# The Law Society of Kenya
## A House Divided?

By W

## What is the Issue?

The uproar crowning the announcement of the election of Paul K. Muite as the chairman of the Law Society of Kenya for 1991-92 serves as an important lesson - political decay infects everything it touches. For some time, fissures have been apparent in the LSK body; but just how deep they were and how intense the acrimonious exchange could be has just been revealed. The ideological camps divide along two lines. One group argues that the LSK is an apolitical body and that its mandate is 'purely' legal, the other side says that the mandate is wider and includes some matters that its rivals term "political." So far, it remains unclear what constitutes a political agenda.

Ostensibly the controversy arises from the interpretation (or misinterpretation) of Section 4 of the Law Society of Kenya Act - especially subsection (c) and (e).

Subsection (c) provides that one of the LSK's objectives is "to assist the government and the courts in all matters affecting legislation and the administration and practice of law in Kenya." Under (c) the LSK's other objective is "to protect and assist the public in Kenya in all matters, touching, ancillary or incidental to the law"

Reasonable people may ask how the meaning of these subsections can be disputed. Yet to define the quarrel simmering in the Law Society's ranks in terms of Section 4's meaning is to miss the point. The wrangle is a microcosm of the wider political crisis. The real issue concerns the role of an independent professional body in situations of political decline. The downward spiral of economic and political decay that one can trace in Kenya's institutional life reveals certain features that help unravel the tangle in which the LSK finds itself.. Some of these features include: an inefficient public service bureaucracy straining under the weight of graft, corruption and nepotism; frequent transgression of legal and constitutional restraints on power, and the withering of instruments of public accountability. But although the picture seems grim, institutional reform is possible. The quandary is that the politicians and bureaucrats who should reform the system stand to lose the most.

An independent professional body which objects to current government policies can serve an important correctional role. It is at this level that the LSK factions come to duel. One group thinks that to stop institutional decay, *fundamental* reforms are necessary, now. To call for institutional reform threatens the job security of politicians and bureaucrats. And any call for institutional reform *is* a political statement. The second group of lawyers thinks that the LSK should not call for reforms, saying that the politicians must be left to address the issue at their own bidding.

The dispute has little or nothing to do with the interpretation of Section 4 of the LSK Act. For example:

- calling for the repeal of the Preservation of Public Security Act is political (because it leaves the public officials with no administrative instrument to contain powerful dissenters).
- calling for the repeal of the Chief's Authority Act is apolitical.

Each act has roots in colonial Kenya.

The wrangle may have yet another side. The existence of many regulatory mechanisms and numerous licensing authorities manned or supervised by the same public officials whose administrative inefficiency is in question often determines a man's fortune. A lawyer's economic success could depend on what side he is interpreted to be on.

Thus the unfolding saga of the Law Society of Kenya. This is one interpretation of the organisation's hidden agenda: unstated but evident from the acrimonious outpourings of the last few weeks

## The Annual General Meeting - "The tip of the iceberg"

Those that nursed the gloomy hope that the fractured LSK would come out of the AGM kiln heated and strengthened for the future lost faith 30 minutes after the meeting started. That the "losers" of the previous year were the victors this time round only compounded the matter. From the word 'go' mischief was afoot.

*Paul Muite* - LSK New Chairma
"Rule of law Supreme"

group of lawyers argued that since there v
case pending against the Law Society of Ke
the organisation was not competent to delib
on matters relating to the elections. Mun
odd argument seemed to find sympathy witl
Okwach. Then in the chair, Okwach said t
was still unclear whether the immediate for
chairman of the LSK was or was not val
elected. The tacit message was: let us defe
issue until the matter is decisively settled.

The argument has a deceptively attrac
legality, but that did not mask its intention
block the ascendancy to the helm of "rad
lawyers." Githu Muigai felt that events unfo
ing at the meeting hinted at a hidden ager
Fact: Mutula Kilonzo was a member
Ojiambo's council. Fact: At no time during
councils' meeting - including the one that
cided to send the ballot papers for the 19
election (for 1991-92 officials) - did he raise
issue of LSK incompetence to hold an elect
during the pendency of the suit. Fact: Ojambo
tenure had ended and whatever the court c
cided about the validity of his election would n
affect future LSK business.

After Muigai's remarks the campai
flagged. At one time Kilonzo waged a lo
crusade not just so that his point would
conceded but also, in an increasingly hosti
atmosphere, to win some members to his side
It was probably Muigai's remarks that defac
the superficial attractiveness of Kilonzo's arg
ment. Even as the argument raged, Kokony
Mukolongolo sought to salvage the situation. I

***Willy Mutunga - Vice Chairman***
**A scholarly life in the law.**

***Martha Njoka***
**Bold advocacy**

***Japheth Shamalla***
**"From the civil service to a commitment in the law"**

*Charles Nyachae*

issues. Describing the previous year's wrangles as shameful, bad and inconsistent with the regulations governing the LSK, Mukere said: "We should stop being emotional and approach the meeting like learned people. Mr Chairman please try to move the meeting along smoothly."

He said that he came all the way from Western Kenya because he wished to participate in the AGM and to ensure that the discord of the previous year would not be repeated.

At the insistence of Gumba Onywera, one of those elected to the new council, the chairman finally put the matter to vote. Only Mutula Kilonzo and David Mereka voted in favour of postponing the agenda.

Now that the members decisively knew that the results would be announced, a feverish excitement gripped them. What would transpire? Who were the victors?

When the results were ultimately announced a wave of exultation swept through the audience. Later when various members - losers and winners - exchanged pleasantries, homilies and gracefully congratulated the new chairman - Kilonzo stayed apart.

The second contentious issue was a motion by P M Wamae of Nairobi to support an appeal to the government to repeal the notorious Preservation of Public Security Act. Traditional arguments against detention law were made. The gathering took time to hear out former detainees Dr John Khaminwa and Mohammed K Ibrahim.

Mutula expressed the view that though he was opposed to detention without trial (in principle!) the LSK was not the proper forum to address the issue. A G Ringera seemed to be of like mind. He called for a strict separation of law and morality.

The motion was carried by an overwhelming majority. Yet even at this early stage one could clearly identify the battle fronts. The dispute was couched in legal terms but its inner content told a different story. Some said that the new LSK council would be on a permanent collision course with the government and that they would not let the council persist in such a course. They would like to see the LSK's role as genuinely "non-partisan", committed to the interests of the members and no more.

But what if these people themselves *have* a personal agenda?

## A New Agenda for the Future?

Muite's victory had been predicted. But it was not clear what sort of council he would work alongside. A difficult challenge faces the chairman who must preside over a fragmented council. Instability and strife in the law society's executive body would mar its image and destroy its effectiveness. It is from the council that the chairman gets his strength. (His mandate is of course from the members).

Fears that the new council may turn out to be

own story: the members of the legal profes wanted a complete change of guard. Of the council only GBM Kariuki - himself a for chairman of the LSK and articulate opponen the 1986 Constitutional amendment (stripp the Attorney General and the Controller Auditor General of tenurial Security) - was elected.

Willy Mutunga was elected vice-chairm Mutunga is a former University lecturer and taught many of the relatively younger memb of the legal profession. He has distinguish himself in making legal education available the common man and to this end is curren coordinating the Oxford University Press le eduction programme.

Other members of the council include Mar Njoka - without doubt one of Kenya's m courageous advocates. She appears, along wi Japheth Shamalla, a council member, in the o going treason case - *The Republic versus Koi Wamwere and four others*; Charles Ny chae though he rarely conducts litigious matters has come out strongly against unlawful poli searches and seizures (as were experienc those advocates termed controversial as last year), and G. Akhaabi, a well-known Na robi practitioner. The others are Joseph Vital Juma, Ben Mwangi, Robert Gumba Onywe andWainaina Kagwe.

This is without doubt a powerful and determine team. That however is no guarantee of results a lot will depend on strategic planning an nimble gamesmanship. At a time when publi officials get testy when told that they need respect constitutional and legal safeguards spineless LSK is a liability, not just to its bers but to the country too.

A hint to the sort of pressures that the new tean may encounter in the future has already bee given. In his inaugural address Muite made personal appeal to the government to registe Jaramogi Oginga Odinga's National Democratic Party.

The first reaction to this appeal came from Mutula Kilonzo. Considered pro-establis in legal circles (though he prefers to de be himself as conservative), Kilonzo had already shown his strong disapproval of a possible Muite victory even before the results were announce [see separate story]. Moreover, the last year has seen Kilonzo take an increasingly vocal role against those advocates perceived to be anti-establishment. Last year's ICJ meeting at the Safari Park Hotel where he purported to give Gibson Kamau Kuria a dressing down is one example. At the time, he proclaimed his loyalty to the government (a tacit suggestion that the others were not?) and pointed to his KANU shirt. The exchange became unseemly when it turned out that it was not the ideas presented that Mutula was disenchanted with but rather with Kamau Kuria. Kilonzo has said that Muite's call for the registration of NDP was the LSK chairman's personal view and that by making the call Muite abused his office.

In this regard, Kilonzo is not being candid.

:xpress his personal views. During Kilonzo's enure of office he expressed the personal view hat detention l aw be repealed. If the VOK was hen a proper forum to call for the repeal of letention law, is it not self evident that the LSK, icting corporately cannot publicly call for the epeal of the same law.

Outside the legal profession the strongest criti-ism against Muite's remark came from the President himself. Addressing Nandi leaders at he Kapsabet County Council Hall, the Presi-lent said that the introduction of politics into the SK endangered the administration of justice. Ie expressed surprise that several High Court udges attended the dinner. The President also bjected to actions by the lawyers who passed a notion asking for the repeal of the Preservation f Public Security Act (Detention Law).

The Minister for Energy Nicholas Biwott called Muite's appeal treasonous. He said that lawyers ntered politics at their own risk.

The exchange that followed in the public forum nly served to reveal the different thinking haracterising the legal profession. Those that d for the resignation of Muite argued that he dragging them into politics. His supporters that he was expressing a legitimate legal pinion and that without allegations of electoral alpractice the calls for resignation were mis-onceived. The most conspicuous support came om the council itself. In part it said:

> The new council has no wish to be distracted from the purpose for which it was elected which include taking all the necessary steps for the promotion and attainment of the Rule of law, democracy and Human Rights.

Some of the criticism against the new chair-an has tended to deflect the issues. In his own dvice to the Muite group, *Kenya Times* editor--chief Philip Ochieng is of the view that since e LSK has the statutory objective to advise rliament which created the organisation, any marks that question Parliament's authority to t is automatically beyond the society's man-ite. Ochieng then came to the following con-usion

> If the creator (of the LSK) is no longer an ntity to be listened to, then so are all its creation. If Parliament must be dissolved - as the Muites continue to demand(?) - then of course, so must the law Society of Kenya, among other creatures of that house.

king that 'logic' to the end, every organ of le must be dissolved. The conclusion is irre-tible that the result is a Hobbesian state of ture. So it is. But then the argument is isprudentially faulty. First, it confuses the ocedural validity of a statute with its substan-e legitimacy. A statute is *prima facie* valid ce passed by Parliament and given presiden-l assent and finally brought into operation by minister responsible. The substantive legiti-icy of any statute in our country is determined eference to one question - is it constitutional? cond, the argument fails to recognise that ality of law that Herbert Hart in The Concept Law calls persistence. Laws continue to exist g after those that made made them have sed to exist. If the legitimacy of a law ended on the continued existence of its *de* to exist. Since they do, can we say that - first, we are a colony (since these laws were made by the English Parliament), or second all such regula-tions are invalid and of no effect at all? That is not the case.

Moreover Parliament's five-year life expectancy (the President can dissolve it any time) is not what makes laws legitimate. That is why when the President dissolves Parliament, nobody imagines that he has dissolved "every organ of rule" (which includes the presidency). The proper mandate of the LSK does not come from its relationship with Parliament.. The mandate comes from the LSK Act and the Constitution of Kenya. Parliament also must obey the Constitution.

What sort of agenda will the LSK pursue? The new chairman says that there shall be no compromise on the rule of law. But as experience shows the "rule of law" can mean many things. And a lawyer who gives it as much certainty as A.V. Dicey did often finds an unyielding public power on the other side It is a slippery path.

## The Rainbow Coalition

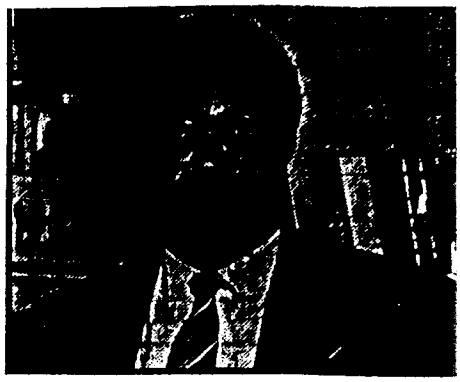
Leading the campaign against the election of Paul Muite as the new LSK chairman is Mutula Kilonzo, a former chairman himself. Even before the election results were announced Mutula had already vowed to fight Muite. He told the *Kenya Times* - "Muite is always a bad loser. But if he is declared the chairman, we will fight him right from day one."

True to form, Kolonzo announced the formation of a "Rainbow Coalition" to get Muite out of the LSK chairmanship soon after the elections were announced. Talking to *The Weekly Review*, he stated that he represented the views of the majority of the lawyers. "Our principle concern is the fact that Muite's political posturing will pit the Law Society against politicians," he said.

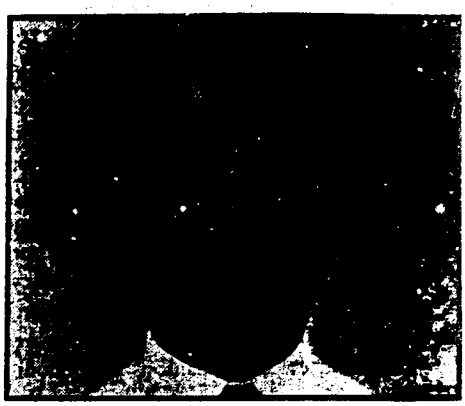
Ostensibly Mutula's quarrel revolves around Muite's remarks at the LSK dinner (which he did not attend). It is clear that the dispute (if there is one) runs deep. He denies that he has a hidden agenda against Muite. Yet this is not the first time that an LSK chairman has caused a political stir with his remarks.

Mutula admits that he called for the repeal of detention laws when he was chairman. But he makes the distinction that he did so in his private capacity. "In my view and as I said at the Saturday meeting, the problem we are facing today is that of whether the LSK is the proper forum for seeking the removal of detention without trial," he said. Mutula is quite correct. The LSK is not the forum for seeking the removal of detention without trial. The proper forum is Parliament. But there is no bar to any group, professional or otherwise, to go public on any issue of interest and to express its preferences. That is why individuals call press conferences. That is why Mutula gave an interview for publication on the matter.. Given the LSK's mandate as provided in Section 4, the LSK can also go public on such issues as are provided for in the law. Choice of forum is a question of expediency and the discretion is on the LSK itself.

Mutula says that Muite is inconsistent and has



***G. Akhaabi***
**Joined the team**



***Joseph Vitalis Juma***
**Mombasa representative**

***G.B.M. Kariuki***
**FormerChairman - championing the rule of law**

*F.W. Kagwe*
**Elected to the Council**

evident that Mutula himself has been consistent. The strength of the anti-Muite coalition is is not clear at the moment. Among those who have been critical of him are David Mereka, A.G. Ringera, Kokonya Mukolongolo and Maxwell Ombogo. Soon after the announcement of this year's election results, Mereka said that "the father of all battles had just begun." His dispute with Muite goes back to March last year when opposing the lawyer's candidature he declared that Muite was not loyal to the government. At that time Mereka said, "There is nothing Muite can do for lawyers that has not been done by the LSK. I cannot foresee him doing anything for the Law Society vis-a-vis the government of Kenya."

On March 14, four Nairobi lawyers Ringera obtained a High Court order rest Muite from presiding over or participa any LSK council meeting and from con the business and affairs or from issuing ments on behalf of the society. The ord granted by Justice Norbury Dugdale.

Up to now, Muite has not publicly respon the order, and it is unclear what the next m the "father of all battles" will be. But perha of the parties involved, as Mutula says, will to be good losers.

## Speech by P. Muite

I thank you all for turning up tonight and for this morning's Annual General Meeting. I especially thank those of you who supported my candidature, and voted for me. I wish also to thank those of you who did not vote for me. I thank you because by exercising your right to vote against me you strengthened democracy. Democracy is not nurtured by unanimous unopposed elections. Democracy is strengthened when important elective positions are periodically subjected to contested elections. We have therefore as lawyers set a good example. Let us hope the country will follow suit. Zambia too has set a good example. We have heard that President Kaunda will be opposed at the next election. This is good news for the continent.

Let us put behind us the controversies of last year. Their relevance is only when history comes to be written. We have enough on the present and future agenda. Time and energies should be expended on these.

We have the Sh. 5,000/- trade license fees. It is a fee too onerous for many of our more recently admitted members.

There is the VAT.

There is the remuneration order, always a couple of years behind.

There is your society's secretariat, badly in need of re-vamping: word processors, mini-computers and a high powered competent secretary are all very urgent matters.

The agenda is long. But the internal agenda must be addressed in the context also of other wider issues. The motion you have passed today on the repeal of the Preservation of Public Security Act (detention laws) is an important milestone.

The Kenya Government must continue to be told by us lawyers that the greatest threat to public security is not us lawyers when we speak out, it is not the clergy when they speak out. It is not Martin Shikuku, Dr. Timothy Njoya, Masinde Muliro, Archbishop Manasea Kuria, Bishop Okullu -- hostile

danger to public security is the Kenya Government itself. It can remove that danger by adhering to the Constitution, in theory and in practice. By faithfully subscribing to the Rule of Law, democracy and respect for fundamental human rights, "threat to public security" will become a thing of the past.

It is the function of your society to be the watchdog against any erosion or violation of these ideals. It would be immoral in my view for your society to compromise on these ideals or trade them in, in return for governmental favours. Principles cannot be compromised.

Under my Chairmanship, your society will endeavour to work with the Government and the Judiciary but not, and I repeat not, at the expense of compromising on issues of principle. The rule of law must reign supreme. Then and only then can there be a shared moral platform between the lawyers and the government. Then and only then can prosperity for us as a profession and a nation be assured. Let us not live in the shackles of the past inhibited by views that speaking out on important public issues is politics. If it is, so be it. It is squarely within the objects of the Law Society as spelt out in the fairly wide language employed in the Law Society of Kenya Act.

We have been here for a long time and I do not wish to bore you with a long speech. Let me appeal once again to those of you who may have fixed ideas on the extent of the mandate of the Law Society, those of you with genuine apprehensions about my chairmanship that I shall endeavour to accommodate minority views. When minority views are unaccommodatable, please accept my assurance that your council will have acted sincerely in the best interests of the members generally and in the best interest of the Kenyan Public.

Let me conclude by calling on the Kenya Government to respect Section 80 of the Kenya Constitution, (freedom of association) and the International Covenant on Civil and Political Rights to which Kenya is a signatory, regarding freedom of association and thus register Jaramogi Ajuma Odinga's National Democratic Party. Section 2A of the Kenya Constitution

KANU. The constitutional consequence of this provision is that any other party cannot constitutionally field candidates for elections or constitutionally take over governmental power. But the primary fi tion of associating in parties is not the fielding of parties or the formation of governments. The primary traditional function of a party is the provision of a forum for exchange of views by individuals and an organisational setup of machinery whereby individuals can persuade others to share their views. So long as a party appreciates its constitutional disability to field candidates for elections or form a government, it would be a breach of Section 80 of the Constitution and a derogation from the International Covenant on Civil and Political Rights to refuse to register such a party. From the statement and manifesto as published in the *Nairobi Law Monthly* Jaramogi Ajuma Odinga appears to fully appreciate the constitutional position. Hon. Shariff Nassir, Hon. Ole Ntimama, Hon. Arthur Magugu, Hon Joseph Kamotho, Hon Elijah Mwangale, Hon Nicholas Biwott will be the first ones to testify that KANU is very strong. What then does the KANU government have to fear in allowing registration of another party whose main object will be confined to orchestrating a campaign for the repeal of section 2A?

I ask you to join me in:

1. Remembering with sympathies Gitobu Imanyara now in remand
2. Asking for the release from detention of Messrs Raila Odinga, Charles Rubia and Kenneth Matiba.
3. Remembering with sympathies the many Kenyans unable to get employment, including university graduates and the many Kenyans with jobs who are unable to make ends meet because of the spiralling cost of living and inflation, and many others whose social and economic situation is in dire need of im-

# Mutula Kilonzo's Statement

***In light of Mr. Muite's statement on Saturday 9/3/91 regarding registration of Mr. Odinga's alleged political party, I call on Mr. Muite to resign his position of chairman of the LSK on the following grounds:***

**1.** The Law Society of Kenya by form, substance and legislation is non-partisan in political affairs. Mr Muite has violated this cardinal principle of the very foundation of the Society.

**2.** If the LSK, under Muite's regime changes, as it clearly appears to have done, from non-partisan to partisan politics the damage it will suffer will be irreparable. There is no reason why Mr Muite should use the LSK to achieve his "chosen course" at the expense of the society, the country and lawyers.

**3.** The LSK was established by an Act of Parliament in 1949 during the peak of colonial administration. The structure then established survived the colonial regime and remains intact. The reason for this is clear; the LSK has avoided partisan politics by avoiding thumping its chest.

**4.** Mr Muite, veryimprudently in my view, is thumping his chest at the political establishment using the status using the status of Chairman of LSK. He could have called for registration of Odinga's party before attaining such status. On 14/2/91 I had coffee with him and several of his supporters when they bragged about the launching of the party. I had never heard of it before. I ask myself; why didn't Muite call for the party's registration between 14/2/91 and 9/3/91? The answer to me is clear, he wanted the additional status of chairman of LSK and its members notin terms of office duty he owes to the country, but for his personal and selfish purposes.

**5.** Lawyers, more so the chairman of LSK, do not achieve much by chest thumping. They are trained otherwise. The result of chest thumping is always stiffening of attitudes. Mr Muite's approach to LSK affairs will only stiffen the attitudes of existing institutions of democracy in Kenya. It will also cause a backlash against the LSK. I do not think the LSK structure will survive such backlash. All lawyers, including

***Mutula Kilonzo***
**Leader of the rainbow coalitio**

Muite will be the losers. The country necessarily lose in the long run, but will the short run.

It is therefore imperative that Mr Muite forthwith and continues big fight for Mr and other political cripples outside t without damaging the essence and struc the LSK for generations to come.

If Muite does not resign I appeal to all of goodwill of this country to form a coalition to remove him and his clique.

# Beyond the Noise

Noise and windbaggery seem endemic in Kenya's political body. Noise to drown reason. Windbaggery to derail the issues. The reaction to Paul Muite's appeal to the government to register Oginga Odinga's National Democratic Party shows that this is so. The habit of short-cutting debate, contemptuously dismissing and abusing those whose ideas we do not like is incompatible with civilised behaviour. We must be courageous enough to let new ideas flourish. But we must be even more courageous to let inappropriate ideas die. Old ideas need cross-fertilisation with new ideas. Conventional wisdom needs to be continually questioned and the dross, every so often must be discarded. To listen only to those that stoke our egos is to imbibe the perverse wisdom of the crab: even as he roasts to death sitting on hot coals he expends his failing energies gathering more embers around himself.

*David Mereka*
**"The Father of all Battles has just begun"**

The short way to deal with critics we do not like (and it is hard to find any that we do) is to ignore them. Yet that short way, even though infinitely more preferable to invective, is too short. And it is not in the long term interests of anyone.

Ideas that we cherish (even worship) and institutions that we respect must be transparent - open to scrutiny and inquiry. To safeguard ideologies from debate is to invalidate them, to render them incapable of competing at the "market-place" of ideas. It is to this arena that Muite's ideas should have been thrown to stand or fall, jostle or squirm and to be sustained or condemned by their own logic.

"The constitutional consequence of section 2A", he said, "is that any other party (except KANU) cannot field candidates for elections or constitutional by take over governmental power"

*But*, he went on, this was no bar to the registration of another party

What are the jurisprudential credentials of his argument? Section 2A of the Constitution reads: "There shall be in Kenya only one political party, The Kenya African National Union." This is not as conclusive as it sounds. Especially when read alongside section 80, which says:

> Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations *(including political parties)* for the protection of his interests.

Muite makes the argument that Section 2A is not a criminalising section. In other words, the section does not make it an offence to form a political party under section 80. And he further says that 2A is not worded in any way that takes away the right guaranteed under Section 80 it is not worded in the following way: *"Notwithstanding the provision sof section 80 of this Constitution* there shall be in Kenya only one political party, the Kenya African National Union." That the legislature did not see it fit to add the italicised words must be significant.

An absurdity is readily seen. If one can form a political party under Section 80 while Section 2A restricts the number to only one (KANU) then the term 'political' in Section 2A must be given a meaning distinct from its customary meaning. This is consistent with known canons of statutory interpretation. Muite sought to resolve the issue thus: that the term "political" in section 2A relates to Kanu's exclusive competence to field candidates for elections and competition for elective public offices.

Is this interpretation consistent with juristic thought? It is easy to show whether it is or not.

Rules of law are not of a na- law as if they all belonged to one category doomed. There are for instance, rules that c fer legal competence. Professor Hart in *Concept of Law* calls them power-conferri rules. They may be shorthanded this way "I *can*....." They include such rules providi that an adult of sound mind *can* (has the pow to enter into a binding and enforceable contra There are some rules of law that are prescripti (criminal statutes are).

The argument that Muite advanced and whi has raised so much heat is this: Section 2A of t Constitution is a power-conferring provision, bestows legal competence on KANU. A diffe ent way of saying the same thing is that t section imposes, not a duty on other parties, b a legal disability - a lack of power. This npl idea is extremely important. Associations, pa ties, unions - political or otherwise.- formed i exercise of the right guaranteed under Sectio 80 *have* legal existence and *must be given lega recognition* (the right is otherwise denied). Th thing is that all such associations lack the sort o legal competence vested in KANU by Sectio 2A.

These are legitimate legal arguments and ought to be treated as such. Those that argue that inviting such discussion is politicising law may wish to consider what students of constitutionalism have always known: behind every constitutional order lurks the spectre of power. The Constitution is the law that sets out the limits and the way that public power should be exercised. Forgive the cynicism, but we must all look forward to the eschatological realisation of that legal utopia that some lawyers so passionately desire in which we shall cre a constitutional order without saying a word about how public power ought to be exercised. ■

The Constitution of Kenya (Act No. 5/1969) says the following in respect of freedom of expression:

> Section 79 (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to communicate ideas and receive information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

So the supreme law of the land says. And it also sets out in section 84 the course to be taken by an aggrieved party when his/her rights are being or threatened to be interfered with relief lies in this very court. First, and here speaking for Mango, J the order to be obeyed did not at any point seek by any way to infringe on the Respondents freedom of expression. This court would not issue such an order since it was not even among the prayers sought from it. In any case, other than considering that a court should not make unconstitutional orders and Mango, J issued none, the Applicants themselves in their plaint paragraph 14, state at follows:

> 14. It is the plaintiff's case whereas the defendants Nos. 1 to 10 are *entitled to hold and express their own individual* political views and participate in national debates and take such positions on political matters whether confrontational, partisan or otherwise as they may choose...

(emphasis added), that it is patently clear that nobody including applicants ever wished or wishes to interfere with respondents' individual right except that as members of LSK Council acting individually and/or jointly from that seat they should not issue combative and confrontational political statements. Such statements, applicants averred were outside the LSK Act and prejudicial to them. On evidence and material placed on that issue alone, orders were given as they are on record. Respondents were never restrained from enjoying their right of expression. Respondents can enjoy that right ie. to make political statements but not from the LSK where some members feel prejudiced by those statements. This cannot be taken as a blanket restraint on Respondents at all - as long as they are still LSK Council members and the suit is pending. In any case even if that very curious and novel idea were to be accepted for once, which it is not, would it be a principle of law that where something akin to unconstitutionality is perceived to feature in a court order, that order ought to be disobeyed? When did that principle find way in law or is it part of change taking place in legal practice? If such state of affairs existed, it is this court's view that prompt steps should be taken in the judicial system to set right disobeying a court order because of he/she perceives it as unconstitutional.

In these proceedings this court is of the considered view that such a state of affairs did not attend the court orders in issue and respondents were in error to disobey them on that ground - a ground that so far does not exist in our system at all.

From the foregoing this court concluded that respondents breached the court orders and even evince an inclination to do so again. These respondents have a desire to do so because they are of the opinion that they are pursuing a course of democracy (see Mutunga's replying affidavit in full). But that was not the issue before this course. This court is thus unable to make a finding in that regard for it is a well known principle in civil pleading, and Respondents are good lawyers who all know it, that a court deals with and rules only on the matters in dispute brought before it, the parties before it and on the evidence and law presented in arguments.

The case law in the area of contempt proceedings is wide. But the fundamental and focal point is one.

In *Hadkinson v. Hadkinson* (1952) CA 285, Romer L.J. said:

> It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction to obey it until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where *the person affected by an order believes it to be irregular or even void.*" (emphasis added).

The same is the law of this country (see Civ. App. NAI 89 of 1991). The court which gave the injunction orders was a competent one. They ought to be obeyed until discharge in spite of respondents *beliefs*. That obligation is uncompromising in any event including (mis) conceived unconstitutionality. Indeed in *Hadkinson's* case a further remark was made by way of a quotation by the learned Lord Justice:

> A party who knows of an order whether null or void, regular or irregular, cannot be permitted to disobey it ... It *would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null* and void - whether it was regular or irregular. That they should come to the court and not take *upon themselves to determine* such a question: that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. *He should apply to court that it might be discharged.* As long as it existed it must not be disobeyed." (emphasis added).

(see *Chuck v Cremer* (1846) Cooper Temp. Cott. 205, 338) Nothing ... awkward position considering, besides, that they are lawyers. In short, they have been found to have disobeyed the injunction imposed on them by this court. They are in contempt (rather defiantly) of court. As officers of this court, it shall punish them for this.

To a self-respecting professional it is enough chastisement if those of one's own kind find one liable for wrong-doing.

In our instant case, the court considered the conduct of the Respondents. Their submissions long or short, irrelevant or relevant were heard alongside those from the other side.

It was apparent at the end of the day that Respondents, in the name of their perceived cause wanted, nay, dared this court to commit them to civil jail. That indeed is what this application prayed for. Suffice it to be remarked that among the long speeches made to this court, apparently intended by the respondents for audience other than the court, respondents expounded on their various political views. Such use of court is not unknown in history or many countries including Kenya. But usually there is a nexus between the cause and the case. The speech-makers want to be considered as or in some pertinent cases they leave court and may go to jail as heroes or martyrs.

In his *Landmarks In the Law*, Lord Denning has some remarks in this regard:

> We look with scorn upon anyone who seeks to 'make a martyr of himself'. He is ready to suffer death or grievous pain in order to gain credit for himself or for doing it. Such a man is not entitled to the credit which he seeks.
>
> A true martyr is one who does not seek credit for himself. He suffers death or grievous pain because of the faith in which he believes. He is called upon to renounce it but refuses to do so: and is punished for his refusal. Those who are of the same faith call him a martyr. Those who are a different faith call him a heretic or misguided.
>
> Martydom does not enhance the credit of the cause for which he dies or suffers pain. Judges should be careful not to pass a sentence so severe as to make the offender a martyr."

When dealing with a contempt matter the court need only focus its attention to the prevention of interference with administration of justice. The course should not be let to degenerate into oppressive and vindictive abuse.

As it was noted in the earlier pages of this ruling a court which has found one liable in disobeying court orders, has several measures to curb that wrong-doing. A jail term is the most severe. In this matter a fine and a further injunction on the Respondents cited herein will be imposed.