abeid Amani Karume, elected in 2000 on *Chama Cha Mapinduzi* ticket and re-elected in 2005.

255 The speaker of the Zanzibar House of Representatives at present is Hon. Pandu Ameir Kificho.

> The right to access to courts is indeed foundational to the stability of an orderly society. It ensures a peaceful, regulated and institutionalised mechanism to solve disputes, without resorting to self-help. The right of access to courts is a bulwark against vigilantism, and the chaos and anarchy that it causes. Peace is not just the absence of war, but also the presence of justice. Justice, like peace, is indivisible and consequently, the courts are meant to foster peace, order and stability in the society.[256]

The judiciary in Zanzibar is interesting because it is partly a purely Zanzibari matter but becomes a *Union Matter* at the highest level. The highest appellate body, the Court of Appeal of Tanzania is a *Union Matter*.[257] The rest of the judiciary is "domestic" to Zanzibar. The judiciary in Zanzibar is made up of four distinct courts. These are the High Court of Zanzibar, Regional Courts, District Courts, Primary Courts and the Kadhi's Courts. Another important institution in the judiciary is the Juvenile Court, which is attached to the Regional Court. These courts are examined below. It is envisaged that the judiciary in Zanzibar could be completely revolutionalised by reform in order to enhance its independence, professionalism and standing in the eyes of the ordinary Zanzibari, as a fountain of justice.

256 On this statement which was made on 9 May 2002, see HAMID, M.H. 2003 Access to Justice: A Legal Right. In Othman, H. and Peter, C.M. (Eds) Perspectives on Legal Aid and Access to Justice in Zanzibar. Zanzibar: Zanzibar Legal Services Centre. pp. 80 - 81.

257 The Court of Appeal of Tanzania is Item No. 21 on the list of Union Matters provided in Schedule One to the Constitution of the United Republic of Tanzania. It is established vide Part Five of Chapter Five of the Constitution of the United Republic of Tanzania (Articles 116 - 123) and is also specifically recognised in the Constitution of Zanzibar of 1984 (Articles 98 - 99A, which are in Part Two of Chapter Six).

High Court

The High Court of Zanzibar was established under Article 93 of the Constitution of Zanzibar. It is a court of record with jurisdiction on all matters – both criminal and civil and other matters that might be trusted to it under the Constitution of Zanzibar and/or under any other laws.[258] The High Court of Zanzibar is supposed to be handled by the chief justice and other judges whose numbers should not be less than two.[259]

The chief justice of Zanzibar, the head of the judiciary, is appointed by the president of Zanzibar from among judges of the High Court after consultation with the Judicial Service Commission (JSC)260. Other judges of the High Court are appointed by the president on the recommendations of the JSC.261

Qualifications for appointment into the office of the judge of the High Court of Zanzibar are not light. To qualify, one should have the following qualifications:

(a) a law degree from a recognised University;

(b) be a judge of the High Court of Tanzania or any other Commonwealth Country or be a judge of any other court which has appellate jurisdiction over the High Court;

(c) to have been a lawyer in Zanzibar or Tanzania for a period of not less than seven years; or

(d) possess experience as a judge or a lawyer of not less than seven years.

258 Establishment and existence of a Court of this nature is envisaged under Part Four of Chapter Five (Articles 114 and 115) of the Constitution of the URT of 1977.
259 Article 93 (2).
260 Article 94 (1).
261 Article 94 (2).

Currently, the High Court has a chief justice and four judges. Out of the four judges only two can be said to be on permanent terms. The other two are on contract. Under the current circumstances, one cannot say that the High Court of Zanzibar is properly constituted. Sincerely speaking, judges serving under contract cannot be said to be free and independent to administer justice in accordance with the law. They have no security of tenure and their very existence as judicial officers is entirely dependent on the whims of the appointing authority – who can terminate such contracts or refuse to renew them at will. It is expecting too much to expect justice from a judge in this situation.

In a discussion with the chief justice of Zanzibar, it was conceded that there was a shortage of judges in Zanzibar. He assured the author that this problem is being seriously addressed by the judiciary. He however insisted that, for political reasons, judges from outside Zanzibar will still be needed by the Zanzibari judiciary. According to His Lordship, in the Zanzibar situation the role which can be played by a judge from outside cannot be underplayed. Asked whether it was difficult to attract lawyers who are Zanzibaris who qualify as judges, the chief justice was of the considered view that not every lawyer can be a judge. There are other qualities required if a person is to make a good judge. Indirectly and maybe without knowing he repeated what Mwalimu Julius K. Nyerere had said back in 1984 when addressing a meeting of judges and magistrates in Arusha about the qualities of the officers of the higher judiciary. Mwalimu pointed out that, "There are jobs in our society which can be done by undisciplined people and people

whose personal integrity can be called into question; being a judge or magistrate is not among them."[262] The chief justice confided that currently there are recommendations before the appointing authority to fill the lacuna in the judiciary. It will not be long before new appointments in the High Court are made.

Resident Judge for Pemba

A burning question on justice in Zanzibar is that of stationing a judge in Pemba, the sister island of Unguja. Surprisingly, this issue raises both controversy and emotions. In brief, arguments for and against having a resident judge in Pemba are as follows. Those against having a resident judge in Pemba base their arguments purely on statistics and the economics of having such a judge placed in Pemba. They argue that there are just too few cases emanating from Pemba to justify stationing a High Court judge there on a permanent basis. In their opinion, such a judge would be idle, with little to do.

The camp supporting stationing a judge in Pemba raises two points. One, justice is not about statistics. Justice is about fairness and that the possibility of a single person being wronged by denial of access to the courts of law was enough justification to provide such machinery for justice for this and other persons. It is argued that the fact that there is no High Court judge in Pemba gives magistrates a free hand to abuse the rights of residents of this island. A magistrate can arbitrarily imprison a person for a brief period, say four months, knowing that by the time an appeal is lodged in the High Court in Unguja, the sentence would have already been served and the person "taught a lesson". Two, the statistics which indicate few cases in Pemba are misleading. Most of the people with genuine

262 See also *Daily News* (Tanzania), 16 March 1984, p. 1.

grievances realise that the situation is hopeless and that it is a waste of time to go to court. Had there been a functioning High Court in Pemba, the cases might have been more. It is therefore a matter of interpretation of available statistics.

Regional Court

The Regional Court was established under the Magistrates Court Act, 1985. Under the law, each of the five regions in Zanzibar and Pemba is supposed to have a Regional Court.[263] The Regional Court is presided over by a regional magistrate who is supposed to be a qualified lawyer and holder of a law degree from a recognised university. In civil matters, the Regional Court has the power to entertain cases in which the subject matter does not exceed TShs 10,000,000.[264] The Regional Court also receives appeals from the District Court and has revisionary powers over that court. In criminal matters, the Regional Court has power to hear cases originally heard by subordinate courts, such as cases relating to offences listed under Schedule 1 to the Criminal Procedure Decree. At the same time, the regional magistrate, by virtue of his position, is the chairman of the Juvenile Court working in his region.

In situations where the chief justice extends the powers of the regional magistrate, such a magistrate with extended jurisdiction, can exercise the powers of a High Court judge. Such powers involve hearing of matters which, in most cases, are exclusively reserved for the determination of the High Court. These include hearing of murder and manslaughter cases. Normally, extended jurisdiction may either be in respect of a particular or specific case or may be general.

263 The five regions of Zanzibar are: North and South Regions of Pemba; and North, South and Urban West in Unguja.

264 The latest setting of the civil jurisdiction of the subordinate courts in Zanzibar were set by the Chief Justice vide Legal Notice No. 18 of 1993, which came into effect on 30 July 1993.

Initially, there were five regional magistrates in both Zanzibar and Pemba. One posted in the South Region of Zanzibar; three in Urban West Region, which is the most densely populated area of Zanzibar; and one in Pemba. The regional magistrate in Pemba also acts as deputy High Court registrar. Incidentally, two of the regional magistrates are from Tanzania Mainland and are in the Isles working on permanent terms.

In order to improve the situation, the JSC met on 18 December 2003, to interview applicants for the position of regional magistrates. Four new regional magistrates were selected to join the judiciary. They were sworn in by the chief justice of Zanzibar on 2 January 2004.

District Court

The District Court, like the Regional Court, is established under the Magistrates Court Act, 1985. Under the law, each district in Zanzibar and Pemba is supposed to have a District Court. However, in situations where it is not possible to provide each district with at least one district magistrate, the law allows the chief justice of Zanzibar to extend the powers of a district magistrate beyond the geographical boundaries of the district. The district magistrate has both criminal and civil jurisdiction. In criminal law, the district magistrate, upon convicting an accused person, can impose a sentence not exceeding five years in jail. In civil matters the District Court can handle matters with a value not exceeding TShs 1,000,000.

The District Court also exercises appellate and revisionary jurisdiction over the Primary Court immediately below it. In exercise of those powers, the District Court can confirm, reverse, amend or vary the decision and the order of the Primary Court. The District Court can therefore call for examination of the record of any proceedings of the Primary

Court. In terms of qualifications, a district magistrate should be a holder of a diploma in law from a recognised institution of higher learning.

Primary Court

The Primary Court is at the bottom of the judicial administrative structure. That position notwithstanding, the Primary Court is the most important institution in the administration of justice in Zanzibar. This is because this court touches directly on the daily lives of the people around it. There are hundreds of Zanzibaris who do not know who a judge of the High Court is, or even the chief justice of Zanzibar. However, they all know the "all powerful Primary Court magistrate" (PCM) in their neighbourhood. It is this person who settles disputes among neighbours and it is he or she who fines those who do not conform and eventually sends repeat offenders to *Chuo Cha Mafunzo*.[265]

The Primary Courts are also established by the Magistrates Court Act, 1985. Normally, there is supposed to be one Primary Court in each district. However, the chief justice is by law allowed to establish more than one Primary Court in each district. In essence, the Primary Court was meant to be a forum for alternative dispute settlement. That is to say, a place where people could be facilitated to meet and iron out their differences - that is a form of small claims or petty cases court.

In its criminal jurisdiction, the Primary Court can impose a custodial sentence not exceeding one year or a fine not exceeding TShs 2,000 or corporal punishment. In deserving situations the court can also combine all these sentences. In

265 Prisons in Zanzibar are interestingly referred to as *Vyuo Vya Mafunzo* (plural) or *Chuo Cha Mafunzo* (singular) which means training institutions.

civil matters, the Primary Court was supposed to deal with matters if which the value did not exceed Tshs 10,000 but the chief justice increases the amount from time to time in conformity with the times. Currently, the Primary Court can deal with matters with a value up to TShs 100,000.

There are complaints about the low level of the pecuniary jurisdiction of the Primary Court, and particularly taking into account the rate of inflation in the country, which is eating into the value of the shilling. The net result has been to disable the Primary Court from doing any serious work while referring more and more cases to the district level. When this issue was raised with the chief justice, he conceded that it was a problem, and promised to invoke his powers to correct soon.

Primary Court Magistrates normally hold a certificate in law from a recognised institution of higher learning. Most of them are former court clerks, interpreters and other functionaries of the judiciary. Due to the nature of these courts and people who manage them, advocates and state attorneys are prohibited to appear in the Primary Court. However, *Wakyls* (unprofessional attorneys) are permitted to appear before PCMs.

Juvenile Court

The Juvenile Court is not actually a separate court as such. It is a normal Regional Court, which constitutes itself into a Juvenile Court when dealing with juveniles. Normally, it is composed of a regional magistrate and two lay members of the public, one of whom must be female. In order to protect the juvenile involved, this court meets *in camera*. The relevant law on juveniles in Zanzibar is the Children and Young Persons Decree, 1952.[266] This law recognises a child as any person under the age of 14 and a young person as any person under the age

266 Chapter 58 of the Laws of Zanzibar.

of 16. It is these categories of persons who are dealt with by the Juvenile Courts. The only exception are instances when a juvenile is jointly charged with adults, when the juvenile loses legal protection to be treated as such. By virtue of their age, juveniles are vulnerable and thus require protection of the law and society in general. It is the author's sincere hope that legal protection to juveniles will be fortified in the legal system of Zanzibar and that the newly appointed members of the Bench will be sensitised on the rights of children, including juveniles.

Kadhis Court

The Kadhis Court is an important institution in Zanzibar because more than 95% of all inhabitants on the Isles are Muslims. The Kadhis Court is established under the Kadhis Court Act, 1985.[267] According to Section 6 of that Act, the jurisdiction of the Kadhis Court is restricted to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance, in proceedings in which all parties profess the Muslim religion. The Act provides for the establishment of a Kadhis Court in each district of Zanzibar. Appeals from this court go to the Chief Kadhis Court which lacks original jurisdiction but acts as an appellate court for the decisions of the Kadhis Court.[268] Appeals from the Chief Kadhis' Court go to the High Court of Zanzibar which is highest institution of appeal as far as issues handled by the Kadhis Courts are concerned.[269] The Court of Appeal of Tanzania is specifically excluded from handling issues relating to Kadhis' Courts.[270]

267 Act No. 3 of 1985.

268 See Section 10 (1) of Act No. 3 of 1985.

269 In the course of handling an appeal from the Chief Kadhis Court the High Court Judge must sit, together with four Sheikhs who are conversant with Islamic law, and the final decision shall be based on the opinion of the majority of the members. See Section 10 (2) of Act No. 3 of 1985.

270 See Section 10 (3) of Act No. 3 of 1985.

While the Chief Kadhi is appointed by the president of Zanzibar, all other Kadhis are appointed by the JSC. There are controversies surrounding appointment of Kadhis on account of old age and academic qualifications. According to one Kadhi, a young person cannot be a Kadhi, because the minimum age of a Kadhi is 53 years. Others did not specifically fix the age but emphasised that a Kadhi must be an adult person who commands respect in society.

On academic qualifications, there was a general view that the current qualifications of appointment to the office of the Kadhi were vague and unsatisfactory. Mere knowledge of Muslim law is deemed inadequate. It was observed that some Kadhis cannot even read or write Kiswahili or English and were only experts in Arabic. Therefore there was an outcry that those appointed to the office of the Kadhi need to know how to read and write, be conversant with the economic and social problems facing Zanzibaris, and should have attended well-known centres of learning in Islamic matters.

Incidentally, in the course of our research we discovered that several Kadhis are educated up to university level in disciplines other than law. It is our earnest expectation that these educated and deserving Kadhis will be recognised by the authorities and treated like other graduates in the Department.

Non-professional Cadres in the Judiciary

There are other cadres who serve in the judiciary but who are not lawyers by profession. However, their contribution to the Department is so crucial that administration of justice would have been impossible without their presence. These include court clerks, typists, police prosecutors and Wakyls.

Court Clerks

Court clerks are an important part of any judicial system. They handle cases and almost manage the official court diaries of the judges and magistrates. They are the ones who interact with the public on a day-to-day basis and in a way shield their "bosses" against the ever-enquiring public. They are the "reception" of the courts and hence the purveyors of the image of these important institutions of justice in a democracy.

In their day-to-day activities, court clerks deal with the law and the main stakeholders of the judiciary. It is logical that they know some of the basic elements of the law. From the interviews carried out in Unguja and Pemba, it was apparent that the office of the court clerk has been changing very quickly in the Isles. We were informed that there was a time when court clerks were sometimes more knowledgeable about legal procedures than their bosses and could, with great respect, remind their bosses (refresh their memories!) on the basics of the law. It is this calibre of clerks who later become PCMs, district magistrates and some, now regional magistrates (if not judges!). It is industry which has driven them to where they are now.

Currently, according to government procedure, court clerks are treated just like any other clerks in the employ of the Revolutionary Government of Zanzibar. They are allocated to the judiciary by the Civil Service Department. Government needs to rectify this since not any clerk can become a court clerk. It requires more to make it to the grade of a court clerk.

We were informed that the recruitment procedure has been changed to allow each government department to inform the public about any vacancies to be filled. Each department conducts its own interviews and informs the Civil Service

Department of its decision. It is hoped that the judiciary will take advantage of this new system to ensure that it recruits people who are suitable to serve as court clerks. According the chief justice, few of the current court clerks make the grade. A case should be made to allow court clerks to be appointed and disciplined by the JSC. This can be the opening window to demanding special qualifications for those applying to be court clerks and provide commensurate remuneration for qualifying recruits.

Typists

Typists of every grade, like the court clerks, are an essential part of a well functioning judiciary. Records are the backbone of any government department and the judiciary is no exception. Court orders, summons, judgments etc. have to be typed. We are often reminded that justice delayed is justice denied. It does not make any sense for a judgment to be delivered today and the same proceedings leading to the decision of the court made available months later. Yet there are typists in the judiciary who can hardly type their own names! How they were recruited is not easy to comprehend. This cadre of employees in the judiciary is important for the carrying out of the mission and vision of the Department and thus requires to be strengthened.

Police prosecutors

Police prosecutors are part of the Police Force of the URT. Under the Constitution of the United Republic of Tanzania, the Police is a *Union Matter* and falls under the docket of the Minister of Home Affairs.[271]

The above notwithstanding, police prosecutors form an important part of the administration of justice in Zanzibar.

271 On the items which are now listed as Union Matters see the First schedule of the Constitution of the United Republic of Tanzania, 1977, deriving from Article 4 of the Constitution.

Apart from investigating alleged offences, arresting accused persons and charging them, the police are also responsible for handling the prosecution of the criminal cases they refer to courts of law. Therefore, successful administration of justice can only be achieved with the assistance of the Police Force. Accordingly, any envisaged improvement in the work of the judiciary cannot ignore the presence of the prosecutors. Police prosecutors will still be required for quite some time until the office of the DPP is fully operational and prosecution has been civilianised completely.

Wakyls

Wakyls or *Vakils* are a typical Zanzibari judicial category. The Legal Practitioners Decree, 1941[272] defines a Vakil as "a person admitted to practice as such and licensed to practice as such under Rule 6 of the Legal Practitioners Rules, 1946.[273] Rule 6 provides:

> The chief justice of Her Britannic Majesty's Court for Zanzibar may in his discretion admit other person of good character and sufficient ability to practice before all or any of the courts hereinbefore referred to. Such persons shall be known as vakils and shall on signing the Roll provided for the purpose and on payment of the prescribed fee be licensed to practice only during the pleasure of the chief justice and in such courts as may be specified in the licence.

According to Rule 7, Vakils take precedence after advocates and as between themselves in accordance with their seniority or any special directions which may be given by the judge.

Therefore, chief justice of Zanzibar has been admitting Wakyls to practice in the courts of Zanzibar. This privilege is mainly

272 Chapter 28 of the Laws of Zanzibar.
273 Government Notice No. 239 of 1946.

given to retired court clerks or magistrates to represent clients in court and generally handle other matters of a judicial nature. According to our research in the office of the chief justice of Zanzibar, the latest person to be admitted as a Wakyl is Mr. Hassan Bakari Hassan, who was enrolled under Rule 6 of the Legal Practitioners Rules and Chapter 28 of the Laws of Zanzibar and allowed to practice in all Kadhis and Primary Courts. He was admitted on 19 September 2003.

In our opinion, there is a major difference between a Wakyl and a paralegal. While neither of them are fully qualified lawyers (let alone advocates), they have very distinct missions in the courts of law. The paralegal is mainly a representative of a community aiming to assist the poor and disadvantaged in his community. The Wakyl on the other hand is a businessperson in the legal sector. While a case could be made for partial appearance of paralegals in the courts of law, we see no justification whatsoever (moral or legal) to allow a Wakyl to appear before the courts of law.

Historically, one could have justified allowing Wakyls to appear in courts because of a shortage of qualified advocates in Zanzibar. That is no longer the case since there is a substantial number of lawyers now in Zanzibar (maybe still not enough). In order to ensure delivery of justice, it is just fair that those qualified in law should be allowed to appear in court. As recommended elsewhere, the duty of granting admission into the Bar should be placed on a Council of Legal Education and not at the discretion of the chief justice alone. Happily, the chief justice of Zanzibar supports this idea.

Judicial Service Commission

> I would also like to touch on the issue of transfers of magistrates. What I can simply say is that experience has shown that in the judiciary, things work better when magistrates of Pemba origin are posted to the island of Unguja and those originating from Unguja island are posted to Pemba. My Department has conducted and finalised the exercise and since then there has been no complaints from either the leaders or the general public ... The vast majority of those involved in this swap have come out in the open to commend the exercise since they feel freer to work away from people whom they are acquainted with.
>
> Hon. Mr. Justice Hamid Mahmoud Hamid[274]

Establishment and Powers

The JSC is established under Part Five of Chapter Six of the Constitution of Zanzibar of 1984.[275] The Commission is composed of the chief justice of Zanzibar, as the chairman; one judge of the High Court; a retired judge of the High Court or the Court of Appeal; one advocate recommended by the ZLS. All these are appointed by the president of Zanzibar. They are joined by the chairman of the Civil Service Commission; the AG; the Chief Kadhi; and another person the president deems fit to serve in the Commission.[276]

No serving member of the Zanzibar House of Representatives can be appointed to the JSC or any other person barred from such appointment under any law enacted by the House of

274 This statement, which was made by his Lordship the chief justice while closing a magistrates' training session at Bwawani Hotel in Zanzibar on 12 November 1999, is quoted in Fimbo, G.M. and Doherty, T 2000 Review of the Zanzibar Judicial System, A Consultancy Report Submitted to the Inter-Party Committee (IPC). 4 February 2000.

275 Articles 102 to 103.

276 Article 102 (1).

Representatives.[277] Under the Constitution, members of the JSC enjoy both security of tenure and independence. According to Article 102 (3) a serving member of the JSC cannot be removed from office except for bad behaviour, or failure to perform his or her duties due to ill health which has been certified by at least three medical practitioners. In addition, the Commissioners are not supposed to receive and follow directions from any person in the course of their work.[278]

Traditionally, the work of the JSC was to deal with the appointment as well as discipline of various functionaries of the judiciary. The offices whose appointment fall under the purview of the Commission include the office of the registrar and deputy registrar of the High Court; the office of regional and district magistrates; office of any subordinate court with criminal jurisdiction; the office of the Kadhi; and any other office in the judiciary as shall be directed by the House of Representatives.[279]

The JSC has powers to recommend the levels of salaries, allowances and other benefits, including pensions for judges and magistrates.[280] Though appointed by the JSC, magistrates of all levels can be assigned duties, including transfers by the chief justice. Those dissatisfied by the decisions of the chief justice can appeal to the JSC.[281] This is a rather awkward situation because the chairman of the JSC is the same chief justice.

Fortification of the Judicial Service Commission in 2002

In 2002, the Constitution of Zanzibar was amended to fortify the position of the JSC. According to the new Article 102A,

277 Article 102 (2).
278 Article 102 (4).
279 Article 103 (3).
280 Article 103 (4).
281 As per Article 103 (5) of the Constitution of Zanzibar of 1984.

the JSC has powers to advise the president on the appointment of the chief justice and to make recommendations to the president on the appointment of High Court judges. Also, a member of the ZLS has been added to the composition of the JSC. In the course of the discussion with the chief justice, he was upset at the suggestion that it was a violation of the rules of natural justice for him to chair a Commission which is supposed to check his performance as the chief executive of the judiciary. It was also indicated to the chief justice that it is awkward to a person challenging a transfer or any disciplinary measure meted out by the chief justice to appeal to the JSC, which the same authority chairs. However, the chief justice was adamant that the judiciary was his turf and he should be given a free hand to ensure that it is running smoothly. It is our considered view that the chief justice should be a member of the JSC but not its chairman.[282] Another senior lawyer in Zanzibar should head the JSC.

Attorney-General's Chambers

> ... recent events concerning political turbulence in Zanzibar followed by peaceful change in political leadership indicate that this nation of ours is maturing quickly, and is in a position to withstand and resolve its constitutional shocks constructively and peacefully ...
>
> Hon. Mr. Justice Francis Lucas Nyalali[283]

Attorney-General as Principal Advisor to Government

The AG's Chambers of Zanzibar is a creature of the Zanzibar Constitution. The AG as the principal legal advisor to the

282 The same could be said for the Judicial Service Commission (JSC) of the United Republic of Tanzania which, under Article 112 (1), is supposed to be chaired by the chief justice of Tanzania.

283 For this statement by the late former chief justice of the URT see Widner, J.A 2001 Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa. New York and London: W.W. Norton. p. 174.

Revolutionary Government of Zanzibar has a pivotal role to play in all crucial functions of the Government of Zanzibar.[284] These include the introduction of a new democratic constitutional order, the administration of justice, the creation of an appropriate legal framework for development and major economic reforms, civil litigation and the drafting of legislation to facilitate the machinery of good governance and the democratisation process.

The AG of Zanzibar is appointed by the President of Zanzibar and, under the Constitution of Zanzibar, enjoys a unique position of among other things sitting in all crucial organs of the government. He is thus an *ex-officio* member of cabinet and of the Zanzibar House of Representatives. These positions make the incumbent a politician cum technocrat.

Interestingly, the current AG of Zanzibar is also a member of the National Executive Committee (NEC) of the ruling party, *Chama Cha Mapinduzi*, and this creates mistrust amongst political camps, questions the AG's capability to execute the functions of his office fairly and provide balanced advice to the government of the day. It is easy to relate the work of the incumbent with political motives even where he has acted in good faith.

The introduction of the 8th Constitutional Amendment to the Constitution of Zanzibar of 1984, shifted the duty of criminal prosecution from direct supervision by the AG to the newly created office of the DPP which is relatively independent of the AG's Office. These Amendments are in line with a liberal, transparent and democratic system. Despite the introduction of the 8th Constitutional Amendment, however, the AG's Chambers remain a crucial agent in the drafting of legislation to facilitate the operation of the machinery of government, as

284 See Articles 55 and 56 of the Constitution of Zanzibar of 1984.

well as in structuring and negotiation of strategic development projects. It is necessary therefore for the government to facilitate the office with the resources necessary to make it fully operational.

Shortage of Lawyers

One of the major problems confronting the AG's Chambers is the acute shortage of trained manpower. The department has nine attorneys, including the AG and his deputy. There is also a high demand for lawyers from the department by other government ministries and departments. This shortage necessitates that each lawyer becomes "a jack of all trades" in the sector without hope of specialisation in areas of interest or need. A critical evaluation of the available expertise of the department's personnel discloses serious gaps between role of the AG's Chambers and ability of the existing staff, including the handling or structuring negotiations for international business transactions, legal aspects of privatisation and introduction of a market economy, commercial, constitutional law and other specialised fields of law. The department has few lawyers specialised in legal drafting, human rights, and international business law. Out of the nine attorneys, only two have had an opportunity to attend specialised courses in legislative drafting and/or human rights. Only five attorneys have experience of over five years.

A Serious Recruitment Drive

The study was informed by the AG of efforts to recruit and train the officers in his department. These efforts have been affected by lack of financial resources. A few officers have managed to secure training opportunities on their own initiative. Special effort should be made to recruit competent lawyers to build the capacity of the personnel and develop expertise to meet challenges in civil litigation as critical strategies for upgrading

the legal sector in general and the AG's office in particular. The AG's Office, in order to function and execute its constitutional duties effectively and efficiently, needs a substantial number of state attorneys and supporting staff.

The Office of the Director of Public Prosecutions (DPP)

> ... it is doubtful whether a judge in Zanzibar could decide a case before him exclusively on the basis of merit without fear or favour or any other extraneous conditions which could motivate his decision. Recent events have shown that a judge may be given another position and thereby effectively removing him from the bench... Thus the judiciary seems to be placed under the authority of other organs in which case the administration of the law has no longer an impartiality which is required and which is essential for the maintenance of justice in Zanzibar.
>
> Hon. Abubakar Khamis Bakary[285]

Establishment of the Office of the DPP

One of the crucial areas of the administration of justice is the prosecution of alleged criminals. Indeed, a country's system of prosecution is a critical aspect of the rule of law: a major element of good governance. Prior to the 8th Amendment to the Constitution of Zanzibar, prosecution was under the province of the Attorney General as there was no independent office of the DPP in Zanzibar. The 8th Constitutional Amendment established an independent public prosecutions department independent of the AG with a constitutional guarantee of independence and tenure of office.

285 See Bakary, A.K. 195 The 1984 Zanzibar Constitution. *The African Review*, Volume 22 No. 1 & 2, 1995. p. 84 at pp. 111 - 112.

The DPP's office is vested with powers to institute criminal proceedings, take over and continue criminal proceedings instituted by it or any other authorities. The office has the objective of civilianisation of prosecution, dissemination of information related to administration of criminal justice and provides for independent prosecution services which adhere to and uphold the constitution and basic norms of human rights. In order to achieve these sacred and noble duties human resources are an important catalyst.

The office of DPP, being a newly established office with its first director appointed in July 2003, suffers from human, physical and fiscal resource constraints. With the exception of the incumbent DPP and a senior state attorney, the rest of the lawyers in the DPP's office have no experience. The office has no supporting staff but relies on the few experienced attorneys of the AG's Chambers. Recently the DPP's office recruited a limited number of lawyers who had graduated from institutions of higher learning in the academic year 2003.[286] The prosecution service has been crippled by a number of factors, including lack of skills, the poor legal and judicial system, chronic underfunding and lack of comprehensive, systematic and appropriate plans to improve the same.

Areas of Concentration

The office of the DPP needs to develop experience and expertise in different areas of law, including prosecution of white collar crimes, in particular fraud, corruption, money laundering and other financial crimes; E-crime; drug trafficking; forensic examination; anti-terrorism; general legal and prosecution skills including juvenile cases; and skilled supporting staff in

286 University of Dar-es-Salaam, Tumaini University in Iringa and Zanzibar University at Tunguu.

the field of information technology, finance and secretarial services.

It is encouraging to note that there is a comprehensive training programme in place; the problem ahead is the funding of the programme. Although the journey of the DPP's office started only recently, there are all indications that more progress will be achieved. It is our ardent hope that, in a couple of years, many more milestones will have been reached regarding reform and bringing about a completely civilianised system of prosecution and dissemination of information on the criminal justice system.

The Law Review Commission

> The neglect of legal sector in Zanzibar is thrown into sharpest relief in the area of law reform. Although a machinery for law reform – the Law Review Commission – has been set up and the case for an active programme of reviewing and reforming the law is compelling, nothing appears to have been done towards achieving the minimum step of making the machinery operational.
>
> FILMUP Report
> January 1996[287]

Law Reform Commission as Legal Siberia

Most of the lawyers interviewed in the course of this work view the Law Review Commission of Zanzibar (LRCZ) as Zanzibar's "Legal Siberia". This is where one is sent, one's seniority in the profession notwithstanding, once one gets in the bad books of the powers that be on the Isles. You get an empty desk and chair and newspapers to read but no

287 See United Republic of Tanzania (The Legal Task Force) 1996 Financial and Legal Management Upgrading Project (FILMUP): Legal Sector Report. Dar-es-Salaam. January. p. 184.

work to do. Yet, at the end to the month you draw a salary without causing mischief to the Revolutionary Government of Zanzibar.

However, in our view, the Law Review Commission is more than a banishing place for "mischievous" lawyers irritating the system. Given the right people to run it, the necessary political climate and facilitated financially, the LRCZ can be a serious vehicle for effecting legal and social economic transformation on the Isles.

The LRCZ was established by the Law Review Commission of Zanzibar Act, 1986.[288] According to Section 4 of the Act establishing it, the Law Review Commission of Zanzibar has the following functions:

> 1. Review of any law or branch of the law to propose measures necessary for:
>
> (a) bringing that law or branch of the law into accord with current circumstances of Zanzibar,
>
> (b) eliminate anomalies or other defects in law, repealing absolute or unnecessary laws and reducing the number of separate enactments on the same subject matter and
>
> (c) The proper modification and simplification of that law or branch of law.
>
> 1. Considering and advising or making proposal for the adoption of new or more effective methods for the administration of the law and the dispensation of justice;
>
> 2. Undertaking comprehensive consolidation and revision of the laws of Zanzibar;

288 Act No. 16 of 1986.

3. Provision of assistance to Government departments in undertaking the examination of any particular branch of the law for the purpose of reforming and;
4. In addition to other incidental matters, for the above purposes, facilitating meetings, seminars, workshops, public lectures and related activities the aims of which are to facilitate public discussion and participating in matters and activities relating to law reforms in Zanzibar.

Although the chairman and members of the LRCZ were appointed, the Commission was not provided with the necessary human and financial resources to function as envisaged under the Act. It was established to create employment and later used as a dumping ground. With the introduction of multiparty democracy in Zanzibar, it was found that there is a need to strengthen the legal system of Zanzibar in order to improve the base structure that will support this system of Government.

After the first multiparty general election, the LRCZ was reconstituted in May 1998 by the appointment to it by the president of Zanzibar of three Nigerians lawyers. The Nigerian lawyers left the country after the 2000 general elections without leaving any discernible mark on the operations of the Commission.

Law Reform and Good Governance

The LRCZ is an important tool for improving transparency and good governance and enhancing economic activities. In the area of multiparty democracy and good governance, the government has a responsibility to ensure that accurate and up-to-date versions of statutes in force are available to the community. Over the last four decades, this responsibility

has been neglected, as the current statute books show that legislation was last revised, consolidated and printed in 1959. Recent efforts to print an up-to-date version of the statute book have not come to fruition.

Economic liberation efforts and decentralisation policy introduced to Zanzibar left the government with the sole role of regulator of the legal framework. The role of law in enhancing economic progress should be to provide an operating environment which ensures economic freedom, protection and promotion of fair competition. Law should also provide for the orderly settlement of disputes arising from economic undertakings and other elements and an environment conducive to investment.

The productivity of the LRCZ has been undermined by the total absence of membership, acute shortage of supporting staff and an absence of budgetary allocation. Although a new chairman, Hon. Mr. Justice Wolfgang Dourado, has been appointed, neither commissioners nor support staff were appointed. This vital institution for good governance suffers from a serious shortage of staff, researchers, clerks and other supporting staff. Urgent efforts should be made to revive and make the LRCZ viable and operational.

The Office of the Registrar General

> An independent judiciary and a neutral police force are alien systems in Zanzibar since the 1964 revolution. Most of State institutions, including the civil service, have played an obstructive role in the early years of the transition [to pluralism] ...in Zanzibar since the inception of the multiparty system in 1992, the judiciary and the police force have been extensively used by the regime to undermine the legal opposition.
>
> Dr. Mohamed Ali Bakari[289]

289 See Bakari, M.A. 2001 The Democratisation Process in Zanzibar: A Retarded Transition,

Establishment and Functions

The Office of the Registrar-General, which is situated at Mambo Msiige in Stone Town, is one of the oldest government offices in Zanzibar. Its functions include the registration of births, deaths, NGOs and companies. It used to be called the Administrator-General's office up to 1984, when it changed to the Office of the Registrar General.

Among other things, the Registrar General's Office oversees the following:

(a) Registration of documents i.e. mortgages for bank loans, inheritances and wills for non-Muslims, sale agreements and Wakf deeds, gifts and leases and dis-mortgage.

(b) Registration of intellectual property rights (IPRs), patents, industrial designs, copyrights and trademarks.

(c) Administration of estates of non-Muslim deceased persons.

(d) Registration of marriages and divorces.

(e) Registration of business names.

(f) Registration of public enterprises, which is shifted to the Treasury.

(g) Registration of NGOs.

(h) Registration of births and deaths.

Personnel

The Office of the Registrar-General has 53 workers, the majority of whom are support staff who use experience instead

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Hamburg: Institute of African Affairs. p. 306.

of knowledge. Current registry personnel do not posses the qualifications necessary to manage the document management systems envisaged in this sub-study. It has a limited number of skilled personnel, with heads of departments not qualified and equipped to manage their role. It is very difficult for the office to provide individual rights due to lack of legal personnel who are supposed to do the tasks.

Scheme of Service

The office of the Registrar- General has already prepared a scheme of service, but it need to be reviewed to show clearly how a person is promoted from a junior to a senior position. Further, the office indicated a need for training for its personnel and also the need for office space for its other staff other than the registrars.

Training of Personnel

The Office of the Registrar-General does not have a training policy and funding for training of its staff is a major problem. Currently about eight members of staff are attending various courses at institutions in and outside Zanzibar. The importance of the legal profession is already realised by the Office. Seven of its staff are doing law courses through private sponsorship.

Congestion of Functions

The Office of the Registrar-General needs further review and streamlining because it still deals with too many functions without adequate personnel to handle it. It has no lawyers in units dealing with legal matters. The Department of Registration of Companies is a one-man office.

Zanzibar Law Society (ZLS)

> [Firstly] I wish to restate the professional requirement that you are all officers of the court and your main duty is to assist the court in the administration of justice. Many

> things flow from this fundamental professional principle ... Your duty is to see that justice is administered fairly and fearlessly in this country: that whenever you are instructed to defend a person, say on a criminal charge, your duty is first to the court and then to the accused person. When you believe that your client is innocent you must employ all the energy at your disposal to see that he is not convicted for an offence which he has not committed ... More importantly, where your client confesses to you that he has committed the offence in question but instructs you to conduct his defence as if he has not committed the offence, your clear duty is to advise him to plead guilty. You may after his plea of guilt produce before the court such factors surrounding the commission of the offence, including mitigating circumstances, as will enable the court to award a suitable sentence. If your client insists on pleading not guilty your duty is to withdraw from the defence.
>
> Hon. Mark D. Bomani
> Former Attorney-General of Tanzania[290]

Importance of an Independent Bar

The legal profession is crucial in any society which aims to administer the rule of law. The viability of Zanzibar's machinery of justice depends on the commitment of the legal profession to practising law. The legal profession in Zanzibar was historically affected by the 1964 Revolution, when the existing constitutional order was destroyed completely by the revolutionary regime, which abolished a well-established legal system, managed by well-trained lawyers and jurists and replaced it by a *people's courts system* which excluded lawyers, judges and other legally-trained personnel. During the revolutionary era of 1964-1984, no resources were allocated to

290 In a letter to Tanganyika Law Society in 1975.

improve the legal sector in Zanzibar. This led to the limited number of members of the legal profession at present.

Until recently, Zanzibar had been without a Bar Association for a long time. The Zanzibar Law Society is still weak and was for a long time been considered merely a "one-man show" by many of its members.[291] It did not provide its members with what they expected and failed to follow its own constitution properly. With the election of a new team of leaders, there has been a sudden improvement and one feels that there is a Society – with a lot of hope for the Isles.[292]

Few private advocates practice law in Zanzibar. The ones that there are, do not specialise and deal with all aspects of the law. This kind of practice undermines the ability of the lawyers to give maximum attention to the legal matters of their clients, particularly in the Isles where access to the most basic source of information is limited.

Admission into the Zanzibar Bar

Admission to the Roll of Advocates in Zanzibar is governed by the Advocates Ordinance. A person who has satisfied the statutory requirements must also petition the chief justice, as the keeper of the Roll. The chief justice has exclusive discretionary powers to admit an applicant to the Roll of Advocates. It is a matter of concern that such enormous powers have been vested in one person. Good governance dictates the diffusion of such power among several members of a committee, council or board.

291 This was because of the long tenure of the former president of ZLS, Advocate Nassoro Khamis Mohamed.

292 For instance, following the killing of a student during the fracas relating to registration of voters in the permanent book of voter registration, ZLS issued a strong statement signed by its new president Alhaj Salum Toufiq. See Mwambene, A. 2004 Law Body Lashes at Killing of Schoolboy. *Daily News* (Tanzania), 4 December 2004. p. 4; and ZLS Condemns Boy's Killing, *The Guardian* (Tanzania), 4 December 2004. p. 3.

In the course of a discussion with his Lordship, the chief justice of Zanzibar, he conceded that it was high time the powers of admitting people into legal practice in Zanzibar were devolved to a larger institution instead of being left to him alone. He thus supported the idea of establishing a Council for Legal Education for Zanzibar. Dialogue should begin with the MoJCA of the United Republic of Tanzania, to allow Zanzibaris graduating in law from institutions within Zanzibar and elsewhere to join the envisaged Law School, once it is operational, to complement the practical knowledge acquired during the current system of internship.[293]

Legal Manpower - Zanzibar University as a Source

> We know that you have choices for continuing your education, and we are pleased that you are considering Zanzibar University. After reading about our specific programmes and faculty, we hope you will agree that Zanzibar University is a special place and you will decide to join us.
>
> Prof. Shamseldin Z. Abdin
> Vice Chancellor Zanzibar University[294]

Establishment of the University

Zanzibar University is a private institution of higher learning situated at Tunguu, about 20 kilometres south of Zanzibar town on the route to Makunduchi. It was established in 1998 and according to the Tanzania Commission for Universities this University has been granted a Certificate of Full

293 The legislation providing for the establishment of a Law School has already been enacted by parliament. See the Law School of Tanzania Act, 2007 (Act No. 18 of 2007).

294 On this statement made by the former vice-chancellor of the University of Zanzibar in October 2000, see Zanzibar University Prospectus 2000/2001, p. 1.

Registration, which is one step below full accreditation. Since 1999, Zanzibar University has had a Faculty of Law and Sharia and the first graduation of the University took place on 17 December 2003. The main question is whether the Faculty of Law of the Zanzibar University, being the only institution of higher learning teaching law on the Isles, can be relied upon as a reliable source of manpower for the starved legal sector. Many of those interviewed, including some of the senior lawyers teaching part-time at the University, expressed serious doubt.

Admission of Unqualified Students

Two reasons are given for this state of affairs. Zanzibar University, desperate to attract students, has not been vigorous enough in the selection process of applicants. Some students, who do even qualify for entry to a normal technical college, find it easy to be admitted to Zanzibar University. It is common knowledge that some well-connected students are admitted without their capability to pursue higher education successfully being questioned. It is therefore not surprising that, during the Internship Programme, which is done in the final year of studies when students are allocated to institutions dealing with law in Zanzibar, some can hardly open their mouths to explain anything.[295]

Dependency on Part-time Staff

The University in general and the Faculty of Law and Sharia in particular depend to a very large extent on part-time staff. Currently, the Faculty has three full-time members of staff, including the vice chancellor of the University, who has to shoulder heavy administrative responsibilities. In other

295 This very sad situation is clearly reflected in two reports prepared by supervisors during the Internship Programme in 2003, which are available for consultation.

words, the University has failed to attract high quality world-class academics to Zanzibar to teach law. While Zanzibar is a very attractive place for legal research because of its unique blending of Islamic law and Common Law traditions, which could have attracted top researchers, the pay package offered by the University is not attractive. The University may have to address the question of the emoluments of its academics. Otherwise, it will continue depending on part-timers and thus failing to establish a core teaching cadre which can move the University to greater achievements regarding development and dissemination of knowledge. If Zanzibar University does not take up the challenge seriously and is not assisted to address these concerns, then it will be wishful thinking to depend on it as a source of manpower for the ever-growing legal sector in Zanzibar.

In Lieu of a Legal Sector Reform Programme

> Despite the restoration of the court system by legislation, the legal system has not been accorded high priority in terms of allocation of resources, conditions of service and provision of training facilities. Neglect by the Zanzibar authorities has not been offset by the provision of resources from international sources ... the relegation of the legal system to low priority has adversely affected all institutions of the legal sector.
>
> FILMUP Report
> January, 1996[296]

Abandoned but not Giving Up

Though abandoned by the rest of humanity, Zanzibar did not give up. It had to rely entirely on the small cake available

296 See United Republic of Tanzania [The Legal Task Force] 1996 Financial and Legal Management Upgrading Project (FILMUP): Legal Sector Report. Dar-es-Salaam. January. p. 181.

and distribute it equitably and sensibly to all sectors of the economy. This has not been easy, given the fact that the prices of its main cash crop, cloves, has fallen on the world market due to stiff competition from the Far East, a fact that has denied Zanzibar its long-enjoyed monopoly.

Developing its Own Legal Sector Upgrading Strategy

Given the backwardness of its legal sector, Zanzibar has the mammoth task of developing its own strategy for the upgrading the legal sector. It is of paramount importance to ensure that the legal sector is capable of delivering its services effectively and professionally, in order to win the confidence of all stakeholders. One of the solutions to the many-faceted problem of the legal sector can be addressed by effective short and long-term training and specialisation in relevant legal fields for all relevant departments.

It is important that the leaders in the main legal sector institutions are serious and professional in managing their institutions. For historical and political reasons, there has been perpetual interference in their work, thereby hampering their performance. There used to be enthusiasm and keen interest in succeeding to do a good job. Availed with the necessary facilities and financial resources, fast and fundamental changes can be effected in the legal sector. This will not only improve the rule of law and constitutionalism in the Isles but will also cement the ongoing democratic process, prompting a multiplier effect on the socio-economic prosperity of the Isles.

Taking Advantage of a Helping Hand

In the recent past some institutions have offered to assist Zanzibar in its quest to improve the legal sector. These are the UNDP and the Commonwealth. The UNDP has

not only sponsored a study of the legal sector in Zanzibar but is also funding most of the activities for improving the sector. Following the completion of the legal sector study, the Commonwealth, which is not new to Zanzibar, is also providing some assistance.

The UNDP has funded the following activities:

(a) Training for judges, magistrates, clerks and Kadhis in human rights and legal research by the Zanzibar Legal Services Centre and the Institute of Judicial Administration in Lushoto.

(a) Training of young lawyers from the Office of the Attorney–General in litigation and advocacy skills by the International Law Institute (ILI).

(b) Training of personnel in the Office of the DPP on prosecution of white-collar crime and terrorism. This training has been conducted by the ILI.

(c) Undertaking field visits: The DPP's Office has visited Uganda to learn about the programme of "civilianisation" of prosecutions. A *Prosecution Manual* is in preparation.

(d) Training of the personnel of the Office of the Registrar-General on the development of a data base for births, deaths and marriages in Zanzibar as well as funding awareness campaigns on the need to register births, deaths and marriages and other relevant civil matters.

UNDP has also provided office equipment to the judiciary, AG's Chambers, Office of the Mufti, Office of the Registrar-General and the Office of the DPP. The Commonwealth, on its part, has sponsored lawyers to attend a course on terrorism held in Nairobi, Kenya; and has also sponsored a judge from

England to train judges, magistrates, clerks and advocates on judicial work, corruption and ethics.

The Need for Proper Legal Reform in Zanzibar

The type of assistance which the legal sector has been receiving is a good starting point for legal sector reform but it cannot replace wide ranging measures to address reform of the entire sector over the long term. Firstly, the assistance is too haphazard and uncoordinated so that one part of the legal sector does not actually know what the other is doing. Much depends on the ability of the leadership of a particular institution within the legal sector to attract assistance. The fact that some multilateral donors are wiling assist offers an opportunity which should be utilised. A senior official of the government should be appointed to coordinate the process and to ensure that a proper legal sector reform programme is carried out on the Isles!

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