

# Moving from the Norm to Practice Towards Ensuring Legal Capacity for Persons with Disabilities in Kenya

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## I. Introduction

Article 12 of the Convention on the Rights of Persons with Disabilities (“the Convention” or “CRPD”) covers the legal capacity of persons with disabilities. This, perhaps, is the most profound article in a human rights instrument full of other insightful articles. States across all global divides including Kenya are just now beginning to appreciate the significance of that article. While Article 12’s affirmations are resounding, the practical approaches for legislating its provisions into national law are far less easy to grasp. This article offers a reflection on the options available to Kenya and indeed other common law jurisdictions, particularly in Africa, as they seek to make Article 12 of the Convention operational. The article explores the possibility of passing an omnibus law on capacity subsequent to which all legislation which undermines the legal capacity of persons with disabilities would be repealed.

## II. Summation of the Convention on the Rights of Persons with Disabilities

Article 1 states the Convention’s purpose as to: “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”.<sup>2</sup> Yet the Convention

“is not primarily about disability – it is about a theory of justice as applied to disability”.<sup>3</sup> The Convention’s approach to the exercise of human rights offers amazing opportunities for persons with disabilities globally. It also provides policy- and law-makers, as well as implementers, with advanced tools for ensuring the rights of persons with disabilities. The Convention is a truly revolutionary human rights instrument. The paradigm shift which it heralds entails three fundamentals:

“[T]he shift away from treating people with disabilities as ‘objects’ to be managed or cared for to honouring and respecting them as ‘subjects’ (...) restoring voice, power and authority to the self over him or herself (...) and (...) respecting this power and authority by forging pathways to independent living and participation.”<sup>4</sup>

In other words, what the Convention does is to affirm that persons with disabilities are human beings with personhood and dignity. It replaces the theories which in the past have been used to engage persons with disabilities: where persons with disabilities in the past were **objectified**, now they are **subjects with human rights**; where before they did not have legal capacity, now they do; where before persons with disabilities

were forced to live in institutions or hidden away from the community, now they have the right to live independently in the community; where before persons with disabilities were educated in segregated settings, now they are educated along with their non-disabled peers in inclusive settings; and, now, persons with disabilities are no longer asexual or infertile – they have the right to retain their fertility, to have intimate relations and bring up a family.

### III. The Concept of Legal Capacity

Prior to 2006 when the CRPD was adopted by the United Nations General Assembly, laws by and large approached people with disabilities assuming that they had no legal capacity. Following adoption of the Convention, laws now are required to be crafted with the basic assumption that persons with disabilities have legal capacity.

Legal capacity is what a human being can do within the framework of the legal system. It allows one to enjoy the right to access the civil and juridical system and the independence to speak on one's own behalf. Legal capacity means a capacity recognised by law which would make a person capable of having rights and obligations. In other words, it makes a person the subject of law. This subject of law enters into social relations which with the backing of law are transformed into legal relations.

Legal capacity is fundamental to human "personhood" and freedom. It protects the dignity of persons as well as their autonomy – their ability to take charge of their own lives and to make their own decisions. These decisions span a broad range including the development of personal relationships, medical treatment, and finance and asset management.

Possession of rights without legal capacity is impossible: being declared incompetent to manage one's personal affairs means that an individual no longer has the legal right either to make any personal decisions or to participate in activities otherwise taken for granted. Depriving someone of legal capacity often also deprives them of the legal right to enter into contracts, instruct a lawyer, to vote or own property, to marry or even to bring up children. If you are deemed legally incapable then your legal "personhood" is stripped away – your destiny is placed in the hands of others: you are dead.

An illustration of legal incapacity relates to women who for many centuries were denied legal capacity to own property and to vote. It is no wonder that Article 15 of the Convention on the Elimination of All Forms of Discrimination Against Women makes the following affirmation:

"2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals. 3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void."<sup>5</sup>

### IV. How the Law Has Construed Incompetence

There are three models on the basis of which law attributes legal incapacity on persons with disabilities.<sup>6</sup>

Under status attribution, the law declares that a person with a particular disability can-

not perform a specified legal task. The law declares that you cannot adopt a child if you have an intellectual disability; or that you cannot drive a car if you are deaf; or that you cannot operate a bank account.

Under functional attribution, the law treats disability as a threshold condition under which a person is incapable if by reason of such disability he is unable to perform a specified function. So you are stripped of legal capacity if you cannot understand the nature of a contract; or if you cannot understand that an act is wrong or contrary to law.

Under outcomes attribution, incompetence is determined on the basis of the quality of decision at which a person with disability arrives. If you decide to discontinue psychiatric treatment, then you are incompetent because that is a bad decision. In other words:

“[W]hile we may not make assumption about the lack of capacity based on one’s status as, say, a person with an intellectual disability, we can certainly make them by inference from bad decisions or a pattern of bad decisions or a flawed process of decision-making.”<sup>7</sup>

## V. Meaning and Essence of Article 12 of the Convention

Article 12 of the Convention has midwived a significant paradigm shift for the way in which persons with disabilities exercise their human rights. Whereas before the assumption was that persons with disabilities did not have legal capacity, the assumption now is that all persons with disabilities have legal capacity and that wherever they may not be able to exercise that capacity effectively they shall be provided with appropriate supports to make their own decisions. In other words,

before the Convention the supposition was the bottle was half empty. Now the assumption is the bottle is half full.

The aim of Article 12 is to ensure that persons with disabilities are “subjects” of the law capable of determining their own destinies and deserving of equal respect, and not “objects” of the law to be managed and cared for by others.<sup>8</sup> They should not be patronised, paternalised or treated like children. It provides as follows:

- “1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own finan-

cial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.”<sup>9</sup>

What are the key elements of the paradigm shift from substituted decision making to supported decision making that are pronounced in this Article? First, the personhood of all persons with disabilities is reaffirmed: that the law recognises them everywhere as persons. This recognition is not undermined by their cognitive abilities. Second and following from that affirmation, the Convention requires the autonomy of persons with disabilities to be respected on an equal basis with others: that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Third, Article 12 recognises that persons with disabilities may have decision-making deficits which require to be supported in exercising their legal capacity. The state therefore is required to take appropriate measures to provide access by persons with disabilities to the supports they may require. Fourth, the Article requires safeguards to be put in place to ensure that measures for facilitating supported decision making are not abused.

What, then, is the distinction between substituted decision making which Article 12 ousts and supported decision making which it introduces? Substituted decision making assumes that decision-making deficits must be replaced by plenary guardianship or partial guardianship. Under plenary guardianship, a third party assumes the right to make all decisions for the disabled person with total disregard for the person’s views. Under partial guardianship, a third party assumes the right to make certain kinds of decisions

for a disabled person. Supported decision-making assumes that decision-making deficits are just that: deficits which can be augmented, developed, understood. Existing capacities can be developed and capabilities can grow.

## VI. The Approach of Kenyan Legislation

Kenyan legislation is full of situations where the legal capacity of persons with disabilities is constrained and either partially or wholly handed over to third parties. In a few instances, though, some legislation endeavours to move towards supported decision making for persons with disabilities.

### Participation in the Political Process

Article 83 (1) of the Constitution of Kenya (2010) provides that:

“A person qualifies for registration as a voter at elections or referenda if the person— (a) is an adult citizen; (b) is not declared to be of unsound mind; and (c) has not been convicted of an election offence during the preceding five years.”<sup>10</sup>

Three essential questions are relevant here. First, who is a person of unsound mind and who makes that determination for purposes of elections? Second, what is the relationship between Article 83 (1) (b) of the Constitution and Article 12 of the Convention? Finally, what does Article 83 mean when it is read alongside Article 38 of the Constitution?

Article 38 (3) of the Constitution provides that:

“Every adult citizen has the right, without unreasonable restrictions – (a) to be registered as a voter; (b) to vote by secret ballot in any election or referendum; and (c)

to be a candidate for public office, (...) and, if elected, to hold office.”<sup>11</sup>

Article 83 (1) (b) of the Constitution is informed by the outcomes model of determining incapacity. Indeed, Kenya’s judiciary did agree with that formulation when it stated in 2010:

“A person who is in prison and is of unsound mind is not in control of his faculties and may not be able to know the magnitude of any election let alone the referendum. The exclusion of that class of inmates is therefore obvious and self-explanatory.”<sup>12</sup>

Yet, it has been noted thus:

“The assumption is that mad people will cast irrational votes. It hilariously follows therefore that people without labels of mental disorders/disabilities cast rational votes. What is rationality anyway? Since when have people without labels of mental disorders/disabilities had to take a rationality test at the polling station? What would such a test look like? And since when did we discount irrational votes? If we think racism is irrational, did we discount those votes which were cast solely because of the ethnicity of the candidates? Doesn’t rationality in voting boil down to agreement with the person who is conducting the rationality test, just like consenting to medical treatment boils down to agreeing with the doctor?”<sup>13</sup>

And I have noted:

“It is a common adage that: ‘every village has its mad man’. If the residents of a village chose to elevate their ‘mad-man’ to be their chief, would there be anything essentially wrong in that? In other words, if the villagers were so mad they crowned a mad-man their leader, what objective test of san-

ity (rationality) could the law use to invalidate that? With what legitimacy? Why, then, does the law forbid persons of unsound mind from standing for elective office? Is Kenya so ‘mad’ it would actually elect them, and if so, are our leaders not as good (or bad) as the electors who choose them?”<sup>14</sup>

### Restrictions to Civil Life

Civil death is a condition common to many persons with disabilities. The law far too often places a disabled person under the legal guardianship of another instead of providing measures and safeguards to support such person to make decisions. The central basis for ousting legal capacity in particular for persons with intellectual or psychosocial disabilities is framed under the rubric of suffering from mental disorder.

Section 16 of the Mental Health Act (Cap. 248) provides that a police or administrative officer may take into custody and hand to a mental hospital a person with mental disorder; one who is dangerous to himself or others or who on account of the mental disorder is likely to offend public decency; or one not under proper care and control or who is being cruelly treated and neglected by a relative or guardian.<sup>15</sup> Section 2 of the Act defines a “person suffering from mental disorder” as:

“A person who has been found to be so suffering under this Act and includes a person diagnosed as a psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse”.<sup>16</sup>

Section 107 of the Children Act (No. 8) of 2001 provides that if a child suffers from a mental or physical disability or illness rendering him or her incapable of maintaining

himself or herself or managing his own affairs and property without a guardian's assistance, the court may order extension of guardianship for such a child. Such order, though, should be made with the consent of the child if he is capable of giving such consent. Such an order may be accompanied by conditions on duration and how the order should be carried out. This provision proceeds in type when it provides that an application to vary or revoke its order may be lodged by such person's guardian or, if he or she marries, their spouse.<sup>17</sup> In similar fashion, section 26 of the Mental Health Act provides that the court may make orders for the management of the estate of a person with a mental disorder or for the guardianship of such a person.<sup>18</sup> Under section 5 of the Law of Succession Act (Cap. 180), a person who is not of sound mind has no capacity to dispose of his or her free property by will. A person who alleges that another was not of sound mind when he or she made a will has the burden of proof to confirm the allegation.<sup>19</sup> Under section 8 of the Matrimonial Causes Act (Cap. 152), being of unsound mind is also a ground for a petition for divorce.<sup>20</sup>

The Civil Procedure Act (Cap. 21) recognises that a guardian or next-of-friend may oust the capacity of a person with disability to litigate a suit (section 93).<sup>21</sup> The express expectation in such instance is that suits are litigated by non-disabled persons. Order 10 Rule 1 and Order 32 introduce partial guardianship in cases where a person of unsound mind is a litigant. In particular, Rule 15 of Order 32 extends provisions on suits against minors to cover:

“So far as they are applicable (...) persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the court on inquiry, by reason

of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.”<sup>22</sup>

Section 31 of the Traffic Act (Cap. 403) restricts the legal capacity of persons with disabilities to be licensed to drive: deaf persons in Kenya have in particular found it extremely hard to be granted drivers' licenses. One condition for the grant of a driving license is a declaration by an applicant that he or she is not “[s]uffering from (...) physical disability which would be likely to cause the driving by him of a motor vehicle (...) to be a source of danger to the public.”<sup>23</sup>

Even the possibility of a disabled person to purchase ordinary goods is limited. Section 4 (1) of the Sale of Goods Act (Cap. 31) distinguishes general capacity to buy and sell goods from that of persons with intellectual disabilities. It states that:

“Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property; provided that where necessaries are sold and delivered to an infant or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.”<sup>24</sup>

## Criminal Justice

The criminal justice system has far too often been a portent of injustice for persons with disabilities. The law has made it exceedingly difficult for persons with disabilities to be active participants in the justice system either as witnesses or as victims when they wish to seek redress. For example, a court may institute a declaration that a person is of unsound mind during criminal proceedings. Sections 162-164 and 280 of the Criminal Procedure

Code (Cap. 75) establish the procedure via which a court may determine that a person is of unsound mind and the arising consequences, including that once so declared a person may be consigned to a mental hospital or, in the phrasing of section 280, a “lunatic asylum” until such time as the medical officer or the court or the Attorney General deem such person to be of sound mind.<sup>25</sup> Section 165 of the Criminal Procedure Code provides for the defence of insanity which when reached by a court eventuates in the accused being detained by order of the President in a mental hospital until such time as a determination of soundness of mind is made.

Another illustration is in relation to persons with disabilities who are victims of sexual crimes. The probative value of their evidence has in the past been so discounted as to be worthless, either because it was assumed they did not see or hear their violator or because it was assumed they were so dim-witted as not to be able to recognise their attacker. This has been the case too where such persons have witnessed crime. This approach which negates instead of affirming the capacity of persons with disabilities is reflected by provisions such as section 146 (now repealed) of the Penal Code (Cap. 63) which referred to a person with intellectual disability as an “idiot or imbecile”.<sup>26</sup>

It is this substituted decision making that the Sexual Offences Act (No. 3) of 2006 rather mitigates by introducing aspects of supported decision-making. Section 31 of that Act<sup>27</sup> introduces a raft of support measures and safeguards to ensure that a victim of sexual abuse with disability may as necessary communicate effectively with the court. These measures and safeguards include that:

- A court may declare as a vulnerable witness a witness who has a mental disability.<sup>28</sup>

- A witness with psychological, intellectual or physical impairment may apply for the court to declare him or her as a vulnerable witness.

- The court may seek advice from an intermediary on the vulnerability of a witness. An intermediary is “a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children’s officer or social worker.”<sup>29</sup>

- The court may, having regard to all the circumstances of the case including the witness’s views, direct that a vulnerable witness give evidence via an intermediary; but such direction may be varied or revoked.

- An intermediary may communicate the essence of a question to the vulnerable witness and may also communicate to the court on the well-being of the witness.

One doubtful provision in section 31 of the Sexual Offences Act is subsection (10) which provides that an accused shall not be convicted solely on the uncorroborated evidence of an intermediary. Even more worrying is the fact that section 31 applies to a witness and not an accused person. Section 31 therefore does not rectify the draconian provisions of section 280 of the Criminal Procedure Code which could sorely punish persons with disabilities in the dock as accused or witnesses. That section provides that:

“If an accused person being arraigned upon an information stands mute of malice, or neither will nor by reason of infirmity can, answer directly to the information, the court may order the Registrar or other officer of the court to enter a plea of ‘not guilty’ on behalf of the accused person. A plea so entered shall have the same force and effect as if the accused person had actually pleaded it;

or else the court shall thereupon proceed to try whether the accused person be of sound or unsound mind, and, if he is found of sound mind, shall proceed with the trial, and if he is found of unsound mind, and consequently incapable of making his defence, shall order the trial to be postponed and the accused person to be kept meanwhile in safe custody in such place and manner as the court thinks fit, and shall report the case for the order of the President.”<sup>30</sup>

This provision fails to cater for situations where the accused may have a disability making it impossible for him to hear or communicate with the court.

Providing for what it refers to as “dumb witnesses”, section 126 (1) of the Evidence Act (Cap, 80) allows a deaf witness to give evidence “in any other manner in which he can make it intelligible”.<sup>31</sup> This for example may be by writing or signing so long as this is done in open court. Such signing or writing is deemed as oral evidence.<sup>32</sup> Section 135 of the Act confers as privileged communications communications between interpreters and their clients.

## **VII. Conclusion: Towards a Model for Ensuring Legal Capacity for Persons with Disabilities in Kenya**

Thus far, society through the instrumentality of law has been fixated with problematising disability. If the logic of this fixation had been allowed to run its course each time, it would have excluded Stephen Hawkins from being a top physicist; and, astounding as it may sound, mental illness would have excluded Winston Churchill from being British Prime Minister (he had what he referred to as “the black dog” – depression) and so too American Civil War President Abraham Lincoln.<sup>33</sup>

In Kenya, persons with disabilities rather relish the fact that Mwai Kibaki was sworn to the presidency of Kenya on 30 December 2002 while wheelchair bound.<sup>34</sup>

The CRPD revolution demands focus on ability, capability and performance. Yet, legislation passed since Kenya promulgated its new Constitution in 2010 has fallen back to type: continuing to pigeon-hole, exclude and patronise people with disabilities. For example, section 21 of the National Land Commission Act (No. 5) of 2012 provides that the Secretary of the National Land Commission may be removed from office, among other things, for: “inability to perform the functions of the office of the secretary arising out of physical or mental incapacity”.<sup>35</sup> In this instance, surely, the law’s focus should be on performance: that if the Secretary does not perform she will be removed from office. Provisions with the above effect have also been legislated in among other statutes, e.g. section 11 (1) (c) of Commission for Implementation of the Constitution Act (No. 9) of 2010.<sup>36</sup> Section 9 of the Elections Act (No. 24 of 2011) affirms the constitutional provision that persons of unsound mind cannot be registered as voters. But, admittedly, sections 109 (1) (n) and (o) of the Act anticipate regulations to provide for assisted voting for voters with disabilities.<sup>37</sup>

By dint of Article 2 (6) of the Constitution, the Convention is part of Kenyan law.<sup>38</sup> It is incumbent on Kenya, therefore, to take policy, legislative, judicial and administrative measures for enabling Article 12 of the CRPD. Kenya, too, should repeal all policies, laws and administrative procedures which undermine the letter and spirit of Article 12. As a very last resort, Kenya’s judiciary would expectedly provide proper interpretation if a person with disability sought legal remedy against viola-

tion of their legal capacity. But it is far better if the executive and legislature pass legislation to make Article 12 operational.

This leads us to a suggestion on the way forward. Presently, whenever a new law is being drafted, the country is spending far too much misdirected energy working out how to respond to arising legal capacity questions. The variety and large number of statutes discussed in the preceding section show how law-making is obsessed with reacting to the assumed legal incompetence of persons with disabilities. The logic of reacting singly to each legal capacity circumstance as it arises is not smart in view of the probability that different legislators will respond differently to similar issues. Kenya requires deploying a model whose overall aim would be to ensure that future laws would legislate legal capacity not to target persons on account of their disability but rather as laws of general application to all individuals. This would also eschew the need for drafting legal capacity provisions statute by statute.

Under the model, Kenya would pass a legal capacity statute. That law would declare that all adult individuals including those with disabilities have legal capacity in all aspects of life. The statute would then identify and detail the contexts and circumstances under which supported decision-making measures would be available to persons with disabilities. The law would also establish safeguards for ensuring that such support measures are not abused.

The project of preparing a single legal capacity law is weighed down by the obvious

danger that Article 12 remains an extremely mysterious norm which does not lend itself easily to practical nuts and bolts interpretation. Perhaps the most certain issue in all this discussion is that everything remains extremely fluid and challenging. Multiple questions remain unanswered and ideas for making Article 12 remain untested so much that any legislation will bear the tag of pioneering trail blazer with the consequence that trail-blazing carries: the baggage of error and missed steps. The Committee on the Rights of Persons with Disabilities is just now cutting its teeth by beginning to prepare a general comment or recommendation on Article 12. In the meantime, on 23 May 2012, Kenya's national human rights institution, the Kenya National Commission on Human Rights, convened a meeting of state and non-state actors at which initial discussions were had on how to make Article 12 operational. Multiple institutions at the global and national levels will continue to work on this for a fair while.

In conclusion, then, we have shown that legal incapacity in Kenya is legislated over far too many statutes. Repealing or amending all those laws will not be an easy task. Even more difficult are the realities of bias and stereotype imprinted in key national institutions such as the bench and the bar and the practice of medicine. For many years it will remain difficult for Kenya's professional classes to accept that they should treat persons with disabilities and particularly those with psychosocial disabilities equally and without patronising them. Yet, the dignity and personhood of each disabled person is guaranteed and it must be ensured.

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key roles in negotiating the Convention on the Rights of Persons with Disabilities and seeking its domestication in Kenya. Mute is a member of the Working Group on the Rights of Older Persons and Persons with Disabilities established by the African Commission on Human and Peoples' Rights to prepare protocols on the rights of older persons and persons with disabilities.

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- 9 See above, note 4.
- 10 Constitution of Kenya 2010.
- 11 Ibid.
- 12 *Priscilla Nyokabi Kanyua v AG*, Constitutional Petition No. 1 of 2010, which enfranchised persons incarcerated in prison to be rightful participants in the referendum.
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- 14 Mute, L., "Shattering the Glass Ceiling: Ensuring the Right to Vote for Persons with Intellectual Disabilities in Kenya", *Thought and Practice: a Journal of the Philosophical Association of Kenya*, Vol. 2, No. 2, December 2010.
- 15 Mental Health Act (Cap. 248).
- 16 Ibid.
- 17 Children Act (No. 8 of 2001).
- 18 See above, note 15.
- 19 The Law of Succession Act (Cap. 180).
- 20 The Matrimonial Causes Act (Cap. 152).
- 21 Civil Procedure Act (Cap. 21).
- 22 Civil Procedure Rules 2010.
- 23 The Traffic Act (Cap. 403).
- 24 Sale of Goods Act (Cap. 31).
- 25 Criminal Procedure Code (Cap. 75).
- 26 The Penal Code (Cap. 63).
- 27 Sexual Offenses Act (No. 3 of 2006).
- 28 Section 2 of the Sexual Offenses Act (ibid.) defines "person with mental disability" as: "a person affected by any mental disability irrespective of its cause, whether temporary or permanent, and for purposes of this Act includes a person affected by such mental disability to the extent that he or she, at the time of the alleged commission of the offence in question, was – (a) unable to appreciate the nature and reasonably foreseeable consequences of any act described under this Act; (b) able to appreciate the nature and reasonably foreseeable consequences of such an act but unable to act in accordance with that appreciation; (c) unable to resist the commission of any such

act; or (d) unable to communicate his or her unwillingness to participate in any such act.”

29 See above, note 27.

30 See above, note 25.

31 Evidence Act (Cap, 80).

32 *Ibid.*, section 126 (2).

33 See “The Black Dog”, *CBS/AP*, available at: [http://www.cbsnews.com/2100-500164\\_162-239704.html](http://www.cbsnews.com/2100-500164_162-239704.html).

34 See “Kenya’s New President Kibaki Sworn In”, *CTV News*, available at: [http://www.ctv.ca/CTVNews/CanadaAM/20021230/kenya\\_new\\_president\\_021230/](http://www.ctv.ca/CTVNews/CanadaAM/20021230/kenya_new_president_021230/).

35 National Land Commission Act (No. 5 of 2012).

36 Commission for Implementation of the Constitution Act (No. 9 of 2010).

37 Elections Act (No. 24 of 2011).

38 Article 2 (6) of the Constitution provides that international treaties to which Kenya is a party form part of Kenyan laws. See above, note 10.