The Advocate
The LSK Magazine | Volume 1, Issue 12 (Annual Conference Edition)| 2019

AN AUDIT OF THE CONSTITUTION

The Quest for Constitutional Reform and Transformation

+ FASHIONING THE PRESIDENT'S LEGACY: THE FLAMING MILESTONES
ALLEN WAIYAKI GICHUHI *C.Arb*
PRESIDENT, LSK

+ "MR. PAUL MWANGI IS WRONG: MARAGA'S COURT IS NOT STANDING IN THE WAY OF JUSTICE",
DR. GIBSON KAMAU KURIA, SC

CONFERENCE SUB-THEME

Embracing Technology in Legal Practice: Litigation & Commercial Practice

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"Any Constitution is as good as its implementation. In abstract, a constitution is a dead document unless it achieves some measure of constitutionalism. A constitution which provides for respect of human rights— including socio-economic rights, democracy, fair trials, but has no effective mechanism of implementation and enforcement of those rights 5 is a hollow constitution with no constitutionalism." ***Chief Justice Hon. David Maraga, Chief Justice and President of the Supreme Court Of Kenya, at the Oxford Union Conference, Oxford University, United Kingdom.***

"Members of the Public are advised that based on the Court Orders, registration for Huduma Number is not mandatory and the Government should not force any one to acquire the Number. No one should be denied any government services for failing to register. In addition, the Government should not set any deadlines for registration." ***LSK President, Allen Gichuhi on a press statement on registration for Huduma number and payment of housing levy.***

"Forcing a woman to keep a pregnancy resulting from rape constitutes additional trauma which affects her physical and mental health. Many rape survivors in Kenya do not receive immediate medical care that protects them from HIV infections, other sexually transmissible diseases as well as unintended pregnancies. This judgment is their second chance."
Saoyo Tabitha, Deputy Director of KELIN, commenting on the recent decision of the five judge bench in Petition 266 of 2015.

"Strathmore University Law School met Harvard University in the final of the 17th John H. Jackson Moot Court on WTO Law in Geneva, Switzerland. It was the 1st time an African team made it to the final. Strathmore University Law School won the moot. Congratulations great team! Kenya!"
Luis Franceschi, former Dean, Strathmore Law School.

"Legal technology is a field that can no longer be ignored with the fast-paced change in times. We urge advocates to upskill and learn about emerging trends in technology, It is impressive that the Law Society is at the fore front of innovating and re-imagining justice as we knew it, we hope to further collaborate with the Lawyers Hub to engage on global emerging technologies and events to benefit the membership."
Linda Bonyo,
Founder of Lawyers Hub Kenya.

From the Editor's Desk

The Council of the Law Society of Kenya through the Editorial Committee is delighted to publish the Advocate Magazine, LSK Annual Conference Edition 2019. The Advocate focuses of the theme of the Annual Conference which is An Audit of the Constitution: The Quest for Constitutional Reform and Transformation. The sub theme is Embracing Technology in Legal Practice, Litigation and Commercial Practice.

The Constitution of Kenya 2010 promulgated on August 27, 2010 introduced fundamental changes to state and governance structures. It ushered in a more decentralized political system and structure that is intended to make the government more democratically accountable and responsive to the needs of citizens. This is particularly with respect to limiting presidential powers, the establishment of a new system of 47 counties, which replaced eight (8) provinces and 45 districts, and a greater level of oversight over branches and levels of government.

Significant gains and successes have been realized over the past nine (9) years. However, there have been numerous challenges experienced in the implementation of the Constitution. After the upheaval witnessed in Kenya during and after the 2017 General and subsequent repeat Presidential elections, a there are calls for a referendum to amend the Constitution with particular regard to provisions on national governance structure and electoral laws and institutions.

The referendum proponents have proposed changes to the Constitution to provide for a parliamentary or hybrid system of governance which, in their view, would foster a "more inclusive government that would promote regional and tribal inclusivity, protection of the well-being of communities, social justice and shared prosperity."

Conversely, there have been voices against these proposed amendments to the Constitution on grounds that a referendum based on changes to governance structure would merely be a platform to benefit the political class.

Due to this, the Council of the Law Society of Kenya saw it fit to have the theme of the Law Society of Kenya Annual Conference as An Audit of the Constitution: The Quest for Constitutional Reform and Transformation while also introducing another sub theme on technology. This is mainly because the practice of law is fast changing following modern advancements in technology and especially digital technology. Many jurisdictions including Kenya have adopted the automation of legal processes. These include management of law firms, electronic filing (e-filing) or filing documents electronically in Court. In some jurisdictions like USA, federal and state courts are posting court filings on web-based databases, allowing counsel to access court documents remotely. There are also new digital challenges which the law and legal practice are yet to come to terms with, especially in Kenya. These include "smart contracts," artificial intelligence, drones, driver-less cars etc.

We laud members who responded to our call for articles and submitted them to be considered for publication. Readers will find interesting the Article by Dr. Gibson Kamau Kuria titled "Mr. Paul Mwangi is wrong: Maraga's court is not standing in the way of Justice – Rejoinder." Dr. Kuria's Article is a rejoinder to the theory advanced by Mr. Mwangi's in the Articles published in the Sunday Nation editions of 6th, 13th and 20th January, 2019. In the Articles, Mr. Mwangi criticized the manner in which the courts handled corruption cases and argued that courts were one of the impediments to the fight against corruption.

It is our hope that the Conference will provide the opportunity for fruitful discourse and networking as participants engage in Mombasa County and beyond.

We are grateful of the sponsors for their continued support and welcome participants to the 2019 LSK Annual Conference, as well as the LSK Council, LSK Secretariat, and members of the LSK Editorial Committee.

Prof Ben Sihanya, JSD (Stanford),
IP and Constitutional Professor and Advocate
Editor-In-Chief

The Advocate

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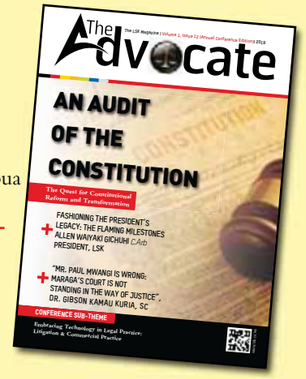

Contributors- Allen Waiyaki Gichuhi, C. Arb, Dr, Gibson Kamau Kuria, SC, David Mugo, Richard Mutiso, Jackson Macharia Githu, Angela Ogang, Anthony Otieno, Hellen Ngessa, Dr. Charles Khamala, Sophie Kaibiria, Judith Akoth, Faith Khalayi, Nancy Namisi Siboe, Ahamed Chris, Gatambia Ndungu, Rosemary Okumbe, Ibrahim Kitoo, Vellah Kedogo, Elias Kibathi, Abigael Kimanzi, Gatuyu Justice, Samuel Njoroge Njeri, Dr. Eric Kibet, Desmond Maina, Elizabeth Oyange, Christopher Oyier, Dorothy King'oo, Hezron Njuguna, Paul Kamau, Elsie Oyoo and Edmond K. Gichuru.

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Message From the CEO

On behalf of the Council of the Law Society of Kenya and the Secretariat, it gives me great delight to welcome you to this year's Annual Conference. Whilst departing from the norm, this year's Conference takes place in the ever vibrant city of Mombasa.

Colleagues, the theme of this year's Conference, "An Audit of the Constitution: The Quest for Constitutional Reform and Transformation" is in line with our mandate to assist the Government and the courts in all matters affecting legislation, the administration and practice of the law in Kenya as well as to protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law. This Conference gives us an opportunity to undertake a critical analysis of our Constitution: applaud and evaluate the gains, assess the challenges, identify the opportunities and propose areas of improvement.

In cementing our role as the gate-keepers of the rule of law and with over fifteen hundred participants from diverse areas of practice, the deliberations will inform the Society's stand on whether or not time is ripe to amend the Constitution. It is without a doubt that the legal profession is a key stakeholder in the implementation of the Constitution. Members are expected to engage the public and contribute to the conversation from an informed point of view.

Technology is transforming the dynamics of the legal profession. You must have noted that the traditional services our profession used to render to clients are slowly diminishing. This has necessitated the profession to adopt new concepts to ease documentation, information processing, storage and retrieval. In line with this year's sub-theme, "Embracing Technology in Legal Practice, Litigation and Commercial Practice" and being a premier bar association, the Society seeks to achieve and surpass global standards.

Whilst transitioning from manual processes to automated systems may seem disruptive at times, the goal is always to build growth, with the ultimate objective of taking advantage of what innovation has to offer. We are cognizant that technology is an inevitable part of the practice of law and in addition, a part of our daily life. This year's Conference intends to dissect; the impact of technology in the legal profession, the integration of technology in legal practice and law office management, cyber-security risks vis-à-vis the sanctity of the advocate-client privilege, information and knowledge management in legal profession and the emerging trends in the application, adoption and everyday innovation of technology in the legal profession.

As you enjoy this year's edition of the Advocates Magazine, let us appreciate members who sent in articles for publication. These Articles focus on matters Constitution and technology. From, interrogating the gains that the Constitution 2010 has brought about to analyzing technology in the legal profession, opportunities, challenges and the way forward, the era of artificial intelligence in Legal Practice and how blockchain technology has affected and influenced commercial law practice in Kenya among other articles. I do however encourage members to heed to the call whenever a request for submission of articles is made.

Lastly, as we take time off from our busy schedules, may we never forget the role we play in the society, may we never forget that we are brothers and sisters in the profession. Let us interact, let us network and build bridges where they may have been burnt.

To our sponsors and partners, we are grateful for the support you accord us in every milestone we take.

I wish all the participants a great Conference.

Mercy K. Wambua
SECRETARY/ CEO, LSK

PRESIDENT'S DISPATCH

Allen Waiyaki Gichuhi, C.Arb

Fashioning The President's Legacy: The Flaming Milestones

Mr. Allen Waiyaki Gichuhi, C.Arb President, LSK addressing members during the stakeholder's consultative forum on the Draft LSK Sexual Harassment Policy at the Hilton Hotel.

MY DEAR COLLEAGUES

I resume my last days as your President by taking you through extremely useful, yet very open, and constructive milestones that the Society has achieved. It is out of this that my success is mirrored, challenges are faced and opportunities are seized to better the Society.
The thematic areas that the Council has endeavoured to front include but not limited to the following:

- **LAW REFORM**
- **WELFARE**
- **INTERVENTIONS**
- **PRACTICE ISSUES**
- **PUBLIC INTEREST LITIGATION**

Let me now delve into brief details that form the substance of the above thematic areas.

The LSK has partnered with the ICJ-K and FIDA in team effort to ensure that the legal fraternity plays a pivotal role in the clamour for constitutional reform. In this regard the theme of this year's Annual Conference dubbed "An Audit of the Constitution: The Quest for Constitutional Reform and Transformation" is timely well thought of. My Council has constituted an Ad hoc Committee, to assist with the development of a memorandum to be presented to the Building Bridges to the Unity Advisory Taskforce.

The Committee has invited contributions from members on the areas of consideration and inclusion in the Memorandum to the Taskforce.

PRACTICE AND TRAINING

My Council has initiated reform initiatives at both offices of the Attorney General and the Director of Public Prosecutions. So far two separate task forces have been set up where LSK is a member with a view to initiating positive reform for the Country and the profession at large: Taskforce on E-Conveyancing and Taskforce on decision to charge

Increased CPD Seminars and Relevance
The CPD Seminars have increased to 72 up from 56 last year following increased demand from members. It's worth noting that this year 2019, new CPD Stations were also included in the CPD calendar. The Stations include, Narok, Kerugoya and Kitui. The idea behind this is to take CPD Seminar closer to our members as our membership continue to grow. The 2019 CPD Calendar also has 7 afternoon lecture sessions which tackle more specialized areas of interest. The inaugural CPD Digest with selected papers presented in previous CPD Seminars and Annual Conference is currently with the Printer.

The Committee on CPD always sends out notices to members to propose topics that are of interest to members to be included in the CPD Calendars to ensure relevance and inclusion.

Strengthening Bar-Bench Relationship
We have created a working rapport between the judiciary, Senior Counsel and the Council to assist the judiciary in the administration of justice and reforms. This is being done through strong support from the eight LSK Branches and the use of the Bar-Bench Committee practice guidelines developed by the Council.

Engagement with the Judicial Service Commission on various practices issues and ongoing recruitment of judges.
The Law Society of Kenya has continued to engage the Judiciary on various practice issues both through the National Office and through the Branches. Through its Standing Committee on Judicial Appointments (SCOJA), the Council forwarded a memorandum containing views from members on the applicants shortlisted for the position of judges. This contribution will assist the Judicial Service Commission while undertaking the appointments.

ICT/IP Committee
Through the ICT/IP Committee, the Council has participated in policy and legislative processes in the Country. The Council has organized public participation forums on the draft Huduma Bill, received views and submitted a memorandum on the same to the Government. Through the Committee, the Council has contributed to the publication of the Blockchain taskforce report. In addition, through the Committee, the Council has initiated and participated in various Public Interest Litigation cases including:

1.Petition No. 334 of 2018 LSK -vs -AG, Speaker National Assembly and Commissioner General – KRA. The LSK filed the suit challenging the introduction of Housing Levy and other sections of the Finance Act. Ms. Mercy Mutemi, Advocate is on record for the LSK. The Court has issued temporary orders in favor of the LSK and the public at large in the matter.

2.Constitutional Petition No. 222 of 2018 LSK -vs -Attorney General – Cybercrimes Matter; The IP Committee working together with the Public Interest Litigation Committee have collaborated in provision of legal advisory to the Counsel in this matter touching on the Cyber Crimes Act where LSK has been joined as an interested party.

3.Constitutional Petition 56 Consolidated with 58 and 59 of 2019 Nubian Rights Forum, Kenya National Commission on Human Rights – vs- AG, CS Interior & 4 Others. The LSK applied and was joined as an interested party in the case challenging the introduction of the Huduma number by the Government. The Court has issued interim orders in the matter and LSK is represented by Ms. Mercy Mutemi, Advocate.

Partnership with the Inns of Court College
In order to build the capacity of its members, the Law Society of Kenya has continued to engage and partner with both local and international partners to organise events and trainings on various emerging areas. Including building capacity of lawyers on advocacy. In collaboration with the Inns of Court College of Advocacy and the Kenya School of Law, the Law Society of Kenya held a training on trial advocacy between the 26th to the 30th of November at the Kenya School of Law.

Partnership with the Mediation Training Institute
The LSK has also partnered with the Mediation Training Institute to train young lawyers in mediation. Since mid-2018, 160 young lawyers have been certified as professional Mediators courtesy of this partnership.

WELFARE

Through the Advocates Benevolent Association, the Law Society of Kenya is working on the setting up of a a pension scheme for lawyers. It is anticipated that the modalities will be finalized and presented to members as soon as possible.

In-house Counsel Non-Practicing Allowance
The Council of the Law Society in noting increased concerns of inequality among legal practitioners in the public service sector with regard to payment of non-practicing allowance, wrote to SRC to recognize the value of the work done by in-house counsel and accordingly address issues of substantial remuneration. My Council recommended the harmonization of the public service legal sector remuneration and also participated as an interested party in ELRC No. 540 of 2018 Nairobi Erastus Gitonga & 4 Others VS National Environmental Management Authority (NEMA).

The claimants, all employees of NEMA and members of the Law Society, moved to the Employment and Labour Relations Court seeking payment of non-practising and prosecutorial allowance. The Society, exercising its mandate under Section 4 of the LSK Act, applied and was enjoined in the matter as an Interested Party due to the nature of the case touching on matters of professional practice and welfare of in-house counsel. The Court, in its judgment pronounced itself in favor of the claimants.

Improvement at the Secretariat
With the expanded mandate of the Society coupled with increased membership, the Council resolved to strengthen the Secretariat through increased personnel and improved infrastructure, Towards this end the Council has recruited a procurement officer who will be reporting in August. With the support of Supporting Inclusive Resource Development Project has constructed a temporary structure that can comfortably accommodate ten staff members. Upon numerous complaints on unanswered calls by members, my Council has initiated a process of acquiring a new telephone system for the Secretariat that will ensure timely answering of calls leading to improved communication.

The Committee on Senior Counsel
Since 2012 there has never been any conferment of members to the rank of Senior Counsel. In that regard I pushed for the reconstitution of the Committee which has had meetings to discuss on members applications for conferment to the rank of Senior Counsel. The conclusion of the process will therefore add more Senior Counsel.

Re-Constitution of the LSK Criminal Justice Committee
As a key stakeholder in matters of Criminal Justice system in Kenya, my Council reconstituted the LSK Criminal Justice Committee to work closely with the National Committee on Criminal Justice Reforms in matters touching on the Criminal Justice System in Kenya. To enhance criminal justice, reconstitution of the Committee will seek to scale up our criminal Justice system by working hand in hand with the National Committee on Criminal Justice Reforms to review the Criminal Justice System in Kenya.

Admission of new members to the bar
I have witnessed new advocates being admitted to the bar. I have given insightful speeches on numerous occasions on admission day. It has been my desire to organize forums with our young lawyers so as to discern underlying issues, themes and needs. We also aim to enhance the mentorship program.

Mr. Allen Waiyaki Gichuhi, C.Arb President, LSK pose for a group photo with stakeholders during the consultative forum on the Draft LSK Sexual Harassment Policy at the Hilton Hotel.

INTERVENTIONS

LSK intervention to have HELB offer Loan to KSL Students
In line with LSK mandate to set, maintain and continuously improve the standards of learning, professional competence and professional conduct for the provision legal services in Kenya, my Council engaged HELB, CLE and KSL with a view to coming up with a viable bursary fund for students at the KSL in regard to payment of tuition and examination fee.

After a series of meetings and negotiations between LSK, KSL board, CLE board and HELB board, the HELB Board finally entered into a Memorandum of Understanding to establish a Sector Specific Fund to support students undertaking the Advocates Training Program.

Meeting with the Inspector General of Police (IGP)
The Council paid a courtesy call on the Inspector General, Mr. Hillary Mutyambai and the Director of Public Prosecutions, Mr. Noordin Haji on Tuesday 21st May, 2019. They held discussions on key issues touching on administration of justice, enhanced access to justice through coordination of various actors in the justice sector and building synergy between the police & advocates.

Intervention at the Ministry of Lands and Planning
Following complaints from members over inordinate delays, poor and unsatisfactory services at the Ministry of Lands I have so far written to the Cabinet Secretary articulating this concerns. The Environment, Land, Natural Resources and Conveyancing Committee has been in active engagements with the ministry to see the issues addressed.

Law Society of Kenya Mentorship Program
With a view to implementing the Mentorship program launched last year, the Law Society of Kenya through the Mentorship Board and in conjunction with the Young Lawyers Committee held aPublic Participation Forum on 17th May, 2019 at Hilton Hotel in Nairobi. The aim of the workshop was to gather feedback on the mentorship program as espoused in the mentorship manual which was launched during the 2018 Annual Conference. The Board sought to engage members of the Society in developing the roadmap ahead of the pilot programme targeted for June to December 2019.

The meeting attracted an attendance of over 100 advocates; senior members of the bar, young advocates, practitioners in the corporate world, state counsel, judicial officers, former members of the bench as well those running law firms and their associates.

Memorandum of Understanding between LSK and Kenya Alliance of Resident Association (KARA)
Under my tenure the Law Society of Kenya signed a Memorandum of Understanding (MOU) with Kenya Alliance of Resident Association (KARA). The MOU centered on areas of partnership and exploration of opportunities particularly to strengthen public participation, sensitization, capacity building and technical assistance

KARA is the apex body representing the voice and pro-active action of resident associations on consumers and taxpayers' rights countrywide – on accelerated access to public service delivery.

LAW REFORM

Under my watch I have witnessed the constructive contribution of the Law Society on various legislations so as to help maintain the Bar's independence which is integral in promoting the Rule of Law. At a practical level, through meaningful engagement with the National Assembly and the Senate, we have strived to voice our concerns on various statute amendment proposals such as the Huduma Bill.

LSK has called on members to give their comments and views on the following legislations; The Interpretations and General Provisions Act, The Evidence Act ,The Civil Procedure Act, The Matrimonial Property Rules, The Micro & Small Enterprises Tribunal Draft Regulations and Data Protection Bill, 2019.The said comments and views have been captured and submitted as LSK memorandums.

Public Interest Litigation (PIL) Code
The Council has developed a Public Interest Litigation Code for the Law Society of Kenya. The Code is expected to streamline the Public Interest Litigation by the Council.

We have initiated various reforms, of importance is forwarding an amendment to Kenya Law Reform Commission and parliament that will allow practising certificates in future to be issued online by the LSK.

Progress on the Development of Anti-Money Laundering guidelines
The LSK supports the fight against corruption. However, in order to assist advocates who are exposed to risk of being victims of money laundering in the course of their work and in line with best international practices that sets out standards of practice, the Council with the support of the GIZ has developed draft Anti Money Laundering Regulations and has held various stakeholder forums across the Country.

Advocates Social Media Usage Code
In order to give guidance to the membership on the use of social media, the Council through the Practice Standards Committee is developing Advocates Social Media Usage Code (the Code), the Code is intended to give guidance to Advocates on matters relating to the professional conduct and use of social media platforms.

Draft LLP Guidelines and the Use of Generic Names By Law Firms
The Council of the Law Society of Kenya, through the Practice & Standards Committee has developed Draft Guidelines on Registration of LLPs & and the use of Generic Names by Law Firms. The guidelines are intended to inform the Council and members on the use of LLPs and the use of generic names. The draft will be circulated to members for their input.

Mr. Allen Waiyaki Gichuhi, C.Arb President, LSK and Chief Justice Hon. David Maraga launching the Young Lawyers mentorship programme, LSK Law Firm Management Manual and the Bar Bench Committee practice guidelines during the 2018 Annual Conference.

Advocate-Police Relations guideline

The Council with the support of the LSK Nairobi Branch has developed draft Advocate- Police Relations Guidelines.

The draft guidelines are aimed at strengthening the relationship between the law enforcement agencies and the advocates leading to an harmonious, conducive working environment for advocates. The Council is engaging the Inspector General of Police to pass the Guidelines.

Alternative Dispute Resolution Guideline

A draft ADR guideline for the Legal Proffession is being drafted. This will provide a guide to advocates appointed by the LSK to deal with arbitral and mediation matters. The LSK ADR Committee has partnered with the Judiciary in promoting sensitization exercise through door to door reach to law firms. The ADR Guidelines will establish standards and guidelines while also providing additional work for advocates who are trained arbitrators and mediators.

East Africa Law Society Bill

During the EALS 2018 Annual General Meeting, I mooted for the need of an EALS Bill. The Council therefore gave me a task to come up with a draft Bill. I am in the process of coming up with the final draft.

Law Society of Kenya (General) Regulations

LSK (General) Regulations were passed by members at the 2018 Special General Meeting that took an amazing 10 hours of fruitful deliberations. The Regulations have since been forwarded to Parliament for scrutiny. The Council held a consultative forum with the Parliament Committee on Delegated Legislation and presented the Regulations, the Committee gave the Council the go ahead to publish the Regulations before they can be formally adopted.

Review of the Advocates Remuneration Order/Taxation Scales in The Court of Appeal and Supreme Court

On 14th January 2019 the Council revived the ad hoc Advocates Remuneration Committee which is to tasked with amending the Advocates (Remuneration) Order, 2014, The Court of Appeal Rules, 2010 and Supreme Court Rules, 2012 in matters pertaining to taxation and costs. The Committee has already begun its work and its collecting views from members.

Sexual Harassment Policy

The Council embarked on the development of a a Sexual Harassment Policy to address silent yet rampant cases of sexual harassment in the legal profession. The Gender Committee has taken a leading role in coming up with a draft Policy. To involve members, the Council sought views through stakeholder's engagements forums as well as through online forums. So far stakeholder forums have been held in in Nairobi, Mombasa, Eldoret and Mt. Kenya region. The Policy is expected to be launched after stakeholder validation is done

CONCLUSION

On my own behalf and on behalf of the Council of the Law Society of Kenya, I wish to thank everyone who has supported and continues to support us. The challenge of delivering transformational change at all levels and for all members must be embraced in the days, months and years ahead.

GIBSON KAMAU KURIA SC

Mr. Paul Mwangi is Wrong: Maraga's Court is not Standing in the Way of Justice

THE STRATEGY OF FIGHTING GRAFT IS IN NEED OF REVIEW: IT IS BASED ON THREE WRONG VIEWS NAMELY:-

(1) That the Judiciary has not been Discharging its Constitutional Mandate Correctly;

(2) That the Independence of the Judiciary is not Necessary for the Citizen to Lead the Life he or she has Chosen for himself or herself; and

(3) That Similarly, Safeguarding of the Rule of Law is not Necessary.

The two day Anti - Graft Conference held in January 2019 at Bomas of Kenya was preceded by three articles which Mr. Paul Mwangi, the constitutional advisor of Honorable Raila Odinga, published in the issues of the Sunday Nation on 6th, 13th and 20th January, 2019. The wrong impression has been created that he was stating the law correctly and that the country may act on those views. This article corrects that wrong impression.

Next to the article published on 6th January, 2019, was another article by Mr. Sam Kiplagat titled "Blow to DPP Haji as Prosecuting Graft Cases Got Harder". see page 25. In the latter, Mr. Kiplagat discussed the judgment of the Court of Appeal delivered on 20th December, 2018, in favour of Prof. Njuguna Ndung'u, the former Governor of the Central Bank of Kenya. The Court of Appeal in applying an exception known in Kenya and also in virtually all commonwealth countries ordered that the prosecution be stopped. Professor Njuguna Ndungu's judgment was a majority one. One Judge dissented.

It is an irresistible inference that Mr. Mwangi has based his entire unfair criticism of the Judiciary on one recent case of the Court of Appeal. He has ignored many decisions of the. Court of Appeal and the High Court discussed below which show that the Judiciary is not pro - suspects.

The judgment in Professor Njuguna's case falls within an exception recognized by that Court. It does not represent the position of the entire Judiciary. To be fair to the Judiciary, a review of the performance of its work as a whole would entail a review of decisions of the Chief Magistrate's Court, the High Court, the Court of Appeal and the Supreme Court. Mr. Mwangi did not undertake such a review before expressing his criticisms which are not borne out by the majority of the court decisions. His opinion is based on anecdotes and possibly rumors. In those articles, he wrongly criticized the Judiciary, which is headed by Honorable Chief Justice Maraga, and the legal profession, which is led by Mr. AlIen Gichuhi. He accused both of obstructing the fight against corruption. Individual Judges or advocates might have fallen short of the standards but the institutions are neither incompetent nor as corrupt as claimed by him. Our Bench and Bar compare with the best in the World. The Kenya Bar is respected in the whole World for promoting the rule of law and constitutionalism for decades.

Below, I use court decisions to demonstrate that the Judiciary has been unfairly criticized and also that as the Chief Justice Maraga has said, on many occasions, the Constitution, vide Article 10, demands that every organ adheres to national values which include upholding the rule of law and the basic rights of the individual. I further demonstrate that the independence of the Judiciary is one of the basic features of a constitutional democracy and that it must be upheld at all times as nothing else will function without that independence. The referendum which ratified the Constitution in 2010 accepted this truth on which constitutional democracies act.

In his articles published in the Sunday Nation on 6th and 13th January, 2019, respectively, Mr. Paul Mwangi said that the Maraga Courts are standing in the way of justice. He did not give any illustrations from any court decisions.

One of the recent decisions on when the court will stop the prosecution of a suspect charged with an offence which fits into the general description of corruption was in Court Of Appeal, Civil Application No. 234 Of 2015 (UR 194/15): Esther Njeri Ngari -v- Director Of Public Prosecutions. The court (Githinji, Koome and GBM Kariuki JJA) rejected the application seeking to have the prosecution stopped on the ground that the Director of Public Prosecutions did not have evidence which demonstrated prima facie that she had anything to do with the theft of Kshs. 11.5 Million of the Kenya Meat Commission. In rejecting her application, the Court of Appeal stated the law as follows:-

[18] We are in total agreement with the above findings, that each case is considered according to its own merits. It is only in instances where there are trumped up charges (that cannot be founded in law) or the prosecution

is not undertaken according to the law, or it is actuated by malice and meant to harass the applicant, having no basis at all in law or in fact. It is in that rare occasion that the Court of Appeal has intervened by dint of its inherent jurisdiction to ensure the ends of justice and prevent the abuse of the process as indeed this is a country that is governed by the Constitution and the dictates of the rule of law and not the whims of the DPP. Does this case fall within the above parameters? In answering this question, we have exercised abundant caution having forewarned that we are dealing with an interlocutory application pending the hearing of the substantive petition before the High Court and the appeal to be filed.

It is worthy of note that Honorable Justice Githinji was also one of the Judges who decided Prof. Njuguna's case. He clearly cannot be wrong only when he finds in favour of the ·suspect. In the Esther Ngari case supra, he found for the Director of Public Prosecutions.

It is significant, and Mr. Mwangi does not appear to be aware of this fact, that the court states that it is only in rare cases that the court interferes with then prosecution.

Besides overlooking the commonwealth comparative jurisprudence on the issue,ihe has also ignored three other truths.

The first one is that as the preamble of the Constitution states, in 2010, Kenyans used a referendum to give to themselves and future generations a Constitution, "aspiring for a government based on the essential values of human rights and the rule of law." Graft must be fought in accordance with the dictates of the rule of law.

The second thing is that the Constitution has given to the three branches of the Government their respective jobs in the governance of this Country and that the Judiciary has been assigned the task of serving as the guardian of the Constitution and the people's rights. In discharge of this mandate, it will free those who are wrongly charged and even stop charges where their object is to oppress the individual. In Mary Wambui Munene -v- Peter Gichuki King'ara & 2 others [2014] eKLR, the Supreme Court (Mutunga, Rawal, Tunoi, Ojwang', Ibrahim, Wanjala and Njoki Ndungu J.) described that role as follows:-

[83] The Court's position in this case was that decisions of the Supreme Court are only arrived at after conscientious and due consideration. This approach is the basis upon which we evaluate the present scenario. As already noted, the Joho case declared Section 76(1)(a) of the Elections Act a nullity-a declaration that was clear as well as unqualified. Indeed, the Court of Appeal appreciated the sanctity of this declaration and dismissed the appeals before it-in accordance with comparative judicial practice around the world. In India, for instance, Justice B.P Sinha in Bengal Immunity Co. Ltd v Bihar, (1955) 2 S.C.R603, ('55') A.SC661 observed:

"Under the Constitution and even otherwise, this Court is naturally looked upon by the country as the custodian of law and the Constitution, and if this Court were to review its own previous decisions merely because another view is possible, the litigant-public may be encouraged to think that it is always worthwhile taking a chance with the highest Court in the land."

As Chief Justice Maraga has pointed out on a number of occasions, Article 49 (1) (g) of the Constitution provides that an arrested person has the right to be released on bond or bail on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released. In his articles, Mr. Mwangi did not indicate in which cases the Judiciary interpreted and applied the Constitution wrongly.

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The third thing which he overlooks is that the Constitution embodies the social contracts which Kenyans have entered into with one another. It indicates how the Country is to be governed. The Bill of Rights sets out the limits of the State's power over the individual. This limitation is placed on all organs of Government – the Executive, the' Legislature and the Judiciary. In an appeal from Jamaica, this principle was stated as follows in Hinds -v- Queen (1976) 1All ER, 353:-

The more recent constitutions of the Westminster model, unlike their earlier prototypes include a chapter dealing with fundamental rights and freedoms. The provisions of this chapter form part of the substantive law of the state and until amended by whatever special procedure is laid down in the constitution for this purpose, impose a fetter on the exercise by the legislature, the executive and the judiciary of the plenitude of their powers.

It is quite clear that the Executive branch of the Government is complaining about the fetter of its power by the Constitution which the courts have enforced as they are mandated to do. It bears repeating that on 4th August, 2010, the Constitution was ratified by 67% of the voters. Mr. Mwangi overlooked the fact that the Constitution addresses many needs of the individual. Fighting graft is not the only task which the Constitution deals with. The individual has many needs such as living in dignity as guaranteed by Article 28 of the Constitution and in liberty as mandated by Articles 29 and 49 of the Constitution. The debate of the graft war must be a holistic one. Article 159 of the Constitution provides that judicial authority is derived from the people and vests in and shall be exercised by the Courts and Tribunals established by and under the Constitution. Article 171of the Constitution establishes the Judicial Service Commission. Article 172 of the Constitution provides that the Judicial Service Commission shall promote and facilitate the independence and accountability of the Judiciary. Mr. Mwangi, as is demonstrated in this article, is criticizing the Judiciary for discharging the constitutional mandate which the people of Kenya have given it. Essentially, his criticism of the Judiciary is a criticism of the people who conferred, on the Judiciary, its independence. That is an issue which is for debate at a forum convened to review the Constitution. The Judges do not engage in such debates as their task is to enforce the Constitution as it is. The criticism of the Judiciary or any other institution is welcome and indeed it is the lifeline of a democracy. However, that criticism must be temperate and based on facts or evidence. If he were not the advisor of Honorable Raila Odinga, one could ignore his unfair criticism of the Judiciary. Similarly, if he were not a lawyer, one could ignore those articles which the Sunday Nation published. However, lawyers and prominent leaders have an obligation to maintain public confidence in courts and other institutions. The rationale for this need was given by Lord Denning who quoted the following passage from Sydney Smith:-

Nations fall when Judges are unjust because there is nothing which the multitude thinks worth defending: but Nations do not fall which are treated as we are treated and why? Because this is a country of the law; because a Jude is a Judge for the peasant as well as for the palace; because every man's happiness is guarded from fixed rules of tyranny or caprice.

Mr. Mwangi has breached two of the duties of the five duties of an advocate which were formulated by Lord McMillan - to his client, a duty to his opponent, a duty to the court, a duty to himself and a duty to the State. A lawyer is required to assist the State in the administration of justice. That duty is breached where the function of the courts is misrepresented to the public as has happened.

The complaint that the Judiciary is not as harsh as it should be towards suspects is not new. It was made way back in 2006 when the former Minister Chris Murungaru successfully challenged the constitutionality of a letter from Kenya Anti – Corruption Commission requiring him to provide a written statement enumerating all his property within 7 days. Please see Murungaru -v- Kenya Anti – Corruption Commission & Another (2006) 2 KLR733 (Lesiit, Wendoh and Emukule :JJ). That criticism was answered by the court as I demonstrate below. Honorable Murungaru's application to stop the Kenya Anti - Corruption Commission from requiring him to make a statement enumerating all his properties pending the hearing of his case to enforce his constitutional rights was refused by the High Court (Nyamu J, as he then was). It was, however, allowed by the Court of Appeal on conditions which would not hinder the Respondent from executing its mandate.

The Court of Appeal, at an interlocutory stage, and the High Court, after it heard his case, made it clear that their intervention was small as the fight against corruption must be allowed to proceed. First, as stated above, the High Court Judge, Justice Nyamu (as he then was) refused a temporary stay of the demand that he supplies the information sought. Following that refusal, Honorable Murungaru was charged in court and he denied the charge. That was an act of the Judiciary now being criticized. He made an application to the Court of Appeal which gave a stay of the demand pending the hearing of his appeal against the refusal. In the course of granting the stay, the Court of Appeal described the constitutional setting in which graft is fought and the need not to tie the hands of the prosecuting authorities. This was in Christopher Ndarathi Murungaru -v- Kenya Anti – Corruption Commission & Another (2006) eKLR where the court (Omolo, Tunoi and O'Kubasu JJA) stated the law as follows:-

Lastly, before we leave the matter, Professor Muigai told us that their strongest point on the motion before us is the public interest. We understood him to be saying that the Kenyan public is very impatient with the fact that cases involving corruption or economic crimes hardly go on in the courts because of applications like the one we are dealing with. Our short answer to Professor Muigai is this. We recognize and are well aware of the fact that the public has a legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished. But in our view, the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the courts, sometimes even to the annoyance of the public. The only institution charged with the duty to interpret the provisions of the Constitution and to enforce those provisions is the High Court and where it is permissible, with an appeal to the Court of Appeal. We have said before and we will repeat it. The Kenyan nation has chosen the path of democracy; our Constitution itself talks of what is justifiable in a democratic society. Democracy is often an inefficient and at times a messy system. A dictatorship, on the other hand, might be quite efficient and less messy. In a dictatorship, we could simply round up all those persons we suspect to be involved in corruption and economic crimes and simply lock them up without much ado. That is not the path Kenya has taken. It has opted for the rule of law and the rule of law implies due process. The courts must stick to that path even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the court's decisions. Occasionally, those who have been mighty and powerful are the .ones who would run

to seek the protection of the courts when circumstances have changed. The courts must continue to give justice to all and sundry irrespective of their status or former status. What orders should we make in the motion before us?

We think we should stay and we hereby do, the implementation and enforcement of the NOTICE dated 9th January, 2006 issued by the Director of the Commission to the Applicant and since Criminal Case No. ACC 11 of 2006 in the Magistrate's court was instituted pursuant to that NOTICE, the hearing of that case is also hereby stayed pending hearing and determination of the appeal brought' to this Court or the hearing and determination of the Applicant's Originating Summons in the High Court whichever is the earlier. In other words, this order of stay does not prevent the High Court from hearing and determining the constitutionality of the sections of the Act challenged by the Applicant. We also wish to make it abundantly clear that this order of stay does not in any way prevent the Commission from independently investigating the Applicant and if necessary, recommending his being charged with an offence of corruption or economic crime based on the evidence which the Commission may obtain by its own investigations.

In his case in the High Court, Honorable Murungaru was seeking 12 reliefs. After hearing his case, the High Court granted only one out of his 12 prayers. This was the one that sought the quashing of the letter dated 9th January, 2006, requiring him to provide a written statement enumerating all his properties. The reason for the decision was that it contravened his constitutional rights.
In Court of Appeal at Nairobi, Criminal Application No. 1 of 2015: Helmuth Rame -v- Republic (Kihara Kariuki, Mwera &Murgor JJA), the Principal State Counsel representing the Director of Public Prosecutions applied for the withdrawal of a charge and the same was refused by the Chief Magistrate's Court.

The Applicant was charged with conspiracy to defraud contrary to Section 317 of the Penal Code as well as on three counts of obtaining money by false pretences. The complainant successfully opposed that withdrawal. The State Counsel applied to the High Court for revision and setting aside of the order of the Chief Magistrate's Court.
This was refused by Hon. Justice Msagha Mbogholi. Being aggrieved by that decision, the suspect made an application to the Court of Appeal for a stay of further proceedings in the Chief Magistrate's Court. The Court of Appeal dismissed that application.

In Civil Application No. 51 of 2008: Republic -v- Kenya Anti – Corruption Commission (Tunoi, Githinji & Waki JJA), the Court of Appeal granted an Applicant a stay of criminal proceedings pending the hearing of his intended appeal reasoning that unless it did so, the Applicant would undergo an expensive trial which could result in his denial of his liberty whilst his appeal was pending before the court. Professor Njuguna Ndung'u's case fell within the exception which was mentioned in the Esther Ngari case supra which is discussed above. This exception is known to all the Commonwealth countries as demonstrated by the Australian case in Williams -v- Spautz 174 CLR 509, and in England by the House of Lords decision in Bennett -v- Horseferry (1993) Vol 3 AER page 138. This jurisdiction was exercised in Canada in In the Matter of the Attorney General of Canada on behalf of the United States of America and Adeyemi Peter Alfred - Adekeye, Supreme Court of British Columbia, Docket 25413.
In the former; the High Court of Australia held that the court has power to stop the prosecution of a person where the dominant purpose is not to serve the ends of criminal justice. It stated as follows:-

15. It is well established that Australian superior courts have inherent jurisdiction to stay proceedings which are an abuse of process (5) Clyne v. N.S.W. Bar Association [1960] HCA 42; (1960) 104 CLR186, at p 201; Barton v. The Queen [1980] HCA48; (1980) 147 CLR75, at pp 96,107,116; Jago. Although the term "inherent jurisdiction" has acquired common usage in the present context, the question is strictly one of the power of a court to stay proceedings. That power arises from the need for the court to be able to exercise effectively the jurisdiction which the court has to dispose of the proceedings. The existence of that jurisdiction has long been recognized by the House of Lords (6) Metropolitan Bank v.Pooley (1885) 10 App Cas 210; Connelly v. D.P.P. (1964) AC 1254 ; Reg. v. Humphrys (1977) AC1. The jurisdiction extends to both civil and criminal proceedings. As Lord Morris of Borth-y-Gest observed in Connelly v. D.P.P. (7) (1964) AC, at p 1301.

"(A) court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."

20. In our view, the power must extend to the prevention of an abuse of process resulting in oppression, even if the moving party has a prima facie case or must be assumed to have a primafacie case. Take, for example, a situation in which the moving party commences criminal proceedings. He or she can establish a prima facie case against the defendant but has no intention of prosecuting the proceedings to a conclusion because he or she wishes to use them only as a means of extorting a pecuniary benefit from the defendant. It would be extraordinary if the court lacked power to prevent the abuse of process in these circumstances.

In Bennett -v- Horseferry (1993) Vo!. 3 AER page 138, the House of Lords stopped a prosecution of a person who had been illegally deported from South Africa at the request of the British authorities because to do so was to sanction undermining of the rule of law. The court stated the law as follows:-

Whatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many of the basic principles to which they seek to give effect stem from common roots. There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognizance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction ,'is, to my mind, an insular and unacceptable view.

In this country, this principle was first applied in Githunguri -v- Republic (1985) KLR page 92 (Simpson, Sachdeva and Mbaya JJA). The case instituted against the former Kiambaa M.P Honorable Stanley Munga Githunguri was terminated. The apparent claim by Mr. Mwangi that the Judiciary is not applying legal principles is based on forgetfulness of our history. And also overlooking the practice in commonwealth countries.

In the High Court, the law has been summarized by Justice Odunga in Eunice Khalwali Miima -v- Director Public of Prosecutions & 2 others [2017] eKLR,in which his Lordship summarized the law as follows:-

45. The law in these kind of matters is that it is upon the applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute is being abused and ought to be interfered with and this burden and standard was expounded in Kuria & 3 Others vs. Attorney General (supra) where it was held:
"A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution ...In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution .."

46. As is stated in Halsbury's Laws of England 4th Edn. Vol. 1(1) para 12 page 270:

"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus) ...are all discretionary. The Court has a wide discretion whether to grant reliefat all and ifso, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief."

47. In this case it is my view that the issues raised by the applicant ought to be raised before the trial Court. It is therefore my view that it is premature at this stage to make findings that the criminal proceedings ought to be quashed. The applicant's case being that she took all the necessary steps in the matter and was not part of the theft conspiracy cannot be dealt with and resolved by this Court in these proceedings in light of the fact that the case facing the applicant, it would seem, is not that she was the principal but that she was an accessory to the theft.

48. With due respect the applicant's evidence falls short of what is required to prove ulterior motives in the institution of criminal proceedings. The fact that the applicant faces the risk of interdiction per se cannot be evidence of malice. With due respect the applicant has simply failed to make out a case that would warrant the serious orders sought herein.

49. As was held by Lenaola, J (as he then was) in the case of Daniel Ndungu vs. Director of Public Prosecutions & Another (2013) eKLR:

"In conclusion, the Petitioner ought to face his accusers, prove his innocence or otherwise and submit to the consequences of the Law should he be found culpable".

50. As was expressed in Kuria & 3 Others vs. Attorney General (supra):

"In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

51. In the premises I am not satisfied that this is a proper case in which the court ought to bring the criminal proceedings to a halt. The applicant will be afforded an opportunity to defend herself, cross-examine witnesses and adduce evidence in support of her case and that in my view is the proper course to take in the circumstances of this case.

That statement of the law which gives effect to the principle stated in the Esther Ngari case supra represents the law which our Judiciary is applying.
The search for solutions to the graft problems demands that research be done into what the Judiciary has actually done as opposed to what, on the face of it, it does.

It also calls for examining of constitutional democracies fight against graft. The trashing of careers of the Kenya jurists should stop.

Dr. Gibson Kamau Kuria, SC is an Advocate of the High court of Kenya

BY NANCY NAMISI SIBOE

Herald! The Era of Legal Artificial Intelligence in Legal Practice

Gottfried Wilhelm Leibniz, a lawyer, predicted the use of machines in law contemporarily now artificial intelligence. He was a prominent German polymath and philosopher in the history of mathematics and the history of philosophy. He is well known for his contribution to differential and integral calculus. He said, 'It is unworthy of excellent men to lose hours like slaves in the labour of calculation which could safely be relegated to anyone else if machines were used.' In 1673, while presenting the machine for four arithmetic operations in the UK, he said, 'The only way to correct our reasoning is to make them as tangible as the mathematicians' so that we can find our error at a glance, and when there are disagreements between people, let's calculate and see who is right!'

Artificial Intelligence is a broad set of methods, algorithms, and technologies specialized in making 'smart' software in a way that may seem human-like to an outside observer. Technology is evolving at a very fast pace and it is quickly getting out of hand if not well handled. One of the problems with the Kenyan legal profession is its similarity to a religious cult which demands 'noli me tangere'. Compared to other jurisdictions, Kenya is hazy when it comes to placing Artificial Intelligence and especially in the context of operations in the legal sector.

In 2017, Felix Steffek, a University Professor at Cambridge University and Ludwig Bull (an AI self-taught specialist in case predictions) announced their commencement of preparing a standardised date set of 100,000 US court cases to test Artificial Intelligence approaches for analysing court decisions and predicting outcomes. This was after an eye-opening contest that took place in October 2017 pitching more than 100 lawyers from many of London's ritziest firms against an artificial intelligence program called Case Cruncher Alpha. Both the humans and the AI were given the basic facts of hundreds of insurance cases. They were asked to predict whether the Financial Ombudsman would allow a claim. The Case Cruncher won by getting an accuracy rate of 86.6%, compared with 66.3% for the lawyers.

In 2018, ILawGeex compared the performance of 20 experienced United Nations lawyers to their AI systems. In the daily legal risk assessment task, the highest performance among human lawyers was 94%, the lowest performance was 64%, and the average performance was 85%, while the average of AI was 94% success. In addition, the average time required for 'human lawyers' for this process is 92 minutes, while the time needed by AI is 26 seconds. AI can continue this process for a long time without rest!

A Select Committee on Artificial Intelligent was appointed by the English House of Lords on 29 June 2017 "to consider the economic, ethical and social implications of advances in artificial intelligence." In June 2018, The Solicitors Regulatory Authority of England & Wales conducted road shows on the issue of legal tech. An Artificial Lawyer spoke at one of its panels in Cambridge raising the question of what would happen if an artificial lawyer tried to practice in court. The England and Wales Law Society's Public Policy Technology and Law Commission is presently examining the use of algorithms in the justice system; and what controls, if any, are needed to protect human rights and trust in the justice system.

In a broader perspective, 25 EU states, including the UK, France and Germany, signed the Declaration of Cooperation on Artificial Intelligence in 2017. The agreement emphasises establishing strategies and policy to ensure Europe's long term competitiveness in research and deployment of AI as well as dealing with the social, economic, ethical and legal challenges of AI. The European Parliament Resolution on Robotics in 2017 defines types of AI use, covers issues of liability, ethics, and provides basic rules of conduct for developers, operators, and manufacturers in the field of robotics. The German Traffic Act imposes the responsibility for managing an automated or semi-automated vehicle on the owner and envisages partial involvement of the Federal Ministry of Transport and the Digital Infrastructure.

Where does Kenya stand? Can AI be succinctly and sufficiently housed under the existing laws? It is important that the laws governing the use of technology be revised in light of the future direction of online delivery of legal services and for a digital lawyering framework. The murky waters of ethical, legal, regulatory and compliance basis upon which AI makes decisions and liability allocation in case of infringement on third parties is something to be considered in great depth and breadth.

Nancy Namisi Siboi is a research assistant in the Department of Business & Law (University of Portsmouth, United Kingdom), Doctoral Candidate and Advocate of the High Court of Kenya

BY DR. CHARLES KHAMALA

Criminal Justice for Post-Election Violence Victims

Victims of police shootings during 2007 Post-Election Violence (PEV) testified before High Court Judge Fred Ochieng in Kisumu in March 2019. The petitioners accuse the Kenya government of failing to protect the victims. These claims are supported by assertions made by the Citizens against Violence and the Independent Medico-Legal Unit, IMLU whose Report alleges that 29 percent of the 80 post-mortems it carried out corroborated the witnesses' "accounts of police complicity in the deaths." IMLU's Executive Director, Samwel Mohochi, says, "In this particular instance there was no thorough, prompt, and impartial investigation on these incidents by the state."

However, it is the argument here that indemnity laws which immunize police brutality are but one "missing link" in the criminal justice system's apparent failure to provide justice for post-election violence victims. Police impunity persists partly due to failure to punish wider corruption including electoral fraud, but also because of the omission to punish preparatory acts by elites who organize ethnic violence to which police respond.

PARALLEL CRIMINAL JUSTICE SYSTEMS

The establishment of single party political systems in post-independent Third World countries was predicated upon the much refuted "development first" theory. The theorists insisted that, until conditions of a minimum income threshold have been attained, democracy cannot be sustained.

Consequently, despite President Daniel Arap Moi's "peace, love and unity" rhetoric, his Nyayo philosophy inherited and imitated President Jomo Kenyatta's belief that a strong centralized government was essential for maintaining peace, as a prerequisite for development.

By the late 1980s, however, upon collapse of the Berlin wall, liberal theory asserted itself. External forces, principally Western donor countries, used the Bretton Woods Institutions combined with "second liberation activists" to compel Kenya to restore political pluralism.

Nonetheless, Moi ominously predicted that the return to multipartyism would precipitate ethnic conflicts. That argument presupposed that "increasing liberty increases crime." Its factual premise was that Kenya's diverse ethnic groups either harbour primordial hate or have acquired grudges against each other. Moi concluded that such irrational detestation would spontaneously ignite violent conflicts.

Conversely according to the Akiwumi Report (1999), the tribal clashes between 1991 and 1998 which claimed 4,000 lives and displaced 400,000 people were directly attributable to or acquiesced in by powerful Kenya African National Union politicians, the provincial administration and the police. Yet to date, no retributive action has been taken to investigate, arrest, prosecute, convict or punish the suspects who were named in that Report.

Although the criminal justice system punished some lower level perpetrators of physical harms, it ignored senior politicians and military personnel who planned, financed and organized tribal clashes from behind the scenes.

This political decision to sanitize these crimes contradicted the state's professed liberal mantra of "equality of all before the law." By ignoring evidence of alleged wrongdoing, official inaction instead immunises a special category of elites from criminal consequences.

Inevitably, such conspicuous unequal application of law erodes public confidence in the courts. If "crime pays" for the rich, then economically marginalized people are encouraged to offend too. Except that, being unable to perpetrate sophisticated white collar crimes such as monumental fraud, environmental damage or fleecing workers, they instead engage in petty offences or establish vigilante groups. Such informal gangs form subcultures which unofficially set out to enforce the law. But officially militia like Mingiki engage in criminal counter-violence, fueling "mob justice," which may escalate into ethnic cleansing.

FOUR CRISES OF THE PENAL SYSTEM

Reviving confidence in Kenya's criminal justice system requires debunking the proposition that "increasing liberty necessarily increases crime." It is thus important to understand the socio-political context in which "shoot-to-kill" orders are issued.

To safeguard the right to life, the state must abandon its knee-jerk reaction to dissent by the exploited masses and the oppressed working classes. Branding freedom of expression, public protests or popular revolts as subversion or a "law and order" problem, justifies suppression using brute force.

Repression, however, ignores the need to engender public discourse in which civil society may organize. The citizenry's voluntary informed consent legitimizes state power. Four interlinked socio-political factors have made it difficult for the criminal justice system to enforce Kenyan democracy.

First was the failure by the post-independence criminal justice system to ensure that human rights were enforced even-handedly in order to facilitate equal electoral competition. Opposition leaders and supporters were harassed, detained, exiled and assassinated. Sedition laws curtailed the propagation of alternative forms of governance. Thus, in 1992, 1997 and 2007, there was a manifest absence of electoral justice and the deterioration of media freedoms.

Second, the recurrent situations of post-election violence (PEV) were predicated upon both real and perceived inequalities in the rewarding

of pro-government operatives and marginalization of the anti-government regions. Discrimination was manifested by the highly uneven distribution of economic public goods such as roads, schools, hospitals etc.
Therefore, the "first-past-the-post" "winner-takes-all" presidential elections resulted in the exclusion of unsuccessful candidates' communities from national resources. Thus after the 2003 elections, while resentful underclasses gestated everywhere, frustrated Luo Nyanza and Kalenjin North Rift opposition zones, desired to expel Party of National Unity migrant communities.

The third factor, which led to the PEV in 2008, was the mobilization of economic underclasses by political elites inciting ethnic identities to promote selfish interests. Masses in the Orange Democratic Movement's strongholds who felt dissatisfied with historical injustices were easily manipulated to take up crude weapons, and the police responded with bullets.
The fourth factor manifested in 2012 where four Kenyan leaders across the political divide were indicted by the International Criminal Court. The PEV in 2008 had left 1,300 dead, 650,000 forcibly displaced, 900 raped and billions worth of property destroyed. This was arguably attributable to the sub-cultural, counter-crimes by excluded tribes. The four indictees contested The Hague cases. They denied igniting a war of 41 against 1, namely "all against the Kikuyu."

Although President Mwai Kibaki then controlled the instruments of state power, fearing military mutiny, he declined to officially declare a state of emergency. Nonetheless, excessive force was used to suppress widespread rioting, exposing the police to criminal charges.

PROBLEMATIC PUBLIC TRANQUILITY LAW

Clearly, therefore, criminal law is a weapon deployed by the ruling class, on behalf of the propertied class, to prevent workers from stealing or rebelling against exploitation. However, in 2007-8, in its attempt to restore public tranquility, Kenya's criminal law experienced four systemic macro-failures.
First, its definition of substantive crimes reflected ideological privileging. On the one hand, rules proscribing acts of poverty such as the offence of unlawful assembly, a misdemeanor contrary to section 79 of the Penal Code, was escalated under section 83 into the felony of rioting. The latter not only attracts life imprisonment, but worse, it indemnifies the police's resort to lethal force. On the other hand, although rules proscribing deviance of wealth, e.g. electoral fraud, particularly the Electoral Commission of Kenya's manifest malpractice, create serious election offences, officials were not prosecuted.

> ***"Nonetheless, Moi ominously predicted that the return to multipartyism would precipitate ethnic conflicts. That argument presupposed that "increasing liberty increases crime." Its factual premise was that Kenya's diverse ethnic groups either harbour primordial hate or have acquired grudges against each other.***

Such non-action was predictable. Previously, the rich had never been convicted for Moi's 13.5 billion shilling Goldenberg scandal, despite devastating the 1990s economy. Hence, when Kibaki's equally debilitating Anglo-Leasing scam was exposed in 2004, it constituted "business as usual." The opposition decried Justice Joseph Nyamu's High Court prohibition order barring former Vice President George Saitoti from Goldenberg prosecution. It was perceived as judicial complicity in politically-orchestrated looting of public resources. Eventually, it caused ODM not to have confidence in the courts' ability to adjudicate over the disputed 2007 presidential election.
The second failure arises from the Penal Code's remedial rules that are based on retributive justice rather than restorative justice. Some modern penalists opine that incarceration does not reduce, but rather increases crime. Moreover, given that neither Kibaki nor Raila Odinga were prosecuted at the ICC, public outrage against selective retribution tended to further delegitimize the penal system.
Instead the 2008 Government of National Unity midwifed the 2010 Constitution containing "appropriate" or "traditional" dispute resolution mechanisms to reconcile victims and suspects through plea-bargaining. Mediation may encourage PEV complainants to withdraw cases under section 204 of the Criminal Procedure Code (Chapter 75 Laws of Kenya) as read with section 176.
Whether compensation can resolve serious crimes remains to be seen. In the Kisumu "police shootings case," lawyers for the petitioners and the government failed to reach an out of court settlement. The government's concern was that admitting liability could lead to an "avalanche" of suits.
The third shortcoming of the Kenyan criminal justice system lies with the formal and alien procedural rules that are too complex for the layman to handle. Yet, the majority of Kenyans cannot afford legal representation – and the state does not provide legal aid – except, traditionally, in Superior Court for capital trials of murder and treason.
Although robbery with violence suspects also face the ultimate death penalty, they are instead tried before magistrates' courts where they are discriminatorily excluded from state legal aid. Curiously, neither the Attorney General's launch of National Legal Aid and Awareness Policy, 2015, nor Parliament's enactment of Legal Aid Act no. 6 of 2016 have enhanced victims' capacity for prosecuting the PEV murder or rape suspects. Nonetheless, because the "Kisumu police shootings case" has attracted significant NGO support, the verdict shall test the Maraga judiciary's resolve to "treat like cases alike."

The fourth shortfall originates from the repealed Constitution's myriad defects that have been carried over. Principally, the absence of means to check executive power – mainly manifested in the criminal justice machinery – from abuse has resulted in many cases of injustice. In this regard, reformists argue that Kenya's post-independence command capitalist constitution failed to uphold liberal democratic ideals of safeguarding fundamental rights. Suspects were routinely subjected to torture or to cruel, inhuman or degrading treatment or punishment.
Notwithstanding the promulgation of the comprehensive constitutional reforms in 2010, the unequal responses by the criminal justice system, which blatantly brutalizes the underclasses while mollycoddling the elites, still persists.

How then can the criminal law prevent violence during future electoral protests? First, a defeated candidate's rejection of election results may be constrained by managing supporters' expectations. Supporters should be made to feel that electoral justice has been done.

Beyond adjudicating election petitions, the law should not only punish perpetrators of ethnic violence, but also impose disutility of non-monetary forms – if not imprisonment or death – upon election officials who rig polls.
Second, albeit ironically, such enhanced punishments are normally ineffective unless a police force is maintained to reduce the possibility of concealment.
Yet, incompetent or corrupt detectives are partly to blame. This raises the circular problem of who shall guard the guardians. Ultimately, the solution lies in punishing preparatory acts. This entails preventing criminal activity before it happens. For starters, devolving resources and power under the new Constitution enhances equitable distribution of the national cake. This reduces ethnic anxiety over the executive's skewed distribution through patronage.

Second, lifting away indemnity from police officers who brutalize in the guise of repressing rioters can restore faith in the criminal justice system's evenhandedness.
Finally, although public policing is more efficient than private, some individual criminal responsibility for post-election violence victimization must be apportioned between officials who rig and elites who organize violence.

Dr. Charles A. Khamala, Senior Lecturer, Africa Nazarene University Law School

BY FAITH KHALAYI

Legal Practice in the Age of Automation

In 2018, a survey piloted by the Australasian Legal Practice Management Association (ALPMA) and the Centre for Legal Innovation (CLI) found that the legal profession was not ready to embrace the disruptive change that came with new technologies. Slow technology uptake by the legal profession might seem like a Kenyan problem, but it is a global issue. While it is commendable that large law firms are more open to using legal-tech tools in their practice, most medium sized and small firms still rely heavily on human capital. In the midst of the growing opportunities that new technologies have presented to the legal fraternity; including the use of social media, the emergence of cyber-security law and expansion of intellectual property related with online creations; it is still a puzzle why legal professions still sticks with the phrase "not now", regarding the automation of legal practice.

A number of reasons have been suggested as to why lawyers are slow towards embracing technology. One of the reasons that have been advanced relates to the nature of legal education. Lawyers have been trained more to investigate, research and write as opposed to be website and computer program creators. The arts nature of the law curriculum which focuses on history, politics and philosophy has left lawyers at a distance with technology. Secondly, lawyers have been traditionally trained to be risk averse. One of the main values that most lawyers have is being over-cautious. Consequently, taking up new things does not come naturally to the legal profession. New technologies are not exactly the safest of innovations, judging from the many cases of information and security breaches that are experienced even by the largest technology companies across the globe. These problems have then impeded collaboration between legal practice and technology firms. More importantly, lawyers are cautious of ventures that require them to collaborate on disclosing a firm's information. This is because one of the valued client-advocate relationships is that of confidentiality and discretion. Hence, the progress of the legal-tech industry is impeded by the principle of nondisclosure. It is extremely difficult for firms to hand over sensitive client information to a tech company for the purpose of managing and digitization. Despite these fears against disruptive technologies, Kenya has made important strides towards embracing technology in the legal profession. Needless to say, while law firms lag behind in automation, major government agencies have led the way in ensuring that legal information is automated. Case in point, advocates and the larger public can now access legal information using the Kenya Law online database. The judiciary has also taken digitization seriously as exemplified by online cause lists and mobile communications in an effort to effectively manage cases. The automation of the company registry and lands offices might not have received favorable response from lawyers, but they are slowly warming up to it.

As the legal fraternity grapples with the timings of technology, there is a breed of "legal-prenuers" and technology disruptors who have made their mission to ensure that they bring technology to every advocate's door step. The kinds of Patafile and PataWakili online platforms that aim to ease file management and access to legal professions, respectively, have already broken ground in the industry. It is only a matter of time before the industry is flooded with other automated technologies such as artificial intelligence. Alternatively, if law firms become rigid towards embracing technology and emerging trends, and as such fail to offer affordable legal services, clients might have to look for alternatives. Further, if the legal industry fails to provide the needed opportunities for legal tech disruptors, it might lose highly skilled professionals to other industries, as the legal career will be viewed as majorly limiting.

Since technology is here to stay, the legal practitioners will have to prepare for both the positive contributions and potential negative effects that might come with the use of legal tech. Imagine a scenario where legal minds will be spared from thousands of research hours by simply using a machine learning device that is able to comb through legal documents and precedents. More so, for small and medium-sized firms, technology is a competitive strategy which allows them to compete effectively with large firms. Technological trends that are already being experienced in practice include cloud and mobile device utilization, emergence of virtual law firms and the widespread of social media by the modern lawyer. On the flipside, issues of concern have been raised regarding the possibility of a robot lawyer, as it is feared that artificially intelligence might replace the human lawyer. Clearly, the modern legal practice will have to adapt to the possibilities, concerns and fears that come with new technology; because its time is now!

Faith Khalayi is an Advocate of the High Court of Kenya

BY RICHARD MUTISO

Autochtony and Nomenclature (The Disconnect in our 2010 Constitution)

Now that there appears to be a concerted effort generally and more specifically by Dr. Ekuru Aokot to have a plebiscite on the 2010 Constitution under the eye catching banner "Punguza Mzigo" may I respectfully urge that if the process comes to fruition we go the whole hog in re-configuring the language of the Constitution.

I respectfully suggest we adopt a new and fresh nomenclature that will, even at a first glance authentic the autochthonous nature of our Constitution.

Autochthony and nomenclature are just two big words (but do I say) that simply mean "home grown" and the act of choosing or assigning "names" respectively

(In the run-up to the 2010 Constitution a lot of effort was made) by the stakeholders to obtain as wide as possible the in-put of the Kenya public. The ultimate result was declared and celebrated as "Wanjiku driven" and "Wanjiku Oriented"

To some extent this was true, Rights hitherto undefined were given a fresh Constitutional breath and underpinnings. The Bill of Rights was henceforth inviolable other than through Constitutional means, Social rights like the right to a clean environment, the right to fair labour practices, the right to free health care services, access to housing and food etc were placed on a Constitutional pedestal.

The newly rejuvenated judiciary was quick to pronounce itself on these rights and various judgments come to mind. William Musembi & 13 Others vs. Moi Education Centre Company Ltd (right to housing) P.O. A & 2 Others Vs. Attorney General (Right to medical care).

However, constitutional nomenclature chosen by our constitutional "fathers" and "mothers" fell short and one would be easily excused while reading the Constitution if they thought the names adopted were an easy but not necessarily good adaptation of the American or Western Democracy Constitutions.
Why do I say this, a quick glance through the Constitution pops out this disconnect between "Wanjiku Oriented rights" and the "non-Wanjiku" language used.

Let's start with the state officers, the President, the Chief Justice, Speakers et.al. The choice of names by itself has direct connotations of "over lords" Notice that the Chief Justice is under the 2010 Constitution not only to be referred to as the "Chief Justice" but also as the President of the Supreme Court.

Who chose the title "Governor" for our counties? Surely, in our Kenyan parlance, considering our colonial background was this desirable? Is it any wonder that some holders of these offices see themselves as "demi-kings" exercising over-lord to their county citizenry, with complete control over their finances?

> ***"This is not an idle assertion what if we replace "President" with "Mtumishi Mkuu" "Deputy President" with Mtumishi Mkuu Msaidizi" What if for "Chief Justice" we replace it with "Mpatanishi Mkuu" and similar titles in the hierarchy? Would this not help in reducing the adversarial culture in our litigation?***

The Senate again a term borrowed if not the system from the American political arrangement. Again is it little wonder that there has been flexing of muscles between the Senate and the National Assembly as to which ranks higher than the other!
One could go on and on but I will save the reader tedious regurgitation.

What is the way forward? May I submit that a change of our Constitution nomenclature would have a serious change in the mind-set of the Kenyan populace and especially those that assume such offices.

This is not an idle assertion what if we replace "President" with "Mtumishi Mkuu" "Deputy President" with Mtumishi Mkuu Msaidizi"
What if for "Chief Justice" we replace it with "Mpatanishi Mkuu" and similar titles in the hierarchy? Would this not help in reducing the adversarial culture in our litigation?

What if for "Member of Parliament" we chose "Constituents Servant to Parliament"? and so on!
Am not for one suggesting that mere change of names is enough but could it be a beginning of a paradigm shift that would change the way we view these offices and office holders? Could this inculcate a greater sense of accountability and servant leadership?

What do you think?

Richard Mutiso is an Advocate of the High Court of Kenya

BY ANGELA OGANG

Copyright Protection in the Digital Age

You are a freelancer with a growing business and you recently published a book to share the knowledge and skills you have gained over the years with other entrepreneurs. But while surfing the internet one evening, you are shocked to see that your book has been made available for download on Kindle without your permission. Or perhaps you posted a video marketing your services on YouTube only to realize a few weeks later that a company in the United States has been using your content in its online training workshops without a license. Maybe you produced a song last year, and you notice to your consternation that it is now available for download on iTunes without your approval. You may even be a blogger who writes about your travels, and you find out one day that your digital content has been reproduced on someone else's webpage who claims to be the author of your work. The common thread in these different scenarios is that you were not consulted on the use of your original work nor were you rewarded for your creative efforts.

The truth is that the internet makes it easier to access and distribute a variety of works around the world and harder to control the use of copyrighted material. While Kenya's Copyright Act (Cap 130) contains many provisions dealing with the enforcement of copyrighted works, its main drawback is that it does not reflect legal developments that have taken shape at the international level in the past two decades and continues to offer analog solutions to problems of a digital age.

INTERNATIONAL COPYRIGHT PROTECTION

The Berne Convention for the Protection of Literary and Artistic Works, 1886 (as amended on 28th September 1979) ("Berne Convention") was the first instrument of international copyright law and it has now been adopted by most countries in the world, including Kenya. It stipulates that foreign copyright owners have the same rights against local infringers as local copyright owners. This means that individuals and body corporates who are citizens or residents of a member state or whose works were made or first published in a member state have rights almost anywhere in the world.

Kenya is also a signatory of the World Intellectual Property Office Copyright Treaty, 1996 ("WCT"), which is a special agreement made under the Berne Convention for the protection of the works and rights of authors in the digital environment. WCT grants authors the exclusive right to sell and communicate their works to members of the public by wire or wireless means. Another noteworthy treaty to which Kenya is a signatory is the World Intellectual Property Office Performances and Phonograms Treaty, 1996 ("WPPT"). It deals with the rights of performers and producers of phonograms in the digital environment and recognizes that producers have moral rights in their sound recordings and the exclusive right to reproduce, sell and authorize the making available to the public by wire or wireless means. Performers such as singers, actors and musicians are granted similar rights in the fixation of their performances in a sound recording.

Kenya's Copyright (Amendment) Bill, 2017 seeks to domesticate WCT and WPPT to better address the challenges of enforcing copyright in an interconnected and continuously evolving digital environment. However, the Bill has yet to be adopted.

PROPOSED AMENDMENTS TO THE COPYRIGHT ACT

Under the Copyright Act, infringement occurs when a person reproduces a copyrighted work in any material form or makes it available to the public without a license. However, the Bill goes further by providing that infringing copies can also be made by transmitting a copyrighted work to the public through wire or wireless means, including making the work available to the public in such a way that the work can be accessed by members of the public from a place and at such a time individually chosen by them.

Thus, the act of uploading a copyrighted book to Kindle or any other online retailer without the author's permission would be considered copyright infringement because it involves copying the work and making it available to the public through wire or wireless means. Similarly, downloading someone else's digital content and uploading it to another online platform would be tantamount to copying the work and making it available to the public. As both acts are protected under the proposed Bill, exercising them without the author's permission would also amount to copyright infringement. It should also be noted that failing to acknowledge the author would constitute an infringement of the author's moral rights.

> *"Thus, the act of uploading a copyrighted book to Kindle or any other online retailer without the author's permission would be considered copyright infringement because it involves copying the work and making it available to the public through wire or wireless means."*

In terms of remedies, the Bill provides that persons whose rights have been infringed can file a takedown notice with the service provider on whose site the infringement occurred. The Bill provides further that any service provider that fails to disable or take down offending content within 48 hours of receiving a takedown notice commits a criminal offence and shall be fully liable for any loss or damages resulting from non-compliance with the takedown notice without a valid justification. Another lacuna in the Copyright Act that the Bill seeks to address is the absence of offences by body corporates and officers of the body corporate.

NEXT STEPS

As we know, there have been a number of interesting developments since the enactment of the Copyright Act that have revolutionized the way we communicate with each other and share information. Many social media platforms now dominate the creative scene and it has become possible to share media with people across the globe in just a few clicks. Consequently, there is a pressing need for Parliament to domesticate the WIPO treaties and create new offences by bodies corporate and internet service providers as provided in the Copyright (Amendment) Bill, 2017. This will go a long way in promoting the intellectual property rights of the people of Kenya and fostering the spirit of entrepreneurship in our internet-driven economy. The good news in the meantime is that most mainstream internet service providers have their own notice and takedown procedures which are available to all copyright holders regardless of where they are located or where the online infringement took place.

Angela Ogang is an Advocate of the High Court of Kenya and a Licensed Barrister and Solicitor in Ontario, Canada

BY GATAMBIA NDUNGU

Popular African Uprisings: Failed States or Turning Point for Democracy and the Rule of Law?

Africa has undergone significant changes in its political landscape since colonization. This is also recalling the wave of democratization that swept through the continent in the early 1990s. During this period, most of the continent's States experienced a democratic transition that heralded the introduction of new constitutions and regular multi-party elections. While this renaissance is credited with producing success stories of democracies that have stood the test of time, sadly enough, there are patches of dictatorial and pseudo-dictatorial regimes that have either creeped back or were left in place.

Indeed, recent developments on the continent hint at a democratic regression. This is manifest by the manner in which several democratically elected governments, including those of Zambia, Uganda, and Tanzania have started to curtail civil liberties and to systematically crack down on media houses, activists, and oppositional groups. Kenya too, in those instances where the Executive made attempts at stifling the civic space and its refusal to initially agree to electoral reforms called by the opposition prior to the 2017 election period and the attempts of introducing the draconian security laws in 2014 that were later declared unconstitutional place the country in this bandwagon.

As a means of responding to injustice and inequality, a new dynamism in the clamour for change has emerged across Africa. This dynamic is popular protests which has increasingly gained traction. The hallmark of these popular uprisings can be said to be the Arab Spring which begun in Tunisia in December 2010 in a neglected interior part of the country when a fruit and vegetable vendor set himself on fire. He felt driven to commit this tragic act by the humiliations he had suffered at the hands of the local authorities and by his sense of hopelessness about the future. This one act would trigger such a wave of protests that toppled the Ben Ali regime who on 14 January 2011 was deposed from power and fled to Saudi Arabia. So soon thereafter, the effects of the Tunisian Revolution spread strongly to five other countries which included Libya and Egypt in Africa as well as in Yemen, Syria and Bahrain. In each of these countries, the regime was either toppled or major uprisings and social violence occurred, including riots, civil wars or insurgencies where essentially the citizenry was demanding democracy, economic dignity, and freedom.

Today, popular unrest has taken different forms that are varied in scale at both the grassroots and national level. They include street demonstrations against rising food prices and the cost of living (Chad, Guinea, Niger), strike actions over arrears in wage payments and labour disputes (Botswana, Nigeria, South Africa, Zimbabwe), protests over rigged elections or attempts by leaders to extend their constitutional term limits (Burkina Faso, Burundi, DRC, Gabon, Togo, Uganda), student protests (Uganda, South Africa), and outbreaks of unrest over police violence, extortion, corruption and impunity (Chad, Kenya, Senegal, Uganda). The seemingly popular appeal to mass protests is further acknowledged by the contagion effect of the Arab Spring as far as in the USA. The organizers of the Occupy Wall Street movement for instance explicitly claimed to have drawn their inspiration from the Arab Spring.

While there has been steady economic growth on the continent over the past two decades affirming the optimistic 'Africa Rising' narratives, this has not translated into a substantial reduction in economic inequality. There is also widespread perception that many African leaderships have failed to deliver fueling the mass uprisings. In sum, political grievances among the middle class and material grievances among the poor are the key protest dynamics where Lisa Muller in her book Political Protest in Contemporary Africa, likens the middle class as the "generals of the revolution" and the poor as its "foot soldiers". Looked in their totality, the drivers and consequences of these uprisings which are more often met by state brutality raise the question of whether the continent is plagued by failed or failing states, or what is being experienced is a turning point for African democracy and the rule of law. When considering popular African uprisings, caution must be employed in instances where an uprising fails in its expectations of democracy, stability and growth or where a protest vehicle later metamorphoses into a dangerous outfit as is the case with several protest groups of the Arab Spring which have reportedly transitioned into militia groups which are presently in competition for power and resources. In appreciating that both the letter and spirit of the African Union's normative frameworks supports the general will of the people, and in spite of the prohibition of the crime against unconstitutional changes of government through the African Charter on Democracy, Elections, and Governance, it is to be construed that a genuine mass uprising can only be viewed as that which paves way for democratic and accountable governments.

Tunisian Protesters during at the start of the Arab Spring with (a banner reading in French, "Stop the repression in the Maghreb)

Gatambia Ndungu is an Advocate of the High Court of Kenya

BY SAMUEL NJOROGE NJERI

Smart Contracts: Blockchain Technology is About to Disrupt Commercial Law

Smart contracts will disrupt the world of transactions. They are not likely to eliminate the need for lawyers, but any commercial lawyer (and litigation lawyer, to an extent) who does not know how to work with them is likely to be handicapped in the long term.

To understand smart contracts, you must also understand blockchain. Blockchain is the technology behind bitcoin. A block chain is a distributed ledger. The best illustration of a 'blockchain' is found in the Lands' Registry. Think of a title under the now repealed Registered Titles Act. Each transaction on the title is indicated through a stamped entry on the document. You can see all the transactions that have taken place for that piece of land, set out chronologically. In essence, a ledger of all its transactions. A chain of events. But that ledger is centralized. You have to go to the registry to verify your identity, verify your transaction as proper and have it recorded in the title. Now imagine there was no central registry. Imagine instead that every person in the country had a copy of that title. And for you to effect a transaction, you had to go to each person and record your transaction on each copy. The person would then verify your identity, verify that your transaction is genuine before recording it. And your transaction would only be considered as complete once every person has it on their copy. The ledger is, in this case, distributed. It would however take forever to get a transaction done but chances of fraud would be eliminated. That is what blockchain does – only that it does not take forever. Each transaction is called a block. As each transaction is added, you end up with a chain of transactions or blocks – a block-chain. But the blockchain does not have a central registry. It is replicated in various computers across the world. And each computer must verify each transaction in order for it to be added to the blockchain. If you wanted to orchestrate a fraud, you would have to hack all those computers.

> ***"To understand smart contracts, you must also understand blockchain. Blockchain is the technology behind bitcoin. A block chain is a distributed ledger. The best illustration of a 'blockchain' is found in the Lands' Registry.***

Now let's consider smart contracts.

Contracts describe transactions and the conditions for those transactions to take place. The parties and their lawyers have to monitor that these conditions are met and the underlying transaction executed. But what if the contract could automatically check for the conditions and execute the transactions?

Smart contracts are contracts that execute themselves. A vending machine or a parking lot pay station are good examples. You never meet the seller of the good or service and unless there is a problem in the machinery, there is no need for human intervention to monitor compliance with the contract terms.

Now imagine if you could do this in a complex transaction. For example, in an investment deal that involves the purchase of redeemable preference shares. Suppose there are some conditions precedent to the transaction – like maybe the exit of minority shareholder. Once the deal is agreed on, rather than creating a contract, one would create a secure computer program which could automatically carry out the agreed upon transactions. The transactions would be recorded in a distributed ledger – for security and for all parties to observe them.

The first transaction it would do, for example, would be to verify the availability of funds by the buyer. It would check this with the bank and possibly place a lien on the funds. Once that is verified, it would then trigger (or verify) the exit of the minority shareholder. If the minority shareholder does not confirm the exit or frustrates it, the program would release the lien on the buyer's funds and close the transaction. If successful, the program would then transfer the funds from the buyer's account to the seller's account. It would then apply for the shares and transfer them to the buyer. And if at any time any of these transactions is frustrated by external forces, it would be set to perform refunds and deduct penalties. And everyone involved, including regulators if they wish, can see the entire chain of transactions as they are being carried out, through the blockchain.

Does this sound far-fetched? Already, smart contracts are being used to trade in derivatives.

Smart contracts will not do away with the need for lawyers. You will still need lawyers or risk experts to conceptualize and design the contracts; very much in the same way we design contracts today. But for a lawyer to be able to create a risk – free smart contract, they must have a basic understanding of how the technology behind it works as well as the systems of banks, government and other players as well and the IoT (the internet of things).

Samuel Njoroge Njeri Advocate of the High Court of Kenya and Risk Practitioner

BY JACKSON MACHARIA GITHU, MCIArb

Champerty and Maintainance – Let's Allow Litigation Financing In Kenya

Champerty and maintenance are doctrines in common law jurisdictions which aim to preclude involvement of third parties in litigation. It has been explained that in modern idiom maintenance is the support of litigation by a stranger without just cause. Champerty is an aggravated form of maintenance. The distinguishing feature of champerty is the support of litigation by a stranger in return for a share of the proceeds.[1] Champerty is simply when a third party who does not have a cause of action finances another person to litigate a claim in return for a share of proceeds, in simpler lingua, litigation financing.

Champerty and maintenance have been crimes and torts in several jurisdictions, a situation which has changed over the years. Several countries such as the United States of America, the United Kingdom and South Africa have legalized and allowed champerty and maintenance in several aspects. Lord Neuberger, former President of the Supreme Court of United Kingdom has convincingly argued that the reasons which existed for initial delegalisation of champerty and maintenance in common law jurisdictions no longer exists i.e. the feudal lords who could wage vicious wars against each other with potential of breaking up the society, including through funding litigation against each other no longer exists in the modern society.[2]

Legalization of litigation funding has led to the emergency of a billion dollar industry. A person with a cause of action approaches a third party financier, who evaluates the claim. If the claim is found meritorious, the litigation financier enters into a funding agreement detailing the level of their support and share of litigation proceeds including costs. Since litigation financiers are in business, they would only fund a claim with a very good chance of success, otherwise they will lose money by funding frivolous claims. Therefore, the age old fear of funding vexatious litigation does not arise. If the rich and powerful know that if they unjustly and unlawfully trod on other people's rights, such victims can approach a litigation financier to fund litigation against them, the rich and the powerful would be hesitant to flagrantly breach the law and other people's rights. Therein lies the magic of allowing litigation financing in a young democracy such as Kenya. It is a win for the rule of law, access to justice, the victims, the lawyers and the judicial system. The lawyers would be confident that their fees will be paid and therefore remove such a worry from their minds and instead concentrate on winning the case.

It is the high time that the nuances and legal provisions which prohibit champerty and maintenance in Kenya be done away with as they are unconstitutional. The single largest impediment we have on access to justice has been costs. Lawyers can bear testament on this considering the thousands of cases and causes of actions sitting in their chambers for the reasons that the clients (and potential clients) are unable to pay legal fees and other case related costs. The constitution has provided of access to justice. Article 48 provides that state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. The fee impediment in article 48 is not limited to the court fees and costs, rather it broadly refers to costs such as legal fees. The state has a duty to ensure that all costs relating to access to justice do not impede the citizens. It is clear that costs have impeded many people's search for justice. A lot of attention has been given to legal aid which unfortunately has not and will not be able to cater for most of the legal claims as it currently concentrates on select cases such as those on human rights and is not capable of financing the full gambit of legal claims. If legal aid was fully successful, the thousands of cases stalling on the basis of fees and costs would not be an issue.

It is therefore in the interest of the society and the wider justice system that champerty, maintenance and litigation financing be allowed in Kenya. The efficiency of the private sector in funding litigation claims would greatly enhance access to justice and rule of law in Kenya. Several countries have allowed these concepts recently, and time is nigh for Kenya to follow suit. This will enable unlock a lot of claims yearning for justice. As the saying goes, let the hawk perch, let the eagle perch, and if one tells the other not to perch, may his wing break.

[1]Giles v Thompson, [1993] 3 All ER 321 at 328.
[2]Lord Neuberger, 'From Barretry, Maintenance and Champerty to Litigation Funding' Harbour Litigation Funding First Annual Lecture Lord Neuberger, President of The Supreme Court Gray's Inn, 8 May 2013.

Jackson Macharia Githu MCIArb is a corporate lawyer with interest in corporate governance, medical law and alternative dispute resolution. You can reach him on jmgadvocates@gmail.com

BY VELLAH KEDOGO KIGWIRU

Technology in the Legal Profession: Opportunities, Challenges and Way Forward

The 2019 Global Legal Hackathon hosted by Lawyers Hub Kenya and sponsored by the Law Society of Kenya (LSK) symbolized the embedment of technology in the legal profession. Innovative technologies have aptly demonstrated that they trigger changes that threaten current markets, social as well as political orders; and the once conservative and exclusive legal market is no longer immune. The increasingly informed tech-savvy client base, the unbundling of legal services, online service delivery and the application of new technologies in the legal profession such as big data, artificial intelligence, blockchain and automation of legal services continues to disrupt the traditional norm of the legal profession in profound ways.

OPPORTUNITIES

The uptake of automated systems assists lawyers to complete tasks such as legal research, predictive analysis, online dispute resolutions and reach a wider client base. Such systems have enabled lawyers meet demands of their clients through adoptive innovative mechanisms.

Automation offers legal services that are 'cheaper, easily scalable systems … and feature new capabilities' and offer legal support to clients in fields inter alia, incorporation of companies, legal compliance, drafting of basic legal documents and contracts reducing the cost of legal services.

Attributably, online service delivery has democratized information enabling clients easily access information. The outcome is that informed decisions on the law form to approach are made thereby enhancing access to justice.

Technological innovations also create new violations requiring lawyers' expertise and creating new job opportunities. Therefore, in the era of block chain technology, electronic discovery, cryptocurrency and e-filing, tech-savvy lawyers must keep abreast with technological advancements and regulation.

CHALLENGES

Technological innovations in the legal sector bring forth a number of regulatory concerns. This includes but is not limited to the regulation of unlicensed legal services providers, price regulation and professional competence.

Legal startups proverbially offer cheaper and affordable services to consumers which brings to the fore the question on who should regulate the prices charged by legal startups? Should the services offered through legal technological innovations be subject to the lawyers' remuneration order?

Many legal startups limit service delivery of legal information through non-reliant disclaimers, indemnities, web terms and conditions thereby diminishing their professional liability.

The assistance of a lawyer is necessitated by the peculiar nature of legal problems which cannot be standardized.

The risk in provision of legal services through technological innovations cannot be shied away. This instantaneously rises where the provider proffers legal services that are otherwise under the preserve of lawyers. See the case of Janson v LegalZoom.com, where the Missouri Court held that, where those offering legal services on online platforms are not authorized to practice law, then there is a risk of the public being served in legal matters by 'incompetent or unreliable persons´.

Other technological innovation challenges in the legal sector include data protection client confidentiality and cyber security risks.

WAY FORWARD

To maximize on the opportunities that technological innovations bring whilst addressing the challenges they present, there is need to:

Review the legal regulatory framework to reflect the changes shaping the legal profession with a view to determining the needs of the digitized client.

Merge technology with legal education in addition to moot courts, trainings and conferences on technological law.

Collaboration of regulatory bodies with different stakeholders including the clients, technological companies and legal technology startups to address issues regarding technological innovations.

Successful law firms will futuristically set technological priorities right from the start. This will involve looking into the future, investing in technology, having a team that is ready to adopt the product innovation and deciding which business model better suits the emerging technologies.

Conducting a thorough analysis on the need for legal reforms in the wake of technological innovations in a bid to ensure the compatibility with competition law of the current legal framework.

Courts must prepare to address disputes that may arise between regulatory bodies and the operators of technological innovations. In the near future, legal startups already sprouting in Kenya will find their way in Court to challenge the legal regulatory framework where the rules are not favorable to their operations.

Technological innovations must operate under the purview of the law, enhance consumer protection and avoid engaging in justified reserved tasks for lawyers.

Vellah Kedogo Kigwiru an Advocate of the High Court of Kenya

BY ROSEMARY A. OKUMBE

Prosecution of Corporate Fraud in Kenya; Are Deferred Prosecution Agreements the Way to Go?

Imagine the perpetrator of a serious corporate fraud avoiding prosecution and a potential prison sentence and instead paying financial penalties and /or agreeing to put in place a compliance program in the affected organization in line with best governance practices. Hard as it is to imagine, this concept has been adopted by countries such as the US, UK and now Australia. Through Deferred Prosecution Agreements (DPAs), companies involved in fraud in these countries can now cooperate with investigators and agree to put in place certain measures such as mandating the appointment new board members or effecting changes in internal controls without having to go through a protracted court process whose outcome could go either way. Thus the prosecution is deferred until the proposals in the agreement are fully implemented. Suffice to say that these agreements are entered into between the affected companies and prosecutors and not individuals as such individuals still have to carry their own crosses. A good case in point is Tesco - a publically listed British retailer with over 3000 outlets worldwide- which deferred the prosecution of an accounting fraud by paying penalties worth £128 Million (Kshs. 17.2 Billion) sometime in April 2017. Since its introduction in the UK in 2014, there have been three other such DPAs including one in which Rolce Royce was fined £500 Million (Kshs. 67.5 Billion) to settle a bribery and corruption claim. Overall DPAs in the UK have contributed a net of £ 460 Million (Kshs. 62.1 Billion) to the UK treasury over a period of 4 years.

Opinions on the effectiveness of DPAs are sharply divided. Whist some believe that they promote good corporate governance by laying emphasis on compliance rather than punishment others such as David Green, the former Director of the Serious Fraud Office, UK, feel that they provide a "soft option for companies that should otherwise be prosecuted for serious crimes."

Back home, prosecution of corporate fraud in Kenya appears to have a long way to go. Recently there have been accelerated efforts by the government (using the multi-agency approach) to bring to book the perpetrators of corporate crimes both in the private and public sectors, although a lot more needs to be done to restore the confidence of a populace that is slowly beginning to bear the brunt through heavy taxation. A 2018 survey by Price Waterhouse Coopers (PWC) on global economic crime and fraud found that global fraud is at an all-time high. The Kenyan Chapter titled; Fraud; The Overlooked Competitor, found that at least 75% of Kenyans reported having experienced at least one form of economic crime in the last two years. This does not compare very favorably with the African average of 62% and global average of 49%.

Parliament, under Article 80 of the Constitution, is mandated to enact legislations that will prescribe penalties for chapter 6 contraventions. Perhaps it is high time that the legislators took a hard look at the current legislative framework and asked themselves whether DPAs could offer a solution to a country that has lost hundreds of billions of Kenya shillings to swindlers and white collar criminals-monies that Kenyans will probably never recover.

Rosemary A. Okumbe an Advocate of the High Court of Kenya

"Back home, prosecution of corporate fraud in Kenya appears to have a long way to go. Recently there have been accelerated efforts by the government (using the multi-agency approach) to bring to book the perpetrators of corporate crimes both in the private and public sectors, although a lot more needs to be done to restore the confidence of a populace that is slowly beginning to bear the brunt through heavy taxation."

BY CHRISTOPHER OYIER

The Future of Legal Practice in Kenya: Embracing Technology and Breaking Away from Obsolescence

There is no shortage of opinions on the question of the impact of technology on the evolution and future of legal practice in Kenya. Technology has been a driver of social change throughout history. To varying degrees, the mark of technology in human civilization has been shaped and restrained by social forces and moral considerations. In contrast, tradition is revered in the legal profession. The terminology and style of legal practice remain largely frozen in traditional forms and nothing much has changed despite sporadic efforts at reform. Like in other jurisdictions, the legal profession in Kenya has generally been slow in embracing information technology and at times resisted certain changes, but not for long. The real or feigned indifference to the technological advancements by some quarters of the legal profession already faces or is likely to face sustained disruption.

Many legal practitioners have adopted technology for personal use but are reticent to embrace it professionally. What is certain, however, is that the wave of the rapid transformation brought about by digital technology has caused subtle yet sustained pressures on the Kenyan legal profession. This is not only evident as practitioners continually face the need to acquire relatively different sets of skills from their predecessors, but also in the novel ways of client service delivery and the digital transformation of the working of Kenyan courts and key government services.

There are immense possibilities for the use of technology in legal practice. From the automation of certain routine processes such as preparation of legal documents, research, marketing, case management, file storage, disseminating information to clients or the public, to electronic billing and preparation of firm budgets, technology offers endless opportunities for lawyers in providing legal services as well as running the law firm. Smaller firms can also benefit from the reduced costs of technology and can no longer have an excuse for sticking to obsolete practice.

Relatedly, courts in Kenya have implemented technology with varying degrees of success in electronic filing, e-discovery and research. The registration of new cases, filing of pleadings, transcription of proceedings, assessment and payment of court fees, the court calendar, searches on the status of cases and serving of pleadings have been automated by various superior courts.

Similarly, the Ministry of Lands and Physical Planning has through the National Land Information Management System (NLIMS) put in place digital systems to improve land administration and management. Though not without challenges, the automated platform is meant to ease the conduct of searches, obtaining of land rent and rates clearances, consents, valuation assessments, endorsement and payment of stamp duty as well as title registration.

The foregoing examples are meant to buffer rather than distract from the main thrust of the discussion. What do the ongoing technological adjustments mean for Kenyan lawyers? Simple, they must shape up or ship out. Indeed, as Richard Susskind reckons in his book, Tomorrow's Lawyers: An Introduction to your Future, it is time for legal practitioners, both new and seasoned, to rethink some of their working practices.

Caution must however be exercised in integrating technology into legal practice. Due to the ethical implications of new technology and the increased scrutiny on handling of data globally, advocates are under serious legal, ethical and professional obligations in protecting personal and confidential client information. To this end, advocates must appreciate the security risks for law firms in this information age and have in place data protection policies and incident response systems using a combination of polices, employee training, and technology.

It is also worth remarking that despite the immense opportunities, the initial cost of technology has at times become a major barrier to entry to the legal profession especially for young lawyers who are yet to create a niche for themselves or accumulated sufficient capital to set up up-to modern legal facilities. However, once such investment is made, upcoming law firms will expediently and cost-effectively access more information and collaborate with large firms in the legal fraternity, which enables them to compete at higher levels.

To conclude, it is clear that times are rapidly changing and legal professionals who are disinclined to adapt may find conservatism to be their bane. Accordingly, rather than being reactive to technological changes around them, Kenyan legal professionals must reassert their role as key stakeholders in the change and make meaningful input to the technological discourse.

Christopher Oyier is an Advocate of the High Court of Kenya. LL.B (Hons) (University of Nairobi), LL.M (University of Nairobi) Postgraduate Diploma in Law (Kenya School of Law).

THE COMESA COURT OF JUSTICE

1. Introduction

The COMESA Court of Justice (CCJ) was established in 1994 under Article 7 of the COMESA Treaty as one of the Organs of the Common Market for Eastern and Southern Africa (COMESA).

The Court consists of two Divisions - an Appellate Division, which has five Judges.

Current Appellate Division Judges

A First Instance Division, which has seven Judges.

5 First Instance Division Judges with the Judge President

The Judges are drawn from 12 different Member States of COMESA. The Judge President is the overall head of the Court and heads the Appellate Division, while the First Instance Division is headed by a Principal Judge.

The Court has a Registrar who is the Chief Executive Officer of the Court.

The Registrar –
Hon. Nyambura L Mbatia

The Seat of the Court in Khartoum, Sudan

2. Cases that may be brought to the COMESA Court of Justice

Cases that may be brought before the Court fall into the following categories;

a) Cases against a COMESA Member State;
b) Cases against the Common Market (COMESA) or any of its institutions;
c) Cases where the subject matter relates to the interpretation and application of the COMESA Treaty;
d) Disputes which arise out of contracts which have an arbitration clause granting the Court jurisdiction to arbitrate in accordance with Article 28 of the Treaty;
e) Any issue regarding the legality of an act, decision, regulation or directive of the COMESA Council of Ministers or of a Member State that constitutes an infringement of the provisions of the Treaty.

Every party shall be represented by a lawyer who must be certified to practice bef

3. CaseLines Digital Evidence Management

The Court recently implemented a paperless digital evidence management system - CaseLines Evidence Management System.

CaseLines will allow lawyers to file cases, applications and evidence in a secure environment from their own offices, saving costs of copying and transporting paper files and personnel, and at the same time cutting the risk of losing or misplacing files.

The system supports efficient pre-trial preparation, especially for lawyers supporting clients in different countries. Judges are now able to easily access evidence bundles at the click of a button.

4. Contact Details

Common Market for Eastern and Southern Africa

COMESA Competition Commission

The COMESA Competition law is embodied in the COMESA Competition Regulations (the Regulations) which were made under Article 55 of the COMESA Treaty in 2004.

The Purpose of the Regulations is:
"To promote and encourage competition by preventing restrictive business practices and other restrictions that deter the efficient operation of markets, thereby enhancing the welfare of consumers in the Common Market, and to protect consumers against offensive conduct by market actors."

Kang'ombe House,
5th Floor – West Wing
P.O Box 30742 Capital City
Lilongwe 3, Malawi
Email: compcom@comesa.int
Website: www.comesacompetition.org
Tel: +265 1 772 466
+265 1 722 530

The Regulations establish two Enforcement Institutions:

1. The Board of Commissioners (the Board) which is the supreme policy making body mandated with issuing determinations, performing adjudicative functions, hearing appeals and recommending Rules for the approval of the Council of Ministers of COMESA. Appeals against the decisions of the Board go to the COMESA Court of Jutice.

The Board of Commissioners

2. The COMESA Competition Commission (the Commission), headed by a Director and Chief Executive Officer, which enjoys independent international legal capacity is responsible for applying the provisions of the Regulations with regard to trade between Member States and promoting competition within the Common Market through monitoring and investigating anti-competitive practices, among others.

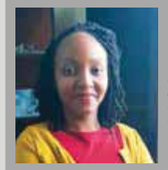
The Director & Chief Executive Officer, Mr. George Lipimile

Mergers and Acquisitions
- ✓Over 200 transactions assessed since 2013, corresponding to deals with over US$ 100 billion in transaction value
- ✓Over US$ 32 million in merger notification fees received
- ✓Over US$ 16 million merger notification fees shared with affected Member States

Enforcement & Exemptions
- ✓ 23 vertical agreements assessed
- ✓ 1 Resale Price Maintenance conduct sanctioned

Consumer Protection Cases
- ✓Airline Sector
- ✓Fast Moving Consumer Goods

Social media
@CCC_COMESA
@COMESA Competition Commission



BY SOPHIE KAIBIRIA

CUCs Advancing Access to Justice Through ADR Mechanisms

One of the objectives of access to justice is to ensure that all persons in the country can, at the bare minimum, enjoy a mode of adjudication of issues that is easily accessible. Article159 (2) (c) of the Constitution recognizes that one of the principle of access to justice that should be promoted is the alternative forms of dispute resolution. These include, but are not limited to, reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

These forms of dispute resolution mechanisms are also engulfed in the human rights discourse. In fact, in recent years, there has been recognition on the importance of the informal justice system. Organisations such as the UNDP, UNODC, and LRF among others have supported the government in both the formal and informal system, this move being a need expressed by the court users.

The need for the informal system of justice was occasioned by the challenges court users constantly faced when seeking to justice through the courts, tribunals and other judicial mechanisms. These challenges which are considered perennial have been documented to include: long delays; prohibitive costs of using the system; lack of available and affordable legal representation; and legal systems that fail to provide preventive, timely, non-discriminatory, adequate, just and deterrent remedies. Other challenges include the inadequacies in existing laws that effectively fail to protect women, children, poor and other disadvantaged people, including those with disabilities and low levels of literacy; the lack of de facto protection, especially for women, children, and men in prisons or centres of detention; the lack of adequate legal aid systems; and the avoidance of the legal system due to economic reasons, fear, or a sense of futility of purpose.

> *"The use of ADR has gained momentum over the last five years through Court Users Committees (CUCs)*

All these challenges; for a developing nation such as Kenya, deterrent to the growth in economic and social services. Resultantly, most players in the justice system have embraced the spirit of the Constitution to ensure justice for all without due regard to technicalities.

The use of ADR has gained momentum over the last five years through Court Users Committees (CUCs). The justice system has taken steps towards employing ADR to reduce case backlog through CUCs.

Case backlog, which is occasioned by delays in the formal justice system, has been identified by most analysts and human rights defenders as one of the most notorious impediments to access to justice. In order to alleviate the situation, efforts have been made through inter agency support towards CUCs. Various court stations have CUCs proffering need based trainings on ADR, especially for succession and land matters. These trainings target chiefs, police, local community organisation and elders being the most accessible authority at the ward levels. These trainings ensure that the employment of ADR is within the confines of acceptable laws as they are done in the most effective way. The trainings are then followed up by approaches through community engagements that invite litigants to try court sanctioned ADR in the first instance.

This approach is governed by rules upholding fairness and equality for all who attempt it. It is envisaged that ADR will invariably lead to a reduction of case backlog particularly petty offences and administrative disputes thereby decreasing the number of cases pending. The approach easily acceptable by local communities that understand ADR as compared to the formal court process.

ADR mechanism were historically used by communities as the primary resolution of disputes. Each community had a recognised ADR system well known to them and practised. The familiarity of the system, therefore, ameliorates its sustainability in resolution of disputes that do not necessarily need court intervention. It is, therefore, imperative for the justice sector to works in synchrony with CUCs that are advancing ADR by providing support and accountability gearing towards a just outcome.

Finally, informal justice systems have come a full cycle. This is evidenced by history documenting the existence of operational justice system in pre-colonial Kenya. The formal justice system was just introduced by the colonialist because they did not understand the informal justice system, and furthermore, needed the colonised to yield to a sort of control. The situation spread and exist for over a century and continues to exist.

That system with continuous gaps that the Constitution through wanjiku recognised and chose to correct. It is now our place as lawyers, judicial officers, chiefs, police, probation officers and non-governmental organisations to advance the movement. It is when we embrace that which we nurture, that we improve and apply our local solutions to local problems for a just society.

Sophie Kaibiria is an Advocate of the High Court of Kenya

BY EDMOND K. GICHURU

Who Should Lead Cyber Warfare in Kenya?

The Constitution of Kenya defines national security as protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity and other national interests.

International law allows states to defend themselves against armed attacks. What baffles many is whether cyber-attacks are essentially armed attacks. It has been suggested that a nation should defend itself against attacks from land, sea, air, space and cyber. This means that any attack that is cyber related and threatens Kenya's sovereignty and national security should be repulsed by the State. However, the question is whether the State is rightly placed to deal with cyber security.

Computers and computer networks have led to major advances in economics, communications and war fighting capabilities. However, the world has become more vulnerable to attacks on these networks. In the United States, the military plays a central role in protecting its critical infrastructures. Critical infrastructures here are defined as those systems and assets, both physical and cyber, so vital to the nation, that their incapacity or destruction would have a debilitating impact on national security, national economic security and/or national public health and safety. The critical infrastructures in the United States have been identified as information and communications, electric power, transportation, oil and gas, banking and finance, water and emergency services. The damage to critical infrastructures would be achieved by an attacker through direct computer attacks such as gaining unauthorized access to computers and taking control of the same. Damage can also be done through the use of other digital tools such as viruses and worms whose injection cause malfunctioning and thus failure. Indeed, these attacks could lead to death or bodily injury, extended power outages, plane crashes, water contamination or major economic losses.

> *"However, it is the new Computer Misuse and Cybercrimes Act, 2018 which establishes the National Computer and Cybercrimes Coordination Committee that is seen to be more effective in dealing with cyber-attacks against Kenya*

The end of the Cold War gave birth to a new set of non-state actors who have adopted asymmetric forms of warfare to challenge established states. Kenya has itself been a victim of terrorism on various occasions largely coming from the Al-Shabaab group in Somalia. Al-Shabaab has resorted to the use of the internet to plan attacks against Kenya, recruit and radicalise followers. It will be most devastating if it launches massive attacks against the nation's cyber infrastructure.

Security threats to personal data pose challenges to everybody within the cyber world including Kenya. Businesses, internet service providers and entities such as Google and Facebook which hold substantial data about their customers and government departments that hold data on citizens remain susceptible.

Cyber security risks in Kenya may have increased since the landing of submarine cables that have increased the bandwidth available to the country. This has made it attractive and cost-effective for international criminals to target the Kenyan market.

The Communications Authority of Kenya is charged with the responsibility of regulating and licensing the information and communication sector in Kenya as well as leading efforts on cyber security. It is established under the Kenya Information and Communications Act, 1998.

However, it is the new Computer Misuse and Cybercrimes Act, 2018 which establishes the National Computer and Cybercrimes Co-ordination Committee that is seen to be more effective in dealing with cyber attacks against Kenya.

The Committee is charged with the responsibility of coordinating national security organs in matters relating to computer and computer crimes, receiving and acting on reports relating to computer cybercrimes and protection of critical infrastructure among other functions. The critical infrastructure contents of the legislation have been borrowed heavily from the United States jurisdiction.

The membership of this Committee is made up of various state agencies that include the Ministry of Internal Security, the Ministry of Information, Communication and Technology, the Communications Authority of Kenya and the Chief of Kenya Defence Forces among others.

Part III outlines offences under the Act that include unauthorized access, illegal use of devices and access codes, unauthorized disclosure of passwords or access codes, cyber espionage, child pornography, cyber harassment, cybersquatting, phishing and cyber terrorism.

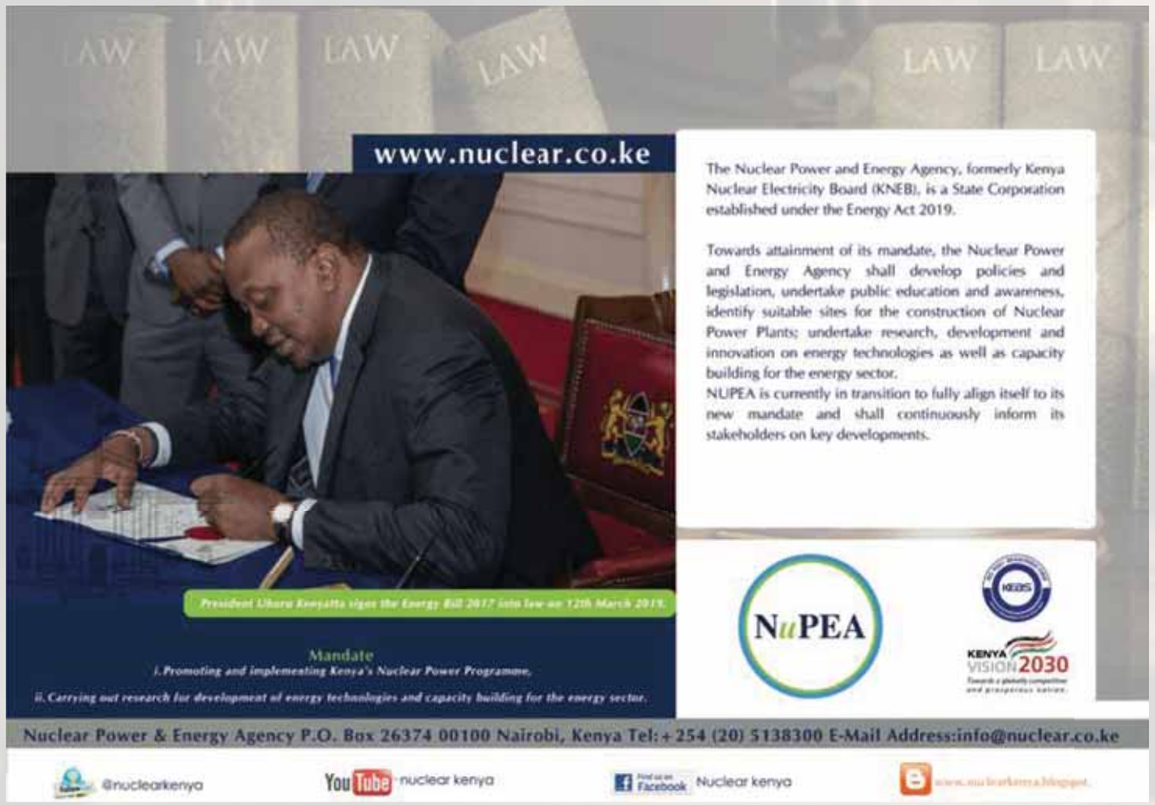
In the two Kenyan statutes that primarily deal with cyber security, the role of the private sector is diminished. For example under the 2018 law the private sector can only cooperate with the Cybercrimes Committee by reporting computer and cybercrime incidents and enter into information sharing agreements with the government.

However, the State has the advantage of using force especially where the sovereignty of the nation is at stake at the instance of a cyber-attack. The Kenyan Navy for example would easily neutralize any attack against the submarine cable landing stations at the Kenyan coast. States also carry more legitimacy in the international plane than the private sector and can seek international partnerships with other states given the transnational nature of cybercrimes.

Yet, the government, unlike the private sector, does not have enormous resources or sufficient expertise to run cyber warfare programs. Indeed, there is need for the State to leverage on the strengths of the private sector if any gains are to be made on cyber warfare. There is also a duplication of roles between the Communications Authority and the National Computer and Cybercrimes Co-ordination Committee. These statutory flaws should be addressed.

Lastly, the passage of the Data Protection Bill pending before Parliament is critical. This will regulate the use of personal data and fortify the quest to win cyber warfare.

Edmond K. Gichuru is an Advocate of the High Court of Kenya



BY ANTHONY S. OTIENO

Adoption of a Fee & Penalty Unit Based Approach in Crafting of Penal Provisions in Legislation: Case for Law Reform in Kenya

Penalty and fee units are used in legislation to describe the amount of a fine or a fee.

In the state of Victoria in Australia, penalty units are used to define the amount payable for fines for offences. For example, the fine for selling a tobacco product to a person aged under 18 is four penalty units. One penalty unit is currently equivalent to $161.19 from 1 July 2018 to 30 June 2019.

Likewise, fee units are used in that stare to calculate the cost of a certificate, registration or licence that is set out in Legislation. For example, the cost of depositing a Will with the Supreme Court registrar of probates is 1.6 fee units. The value of one fee unit is currently $14.45. The rate for penalty or fee units is indexed each financial year so that it is raised or lowered in line with inflation.

The cost of fees and penalties is calculated by multiplying the number of units by the current value of the fee or unit.

In Uganda, following the hyper-inflation experienced in the 1980's, the Currency Reform Statute, 1987 which was part of an economic restoration strategy of the Government had the unprecedented effect of reducing pecuniary penalties to such trifling sums that a re-think was necessary. It also terribly failed to curb inflation.

Then, the Uganda Law Reform Commission and the Judiciary devised the currency points system that was, in the wake of continued inflation and other factors, able to ensure that a sound co-relation between pecuniary penalties, inflation and periods of incarceration were maintained across different pieces of legislation. The currency points system also provided some sort of foundational guidance to policy formulators and drafters on how to "measure" penal provisions in legislation.

As indeed captured in the Hansard records during the second reading of the Law Revisions (Fines and other financial amounts in criminal matters)) Bill, 2006 in the Parliament of Uganda, the advantage of the penal and fee unit approach is in the fact that it allows for rationalization of fines across different pieces of legislation; standardization of the ratio of fines in relation to corresponding periods of imprisonment in written laws; and easier amendment of laws as a result of inflation.

ADOPTING A PENALTY/FEE UNITS SYSTEM IN KENYA

The structure of the various pieces of legislation in Kenya provides pecuniary figures directly in specific statute in relation to either fees or penalties they provide. The process of coming up with these figures is also not guided by a set of standards and, at most times, is hinged on societal or individual feelings of the appropriateness of a figure! This is evident in many statutes where on comparison, say on criminal matters, the periods of incarceration versus fines vary considerably.

The process of varying these amounts through amendments to the different sets of legislation is therefore both, painstakingly difficult and time consuming. The inability to maintain comparability between penal provisions and fees over a number of years is also common, with variations between incarceration periods and fines payable by corporations and individuals for different crimes not following any particular guideline or structure.

The advantages of embracing a penalty and fee units system in Kenya would be that the pecuniary penalties and fees provided for in any legislation can be varied more regularly in response to inflation and the prevailing social, economic, and perhaps, political environments.

The system offers a uniform approach for the wholesome amendment of pecuniary penalties and fees in Kenyan laws, as opposed to the painstaking, labour-intensive, 'single legislation' amendments that is the current practise. The system would promote comparability between pecuniary penalties and fees across different sets of legislation and help to ensure that the same is maintained through the years.

The process of adopting the system could also involve the development of guidelines for policy-makers and drafters on the standards to apply when coming up with penal and fee provisions. The system would also provide a definite measure for converting incarceration periods into pecuniary amounts and allow for the rate of conversion of penalties to corporate entities into pecuniary values.

The application and use of penalty units and fees is, in a very practical and measurable way, a fitting example of how a legal concept can succinctly marry and reconcile the divergent economic and legal aspects of money.

Anthony S. Otieno, B.A (Communications) (UoN) L.L.B (Hons) (UoN), Dip. (KSL) Dip. Legislative Drafting (ILI-Kampala),
Legislative Counsel,
Kenya Law Reform Commission
Anthony.otieno@klrc.go.ke ;
ts.otieno@gmail.com
0720-343-328

BY DR ERIC KIBET

The Economy and the Constitution: Kenya's Constitution as an Economic Charter

Kenya's Constitution will soon be a decade old; old enough for us to reflect on the value it has brought to the country in terms of advancing our collective aspirations for a more democratic, just and progressive society, whatever our conception of these values is. The tenth anniversary will come against a backdrop of a slowing economy and revelations of massive mismanagement of public funds, mega corruption scandals that dwarf Goldenberg and Anglo-Leasing, ballooning public spending not matched by revenue growth, and expanding public debt that is nearing the tipping point.

The transformative nature of Kenya's Constitution from a legal and political standpoint has attracted significant attention in scholarly and judicial discourses. Very little, however, has been written about it as an economic charter. Besides being a legal and political instrument, the 2010 Constitution is an economic charter that makes provisions on the economy and imposes certain obligations of an economic nature. It does this in at least three ways. One, it sets down a framework for an egalitarian mixed economic model. Two, it makes elaborate provisions that govern fiscal processes. Third, it requires the highest standards of probity in public affairs generally, and in financial matters in particular. Thus, it sets a good example of how constitutions can infuse sound economic tenets as a means of securing good governance and realizing human development. The concept of human development as an approach to development focuses on the substantive or real expansion of people's freedoms and welfare rather, and departs from the assumption that macro-economic growth will automatically improve people's lives. Developed by the celebrated economist Mahbub Ul Haq and anchored in Amartya Sen's scholarly works, the concept resonates well with the constitution's grand human rights and egalitarian ambitions. For instance, article 19 of the Constitution is explicit that "the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings." [emphasis added].

A FRAMEWORK FOR AN EGALITARIAN MIXED ECONOMY

A mixed economy is a hybrid model that combines the features of free market, command and traditional economies. Kenya's Constitution bears the features of a free market economy to the extent that the bill of rights firmly protects private property including intellectual property and guarantees other freedoms such as freedom of association including lawful commercial associations and enterprise. The economy also bears certain features of a command economy to the extent that the state is also engaged in enterprise through state owned corporations in key sectors such as agriculture, energy, health services, and education, despite being a key shareholder in many others. It also retains the power to control the market including through regulation of prices. Liberalism and its kin, capitalism, held sway in the West for centuries. However, these ideologies, which are premised mainly on assumptions of formal autonomy and abstract equality, have been on the decline. Socialism has similarly faced sharp decline since the collapse of the Berlin Wall. The declines have been characterised by a corresponding rise in social democracy or liberal egalitarianism. As a twenty first century legal-political document, Kenya's Constitution reflects this trend, and makes effort to counter-balance liberal political ideology with socio-democratic tenets. It does this through protecting individual rights and freedoms in a liberal sense, but at the same time seeking to do more by requiring equity and a substantive equality through deliberate policy demands. Thus we see a constitution that is committed in letter and spirit to taking care of the interests of the marginalized and least endowed members of the society. This is seen in the protection of socio-economic rights, labour rights (which safeguard the rights of workers who almost always are weaker than the state or their capitalist employers), and the repeated requirement for the emancipation of marginalized and minority groups through interventions in public spending and allocation of resources. It is worth noting that the constitution requires a human dignity and human rights approach to public affairs including economic policy. This is the logical deduction from the provision of article 19 (1) that "the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies."[emphasis added]. The independence of the judiciary guaranteed under the constitution ensures that these rights aspirations are indeed respected and realised.

ELABORATE REGULATION OF FISCAL PROCESSES

Kenya's constitution dedicates a chapter to public finance, setting out principles of sound management which the state, its officers and organs must adhere to. In addition, the chapter requires the enactment of legislation to provide for public finance management. The chapter decrees responsible and transparent fiscal procedures, proper use of public resources, public spending policies that promote equity and the emancipation of marginalized groups, equitable taxation, and the most effective public procurement practices. Pursuant to these requirements, Parliament has enacted statutes that enhance prudence in public finance management. These laws include the Public Finance Management Act, 2012 and the Public Procurement and Asset Disposal Act, 2015, among others. The Constitution requires public participation and gives legislators, at both county and national level, as people's representatives, a prominent role in fiscal processes. This democratizes governance and administrative processes hence legitimizing them and taking democracy beyond elections; true to the spirit of "sovereignty of the people" as a central concept that undergirds the 2010 Constitution.

DEMAND FOR PROBITY IN PUBLIC AFFAIRS

Enacted against a background of mismanagement, bad governance, corruption and unimpressive economic performance that characterized most of the post-colonial era, the 2010 Constitution under article 10 and chapter six sets out a creed of national values and principles intended to shape law, policy and public administration. These include the rule of law, democracy, and participation of the people. Others are human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalised, good governance, integrity, transparency, accountability; and sustainable development. These values and principles are a prescription of the highest standards of probity in governance including financial and economic management. Sound economic performance and human development depends a great deal on sound economic governance and prudent financial management. In other words, bad governance and mismanagement of public finance and economic affairs contradicts the Constitution, and is incompatible with economic progress and enhanced individual and societal welfare.

Dr. Eric Kibet is an Advocate of the High Court of Kenya and teaches Law at USIU-Africa

BY DESMOND MAINA

The Coded Future of The Legal Practice in Kenya

New technology is not good or evil in and of itself. It is all about how people choose to use it. (David Wong)

Technology according to Collins dictionary refers to methods, systems and devices which are the result of scientific knowledge being used for practical purposes. Humans have advanced technology from time immemorial in order to make their lives easier, be it from using curved stones, using fire, creation of the wheel in Mesopotamia et al.The legal practice has also used technology for the same practical purposes as well. However, in order to understand how far we have come, we have to understand the journey to date.The legal profession has a long and rich history in the English common law. Its very emergence is coincident with the appearance of professional judges who preceded practitioners. Thereafter its refinement as a body of rational principles in the 13th and 14th centuries was mainly the accomplishment of the elite body of judges and advocates who belonged to the order of sergeants at law. It is from Westminster Hall that a small group of legal experts came up with the greatest system of law in existence today. Since then, the British Empire established the East Africa Protectorate in 1895, the indigenous laws and justice systems were slowly but surely usurped by the Common law. The oldest law firm on record for example was O.B.Dally and E.K.Figgis (later Dally and Figgis) set up in Mombasa in 1899 amongst others paving way for natives such as Argwings Kodhek, the first African Kenyan lawyer.

Our current legal system is a far cry from yester years. It is now more accessible, transparent and faster albeit with plenty of room for improvement. Some of the technologies that have made this possible include: 1. The Internet 2. Machines 3. Artificial Intelligence 4. Block chain technology

THE INTERNET

This global computer network has provided a variety of information and communication facilities. We are able to share and access information using the standardized communication protocols through but not limited to websites, apps, blogs, online videos, social media etc. These new developments are being used across the world by all arms of government to communicate with the public, and Kenya is in the forefront in Africa in using the same to communicate with the public. Advocates too, have used the same to communicate and in some cases, over communicate with the public, clients, prospective clients and yes, trolls. The judiciary for example has created public resource centers through their websites for the benefit of the public at large. This has solved the critical problem of opaqueness that plagued it since independence.

MACHINES

Prior to the 19th century, all legal records were hand written until the creation of the typewriter in the 1860's. It was taken over by the computer in the 1970's and ever since there has been a burst of many other useful machines such as Dictaphones, smart phones, printers, scanners etc. All these machines, modern or otherwise, have made legal practice much easier and practical.

BLOCK CHAIN TECHNOLOGY

This very recent technology was created in 2008. It is a decentralized, distributed and digital ledger that is used to record transactions across many computers. Its very nature is such that it cannot be manipulated and therefore giving it integrity over the highly manipulative manual paper system currently in use. Estonia has embraced this technology for land records and payment systems. In Kenya, it can also be very useful in court filing systems and elections just to mention a few. Despite its challenges, it promises to instill much needed integrity into our legal and governance system through its transparent nature.

ARTIFICIAL INTELLIGENCE

This refers to computer systems being able to perform tasks normally requiring human intelligence. For comparative purposes, the human brain neurons operate at 200Hz, whereas average computer transistors operate at 2Gz. Axons, basically a neural network of our brains operate at 100m/s, whereas computer information travels at the speed of light i.e. 299,792,458 m/s . Artificial intelligence is classified into 3:

1. **Weak A.I**
2. **Artificial General Intelligence(A.G.I)**
3. **Super Intelligence**

WEAK A.I

It has low processing power and is therefore used in memory functions, predictions and recognizing patterns. Our messaging apps, google, bing etc all use this form of A.I. it is also used for games, telemarketing and so many more everyday functions.

ARTIFICIAL GENERAL INTELLIGENCE

It tries to operate at human level but the main challenge is randomness, intuition and creativity. This form of A.I is used in for example driverless cars. To illustrate the challenge, the A.I is trained to recognize road signs and act accordingly when it spots them. However, it cannot recognize what another driver means when they flash lights at it asking for way. There is also a 2016 movie called Sunspring, a short film entirely written by an A.I bot. The script is incoherent and in many ways nonsensical. It just goes to show how far A.I has to go before it can completely mimic a human being.

SUPER INTELLIGENCE

This is a theoretical version of A.I that is expected to operate above and without the need of humans. Movies have best illustrated this and instilled fear of what may come to be once it is developed. Elon Musk once pondered on the same and said that the greatest mistake that can be made is giving such an A.I access to the internet. In June 2017, Facebook published a report on a research they conducted on two A.I chatbots having a conversation. In it, they mused on the possibility of eradicating all human life. While the danger is moot, it is still a possibility.

A.I is very useful to advocates and law firms because it can be used to read through volumes of documents and give opinions in a structured manner. IBM created "IBM Watson", the first of its kind, and a law firm in the US created an A.I lawyer called "Ross", yet another first of its kind. Machine learning however is key in this development, and one can only imagine how much more efficiently a law firm and the judiciary can run with an A.I assistant for research and even making submissions. As the topic suggests, lawyers shall have to get more involved in computer programming to make this ideal future a reality. Some of the things in my opinion are:

Advocates should learn various computer programs and be more in touch with the tech world.

Law firms should seek to develop user friendly apps for their firms, as well as digitizing their systems within.

The Judiciary needs to employ tech savvy individuals including members of the bench in light with the changing times.

The Judiciary needs to invest in Research and Development in the technology sector and further digitization of the current legacy system.

The Kenya School of Law ought to introduce technology related subjects in its curriculum.

Desmond Maina is an Advocate of the High Court of Kenya

BY IBRAHIM KITOO

Public Private Partnerships: A Possible Solution for Infrastructural Development

Public Private Partnership (PPP) is a long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility. Quite often the remuneration to the private party is linked to performance.

Many governments are increasingly turning to PPPs to implement and enable major public infrastructure across the line. But then successful PPP project delivery goes beyond plugging the financing gap and having the respective PPP project assets and liabilities off the government's balance sheet.

The question is, do PPPs deliver? Generally, the answer is Yes, and especially when well thought through. Thus, in the past three decades, PPPs have been pivotal to the rollout of significant infrastructure projects around the world, including in Australia, the United Kingdom, Singapore and Canada. In Australia, many projects have largely been successful. Since its first foray into the PPP space with the completion of the Tuas Desalination Plant in 2005, Singapore, for its part, is seen as a country that is getting the PPP model right.

However, failed PPP deals have sometimes left governments and investors with burnt fingers. Cases in point include the London Underground upgrade from 2003-2008 and the Cross City Tunnel financial collapse in Sydney in 2006 and again in 2013.

Nick Prior, the global leader for infrastructure and capital projects at Deloitte's London office, believes that PPPs generally work. He says that, "The problem isn't typically with the PPP construct – it's when the PPP model is used in circumstances when it is not the appropriate model".

A strategic PPP approach can potentially mitigate schedule delays and overruns that plague traditional infrastructure project delivery by clearly delineating governance, allocating shared risk, integrating resources, applying best practices, and establishing a life cycle–long perspective of costs and accountability.

Despite controversy over PPPs and an apparent backflip by some quarters over plans to use PPPs for infrastructure financing, PPPs are unlikely to slip off the radar. Indeed, a "Holy Grail" could be made out of PPPs.

Ibrahim Kitoo, Advocate of the High Court of Kenya and Chief Legal Officer – Projects & Disputes Resolution with the Kenya Electricity Generating Company PLC.

> *"Many governments are increasingly turning to PPPs to implement and enable major public infrastructure across the line*

BY HELLEN NGESSA

Children in Conflict with the Law: Child Offenders, Victims/ Complainants and Witnesses in the Criminal Justice System

A child in conflict with the law refers to a person under the age of 18 year who comes into contact with the justice system as a result of being suspected or accused of committing a crime, as a victim/complainant or as witness to a crime. Under Article 37 and 40 of the United Nations Convention on the Rights of the Child (CRC), children in conflict with the law have the right to treatment that promotes their sense of dignity and worth, which takes into account their age and aims at their reintegration into the society.

Article 260 of the Constitution defines a child as an individual who has not attained the age of 18 year. Similarly, the Children's Act defines a child as any human being under the age of 18 year. Internationally, Article 1 of the CRC also defines a child as a person below the age of 18 year.

The age of criminal culpability is provided for under Section 14 of the Penal Code as 12 years, when the minor has developed the mental capacity to distinguish and know that he ought not to do the act or make the omission. A person below the age of 18, although considered a child, is thus legally capable of committing a crime, and as such, to be in conflict with the law.

On the other hand, a person below eight years is considered to be of immature age and hence not criminally responsible for any act or omission.

Under international treaties such as the CRC and domestic laws including the Constitution of Kenya 2010 and the Children Act, children in conflict with the law are entitled to special treatment and additional care that promotes their sense of dignity and worth, taking into account their age and with the aim of reintegrating them back into society after the trial process.

Whether as child offenders, victims or witness, when in contact or conflict with the law, children are entitled to specific rights and protections that are uniquely available to them for the simple fact that they are minors. Substantial injustice would otherwise be suffered by the minors if these unique protections were not provided for under the law. The different categories of children in conflict and contact with the law and the various rights and freedoms that accrue to them as thus notable.

CHILD OFFENDER

A child comes into the criminal justice system as an offender for doing an act or making an omission in contravention of existing provisions of the law. When this happens, the procedure is for them to be arrested, tried, convicted and sentenced. Thereafter, there must be post-sentencing care.

ARRESTS OF CHILD OFFENDERS

Article 49 of the Constitution provides for the rights of an arrested person generally. Cognizant of the child's age and sex, Article 53(1)(f) specifically provides that a child offender should only be detained as a last resort, and if so, for the shortest period possible. The child offender should also be held separate from adults.

The Children Act too is specific on the treatment of minors during and after arrest. Section 18 provides that a child offender shall be held separate from adults while in custody and is entitled to legal and other assistance as well as to contact with his or her family.

Despite the above clear provisions of the law on the manner of arrest of minors, adherence by police officers has been a challenge. The courts have had to deal with a myriad of cases that involves infringement of the rights of minors during arrest. For instance, in the Criminal Appeal number 169 of 2017 C.K –versus- Republic eKLR (2018), the appellant was detained for over a year with adults and was never accorded legal representation during trial. The High Court considered this to be a grave violations of the rights of the child offender and released him.

There is thus need for continued sensitization of the police of the position of the law.

TRIAL

Trial occurs where the child offender is brought before the court of law and evidence is produced to support and or rebut the case. It is concluded when a determination of the innocence or guilt of the offender is made. Some of the measures that have been put in place to protect the right and guarantees of the child offender include:

IN CAMERA/CHAMBERS TRIALS

This is done to ensure the trial is carried out in private out of the glare of the public and media. This protects the child from the public who might form an opinion and discriminate against him.

MANDATORY LEGAL REPRESENTATION

Article 50 of the Constitution and Section 77 of the Children Act provides for mandatory legal representation for a minor who has been charged. Substantial injustice would otherwise be meted on the minors who go through the trial process unrepresented.

USE OF NAME INITIALS IN THE RECORDS

The use of initials on court records protects the identity of the child from the public and helps with reintegration into the society after the case.

PROBATION OFFICERS REPORTS

The use of probation officers is a tool that has been employed by the courts for a long period of time as a means of obtaining information on the minor's social and legal background before granting of bail or sentencing.

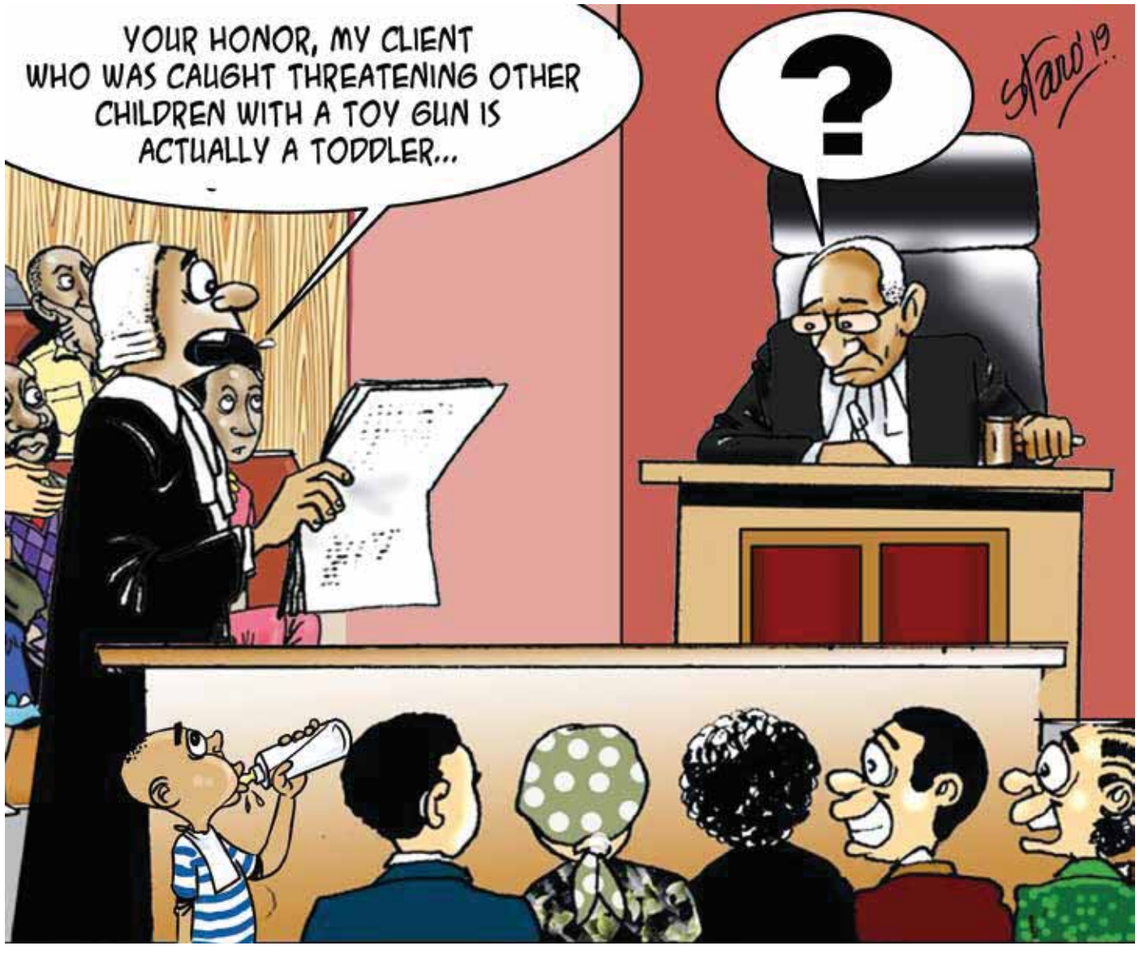
SPEEDY TRIAL

Courts have been known to take cognizance of the school calendar in issuing hearing dates for a case to ensure that child offenders are out on bond and thus able to attend school without interference by the court process.

CONVICTION AND SENTENCING

If the minor is convicted at the end of the process, the court has discretion on the sentences to be meted. However, judicial officers are encouraged to reduce incarceration in the case of child offenders. In their case, sentencing is progressively geared towards their rehabilitation rather than as punishment.

Article 53 of the Constitution provides for a child not to be detained except as a measure of last resort. The same restriction is provided for under Section 190 of the Children Act.



In ensuring the protection of child offenders and the need to reintegrate them back into the society, measures such as counseling, sending them to rehabilitation homes or the children being declared to be in need of care and protection are encouraged.

Moreover, section 18 of the Children Act provides that no child shall be subjected to capital punishment or life imprisonment as a punitive measure for offences committed.

Just like adults, children are also bound by the provisions of the Evidence Act when testifying in court.

VICTIM/ COMPLAINANT

Children may also be victims of offenses committed by other children or adults. As such, they may be the complainants in criminal matters.
The Victim Protection Act, which outlines in detail the rights of a victim. These include the right to privacy and confidentiality, adherence to the victims views during the trial, and especially during plea bargaining, the right to information and right to compensation.

Notably, it is not mandatory for the victim of aggression to be a witness. The court may be required to forewarn itself, after examining the minors who are victims, and declares them vulnerable witness.

As provided for under the Constitution and the Children Act, the principle of the 'best interest of the child' is required to be observed. Thus the court must considers the trauma that the victim has undergone to determine whether they are able to withstand the court process.

The court is also at liberty to demand for a Victim Impact Assessment Report before sentencing the offender- this report is critical as it focuses on the victim and their wellbeing post aggression.

CHILD WITNESSES

Children may also come into the criminal justice system as witnesses. A witness is a person who is called upon to give an account of the circumstances in a case as seen or heard by them. Witness protection in Kenya is provided for in the Witness Protection Act.

Notably also, the Constitution and international treaties has specific provisions on the protection of vulnerable witnesses from threats and intimidation before, during and after trial.

The Witness Protection Agency bears the role of ensuring protection of witnesses in criminal cases and other proceedings. Indeed, where children are involved in cases on account of being witnesses, a threat may arise that would require the Agency to come intervene.

Besides the protections offered by the Agency, the trial court suo moto are required to puts in place mechanisms such as Voire dire test which is conducted on a child to establish the child's ability to comprehend the reason why they are in court. Standard basic questions are asked and on the strength of the minors answers the court will be able to establish whether they can comprehend the issues and are, therefore, competent witnesses.

CONCLUSION

Protection of the rights and guarantees of children in conflict with the law is a main concern for stakeholders in the criminal justice system. There is indeed the need to ensure that as children go through trial process, their rights and dignity are protected. The process should also enable them to easily reintegrate into the society ensuring that are left unscathed by the trial process.

The legal framework is well established both internationally and nationally to ensure adequate protection of children in the justice system is available. There is, however, need for continued sensitization of security agencies on the need to adhere to the law during arrest and detention of minors. As the above cases have demonstrated most of the violations of fundamental rights occur during arrest and trial.

We are, nonetheless, need to be cognizant of the strides that have been made to this end including the establishment of a child protection desks and child welfare units in police stations across the country.

Hellen Ngessa is Prosecution Counsel, Office of the Director of Public Prosecution

> ***"Children may also come into the criminal justice system as witnesses. A witness is a person who is called upon to give an account of the circumstances in a case as seen or heard by them."***

BY ELSIE OYOO

The Uncharted Waters of Social Media Misconduct Under Kenyan Employment Law

The present Information Age compels employers to re-evaluate staff approach and in particular expected behaviour on social media. Employee activity online may be positive when employees act as online ambassadors for their employer's brands by posting entertaining or informative content about the company. Conversely, employees' participation in the internet may also go against the law, the ethos or code of conduct of an organisation, resultantly damaging an employer's reputation by association. How should employers deal with such occurrences under Kenyan law?

The Employment Act, 2007 Laws of Kenya (the "Act") does not provide specifically for social media misconduct. However, section 12 of the Act requires employers with 50 or more employees to embody disciplinary rules applicable to the employee in the employment contract or other document reasonably accessible to that employee. Where the employer has less than 50 employees, good practice dictates that the employer does document the expected conduct in a human resource policy ("**HR Policy**"). When incorporated into the employment contract, the law recognises that the HR Policy binds both the employer and employee as a crucial formation of the contract. In the circumstances, social media policy embodied in a company's HR Policy will bind parties to an employment contractual relationship. It should outline with coherence acceptable and unacceptable social media conduct and the sanctions that follow upon violation of the policy. The policy should be communicated to the employees; preferably through a training session. The absence of a social media policy does not bar the employer from taking prudent disciplinary measures. For instance, an employee who insults an employer on social media may still be found guilty of misconduct.

Regardless of the existence or lack thereof of a social media policy, the employer must always uphold the employee's right to fair labour practices as enshrined in Article 41 of the Constitution of Kenya. This right implies that employers terminating employees on grounds of social media misconduct must ensure that they follow due process as set out in the law and the company's HR Policy. The process includes but is not limited to affording the employee's right to be heard in the presence of an employee of his choice prior to termination, notice of termination or payment of one month's salary in lieu of notice and valid reasons for termination explained to the employee in a language he comprehends.

Kenyan courts have not taken up the fairness of termination due to the online conduct of employees' jurisprudence. In other jurisdictions such as the UK, the same has been embodied. In the case of Plant v. API Microelectronics Limited ET/ 3401454/2016, the Employment Tribunal held that an employee's summary dismissal was neither wrongful nor unfair. The judge arrived at this finding on the basis that, being fully aware of API's social media policy, the employee made derogatory comments on social media about API which she was unable to satisfactorily explain. Furthermore, the dismissal was reasonable. In Burns V. Surrey County Council ET/2301665/2016, the Employment Tribunal found that Burns's dismissal was unfair on account of procedural unfairness. She was a registered manager in charge of a residential care home for elderly and vulnerable adults under Surrey County Council. Part of her duties included visiting the home on Fridays for a music event. After one such event, she posted photographs and videos of the residents on her publicly accessible social media account. In the posts she disclosed the residents' identities and accepted the friend request of a resident's relative. These acts were contrary to the respondent's social media policy which Burns was aware of. Burns was found guilty of the offence at the company's disciplinary hearing and appeal. It was recommended that she be demoted or dismissed if she refused the demotion. However, the respondents only gave her two days to choose. Although she requested for more time to consider the weighty issue, her request was declined and she was deemed to have chosen dismissal.

While unfair termination in UK and Kenya may not adhere to the–same principles in the aforementioned countries, Kenyan employers can borrow a leaf from the above cases. Firstly, it would be prudent to have clear social media policies brought to the attention of employees as illustrated in the above case law ameliorates valid and justifiable reasons for terminating the employment. Secondly, adherence to methodical, timely, and well-documented disciplinary procedures as prescribed by law and HR Policies could determine the merits of a labour dispute on unfair termination.

Elsie Oyoo is a Commercial lawyer and a Certified Secretary.

BY HEZRON NJUGUNA

The Right to Strike: Way Forward - Social Dialogue

The press is awash with reports of ongoing strikes and threats of intended ones. A "strike" is basically the cessation of work by employees for the purpose of compelling their employer or representative employers' organisation to accede to any demand in respect of a trade dispute. Ongoing and intended strikes are in furtherance of the Rights and Fundamental Freedoms provided for under Part 2 of the Constitution of Kenya which include the right to life; equality and freedom from discrimination; human dignity and many others and in particular the right to strike. The right to strike is provided for under Article 41 of the Constitution which states that "(2) Every worker has the right- … (d) to go on strike." Part X of the Labour Relations Act, 2007 provides for matters relating to strikes and lockouts and in particular defines what may be considered protected strikes or lockouts (Section 76) and what are prohibited strikes and lookouts (Section 78), among others.

It is interesting to note that the Constitution does not make reference to lockouts which might be considered a serious oversight.

The International Labour Organization (ILO), a specialized UN agency which formulates international labour standards from which Kenyan labour law is primarily based, recognises the right to strike to be one of the principal means by which workers and their associations may legitimately promote and defend their economic and social interests. The international labour standards formulated by the ILO come in the form of Conventions and Recommendations on the various aspects of labour relations be it hours of work, freedom of association, weekly rest, paternity leave or every other aspect of employment rapport. There is, however, no Convention that contains specific provisions regarding the right to strike. This only appears under Article 8 of the International Covenant on Economic, Social and Cultural Rights, 1966, to which Kenya is party which states that "The States Parties to the present Covenant undertake to ensure: (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country." The right to strike is irrefutable and not debatable and every measure should be taken to ensure that its enjoyment is not seen as negative.

Strikes and lockouts should be options of the last resort. Strangely, in Kenya they seem to be the first port of call - strike first and then dialogue/negotiate, or so it seems! What can the law do to minimise this trend? Labour disputes may be classified into disputes on rights which relate to already acquired rights either through laws, contracts and agreements, and disputes of conflicting economic interests between the parties. Simply put, there are disputes of rights and disputes of interests.

The best approach to solving these disputes is through dialogue which is often spoken about but might not be so well understood. The ILO is a great promoter of social dialogue as a means to industrial peace and harmony. It defines social dialogue to include all types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic and social policy. Dialogue can exist as a tripartite process, with the government as an official party to the dialogue or it may consist of bipartite relations only between workers and employers, or trade unions and employers' organisations, with or without government involvement. Social dialogue processes can be informal or institutionalised, and often it is a combination of the two. It can take place at the national, regional or at enterprise level. It can be inter-professional,

sectoral or a combination of these. The agenda must be specific to the nature of dialogue being undertaken and not mixed up. The parties lead and guide the process.

The main goal of social dialogue itself is to promote consensus building and democratic involvement among the main stakeholders in the world of work. Successful social dialogue structures and processes have the potential to resolve important economic and social issues, encourage good governance, advance social and industrial peace and stability and boost economic progress.

Adoption and commitment to social dialogue and a system whereby disputes of rights are settled through the courts and are not be the basis of any strike or lockout and the settlement of disputes of interest through diverse machinery including power play, strikes and lockouts would in the author's view contribute immensely to the establishment of better and stable industrial relations in Kenya. This is in line with the objectives of the Labour Relations Act which include "to promote sound labour relations … and promotion of orderly and expeditious dispute settlement" which appear to have failed.

As to whether our legal regime is capable of supporting this dispensation is a thought for another day!

Hezron Njuguna is an Advocate of the High Court of Kenya.

BY AHAMED CHRISTOPHER

OVERRULED!

Technology, as law, shares one common themed thread: the need to be impartial. Reality portends however that, opportunities arise with parallel threats. For legal professionals, the convergence of information, communication and artificial technology, arguably, present the best call for renewal. Disruption and innovation will leave in score that only those who understand and harness new technologies with respect to the need for legal documentation, research, evidence, sanctioned applications and intellectual property management would thrive.

Realities today are changing both the practice and the scope of law in obvious and visible ways: being ubiquitous in legal research, admissibility in courts as both prosecutorial and defence tools/ aids. While putting one's practice 'online' is now highly expected, herein lies the challenge: the sheer volume of data to be stored brings both challenges and opportunities. This is because such data not only presents privacy issues and concerns but invariably means that potential data relevant for legal work is no longer the sole preserve of legal professionals. Such data is easily accessible, searchable and analysable by anyone, anywhere, anytime.

Being a conservative profession, the use of remote cloud storage, while reducing infrastructural costs and enhancing data capability and flexibility, raises issues of data protection, jurisdictional concerns and regulatory implications as cloud storage is intrinsically unregulated. However, it remains true that even the 'hallowed' paper records are not encrypted either and remain vulnerable to theft, loss and misplacements. It is time we, as legal practitioners, recognise that the future will be increasingly technology based. Society will expect legal professionals to cater for and understand relevant data in disputes and litigation far extending traditional sets of paper records and will also require attendant capability enhancements.

Further new technological innovations are not mere impersonal constructs, but record the many acts of human behaviour, interactions and relations which remain an integral purview of legal practice as they contain not only past records but also patterns of future behaviour. We, as legal practitioners, must be able to appreciate, cross reference and flag these past records and potential future behaviour as nuances of mundane societal norms. Opportunities thus abound in reshaping legal practice, our attendant thoughts and approaches, as areas that have hitherto been carried in-house will be outsourced including client management systems and the integration of practice areas. The practice of associates/pupils doing repetitive search and verification exercises will be a thing of the past, with automation of most of paralegal work. There will also cause a drawing into the legal arena of a wider range of disciplines from data analysis to technology development. However, this will also give birth to changes in the legal practice. The success of the legal profession will lie in offering alternative fee arrangements through efficiency and collaborative value proposition strategies, with legal services transitioning from bespoke to commodification. The path for continuous improvement and cost efficiency, for example, may call upon legal robots taking charge of legal drafting, contract management and document verification through block-chain technology.

With regard to routine legal work, such as contracting, clients will ultimately be unable to meet the required legal fees which are based on the traditional hourly-billing model. Business entities will demand fast services and turn-around timings at a lower fee, in line with the current 'more-for-less' consumer demands movement across other sectors. Legal practitioners as providers of legal services will be meeting clients "armed" with varied "alternative knowledge", from internet search engines opening up the possibility of birthing ground for alternative and possibly liberalised legal services through e-disclosures, virtual courts, and online dispute resolution.

We thus need to accept and appreciate that technology will be integral to virtually everything and we must enhance our abilities to serve our clients to whom we owe an ethical duty to be technologically competent.

While getting a handle on technological advancements and integration may be daunting, in order to remain valuable, we need to collaborate with technology amidst client pressure for solutions and growing societal issues of concern (including technology!) by having in place a plan for the identification and understanding of potential threats, risks and trends advanced by innovations.

Aspects of the legal practice will then be transformed by the availability of better analytics and better tools for the using of analytics to support decisions through insights guidance on the best trial strategy, litigation timelines and potential resource needs.

We then have the duty and call to embed technology into legal workflow. This may be through communicating, enticing and training our colleagues to move from conversation to conversion. Legal practitioners should also use technological tools to offer solutions to societal challenges and enhance legal knowledge on technology products, including the benefits and risks, identify likely obstacles orstrategies to adoption, and learning opportunities. This will not only uphold the duty to be competent in the law and its practice, but also in technology.

Ahamed Christopher is an Advocate of the High Court of Kenya

> *"While putting one's practice 'online' is now highly expected, herein lies the challenge: the sheer volume of data to be stored brings both challenges and opportunities."*

BY KING'OO DOROTHY

The Lawmaking Process in Kenya - County Assemblies

Article 6 of the Constitution of Kenya, 2010 establishes two levels of government one at the National level and another at the County level. The two governments are distinct but interdependent. They are constitutionally tasked to conduct their mutual affairs on the basis of consultation and cooperation. The County Government comprises of the County Executive and the County assemblies as per Article 176 of the Constitution. The composition of the County Assembly includes the Speaker, persons elected representing every ward during a general election and persons nominated by political parties to achieve the two-third gender rule including the marginalised groups. County Assemblies can only legislate on the functions assigned to them by Part II of Fourth Schedule of the Constitution or by an Act of Parliament. Legislations enacted by County Assemblies must conform to the Constitution and relevant legislation and must be passed according to the provisions of the respective County Assembly Standing Orders. Section 14 of the County Governments Act, 2012 mandates every County Assembly to make Standing Orders whose provisions shall regulate assembly procedure and proceedings.

A legislative proposal can be introduced either by a Member of County Assembly or a Committee of the County Assembly upon its submission to the Speaker. However, a legislative proposal which is a Money Bill can only proceed after the County Assembly Budget and Appropriation Committee has taken into account the opinion of the Executive Committee Member responsible for Finance. Further, a legislative proposal can only be published once the Speaker has certified that it has been accepted. In James Gacheru Kariuki & 3 others v Attorney General & 11 others [2017] eKLR, the Court observed

"…County Legislation does not take effect unless it is published as such in the Kenya Gazette in line with Article 199(1) of the Constitution and thereafter in the County Gazette if need be."

Every legislative proposal must have an enacting formula as relating to the respective County Assembly which is enacting it, provisions on delegated powers and memorandum of objects and reasons. A Bill shall be introduced before the County Assembly through first reading which is undertaken by reading it for the first time to an assembled house without question put.

A Bill having been read for the first time shall be committed without question put to the relevant County Assembly Committee. A committee before whom a Bill has been committed must facilitate public participation and a consultation forum on the Bill and subsequently thereto present a report to the house which report must take into account public recommendations.

> *Every legislative proposal must have an enacting formula as relating to the respective County Assembly which is enacting it, provisions on delegated powers and memorandum of objects and reasons*

However, the house or the Speaker may resolve and direct that the Bill be committed to a Select Committee as the house may resolve.

A Bill shall after having been read a second time before the house shall be committed to Committee of the Whole House and the Speaker shall leave the Chair. Committee of the Whole house can only be presided over by any member of the Speaker's Panel or Chairpersons of Committees. Any proposed amendment to a Bill by any member besides the mover of the Bill shall be moved before a Committee of the Whole House if written notification has been forwarded to the Clerk of the County Assembly twenty-four hours before commencement of the sitting of Committee of the Whole House when the Bill is being considered. However, members can be allowed to move amendments by explaining their meaning, purpose, and effect of proposed by delivering it Chairperson in writing.

A member in charge of a Bill shall after the conclusion of the Committee of the Whole House move that the Bill be reported to the House and the Chairperson presiding over the Committee of the Whole House shall leave the Chair of the Committee of the Whole House and the house shall resume. The House shall only consider matters recommitted and any matter directly consequential as relates to a Bill which has been re-committed to Committee of the Whole House.

A Bill shall be read a third time upon adoption of the report of the Committee of the Whole House of the Bill. Not more than one stage of a Bill shall be taken on any one sitting without leave of the house except consideration of an Appropriation Bill or Supplementary Bill depending on the provisions of Standing Orders of respective County Assembly. The Speaker may allow a member in charge of a Bill a claim to withdraw it without notice if the claim is not an abuse of house proceedings. A Bill once withdrawn shall only be re-introduced before the house after re-publication.

Every Bill passed by the County Assembly shall be forwarded to the Governor for assent within fourteen days and following which the Governor must within fourteen days assent to the Bill or refer it back to the County Assembly with a memorandum outlining reasons for referral. Where a Bill has been referred back, the County Assembly can amend the Bill by taking into account Governors memoranda upon which the Speaker shall submit the Bill to the Governor for assent within fourteen days. However, if the County Assembly passes the referred Bill without amendments or amendments which do not accommodate Governor's memoranda supported by two-thirds of members of the County Assembly, the Speaker shall within seven days re-submit the Bill to the Governor upon which the Governor shall within seven days assent to the Bill.

In instances whereby a Governor does not assent to a Bill resubmitted by the Speaker or refer it back to the County Assembly, a Bill shall be taken to have been assented to on the expiry of that period.

County Legislations once passed by assemblies and assented to by the Governor cannot come into effect nor be implemented unless there are published in the Gazette.

King'oo Dorothy
is an Advocate of the High Court of Kenya, a YALI Alumni and a member of LSK Young Lawyers Committee

BY HON. DAVID MWANGI MUGO

The Evolution of Devolution: County Public Service Boards Enjoy Security of Tenure

The first years of devolution were characterized by confusion, ambiguities and chaos in the counties. There was a lot of squabbling between the various entities and offices in the county government some of which actually degenerated into full blown conflicts that ended up in courts. An interesting conflict that was witnessed in many counties was between the governors and the county public service boards (CPSBs). Whereas members of the CPSBs are nominated and appointed by the governors with the approval of the county assemblies, the law gives them autonomy equivalent to that of the independent constitutional commissions established under chapter fifteen of the Constitution. They are indeed the equivalent of the Public Service Commission at the county level with the mandate of establishing and abolishing offices in the county public service, appointing persons to hold or act in those offices and confirming appointments, exercising disciplinary control over and removing persons holding or acting in those offices on behalf of the county governments.

The governors' expectations however, seem to have been that the members of the CPSBs would work under their command; hire, discipline, and fire employees at the behest of the governors. Many governors attempted to either suspend or out rightly fire the chairpersons of the CPSBs who defied their directives and orders. The chairpersons were rescued by the courts of law that rightfully interpreted the law and ruled that the governors had no powers to either sack, suspend or discipline members of the CPSBs. The judgement of Byram Ongaya J, in Mundia Njeru Gateria -vs- Embu County Government & 5 others (2015) eKLR was precedent setting in this aspect.

The petitioner in the captioned case was the chairperson of the Embu County Public Service Board having been nominated and subsequently appointed by the Embu governor upon approval of the County Assembly of Embu as provided in section 58(1) of the County Governments Act, 2012. The governor, who was one of the respondents, in the year 2015 purported to take disciplinary action against the petitioner by interdicting him from office pending investigations into his conduct and alleged illegal actions by an ad hoc committee. Aggrieved by the decision of the governor, the petitioner filed this petition before the Employment and Labour Court in Nyeri challenging inter alia the legality of the action by the governor.

Ongaya J, while allowing the petition and quashing the decision of the Embu governor was emphatic that the governor did not enjoy the inherent disciplinary powers to impose the disciplinary sanction of interdiction against the petitioner as he has purported to since he had no constitutional nor legislative authority or power. While disagreeing with the submissions on behalf of the respondents that the petitioner, a public officer, served at the pleasure of the governor, the Judge cited his earlier decision in Richard Bwogo Birir –vs- Narok County Government & 2 others (2014) eKLR dismissing the 'pleasure doctrine' as no longer applicable in Kenya on the promulgation of the 2010 Constitution. The Judge categorically stated that, "… the court finds that the pleasure doctrine and the related doctrine of the servants of the crown does not apply in public and state service of the new Republic under the Constitution of Kenya, 2010."

Justice Ongaya came up with what he termed as the new 'doctrine of servants of the people and the doctrine of due process' as the doctrines that apply to public and state officers in Kenya. Any action against a public officer therefore, must be based on the provisions of the Constitution and the Law.

In regard to members of the CPSBs, the County Governments Act, 2012, at section 58(5) is clear that members of the Board may only be removed from office by a vote of not less than seventy five per cent of all the members of the county assembly. The grounds for removal are also as set out in article 251(1) of the Constitution, being;

> Serious violation of the Constitution or any other law including a contravention of chapter six of the Constitution;
>
> Gross misconduct, whether in the performance of the member's or office holder's functions or otherwise;
>
> Physical or mental incapacity to perform the functions of the office;
>
> Incompetence; or Bankruptcy.

The members of the CPSBs therefore enjoy security of tenure but can only serve for a single term of six years. The issue of suspension or sacking of members of the CPSBs is therefore now settled.

What is yet to be settled is the aspect of the financial independence of the CPSBs. For them to have the kind of independence contemplated in the law, they ought to have financial independence just like the Public Service Commission or any other independent commission for that matter as provided in article 250 0f the Constitution. The Chapter fifteen institutions are funded directly by parliament with the budget of each commission and independent office being a separate vote. The remuneration and the benefits payable to a commissioner or holder of an independent office are also charged from the consolidated fund.

> ***"An interesting conflict that was witnessed in many counties was between the Governors and the County Public Service Boards (CPSBs)"***

Hon. David Mwangi Mugo, Legal Advisor to the Governor of Nyeri County & the 1st Speaker of the County Assembly of Nyeri

BY JUDITH AKOTH

Don't be Intimidated! You and I can Tame Corruption

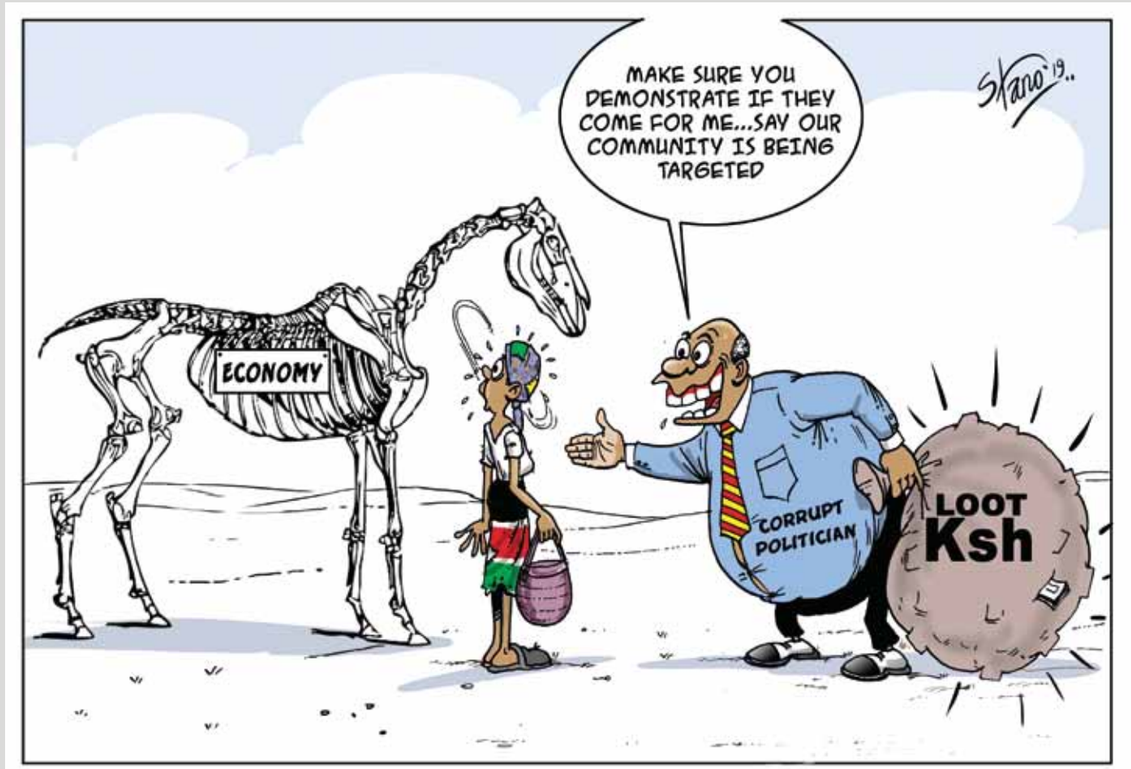
On March 7th 2007, Garuda Indonesia Flight 200, a domestic passenger flight carrying 133 passengers and seven crew members was flying from Jakarta to Yogyakarta. In an unfortunate turn of events, during a calm sunny weather, what would have been a normal routine landing, turned tragic when the plane crashed into a nearby rice field. 21 people were killed, 12 had serious injuries while the remaining survived with minor injuries. Later that year, Indonesia's National Transportation Safety Committee released a report that attributed the accident to pilot error. In a nutshell, the report explained that the Pilot in Command (PIC) was so fixated on landing the plain on the first approach, despite flying at a higher speed than the normal for approach and landing. It was indicated that the PIC was so engrossed in landing the plain that it clouded his cognitive ability to the extent of failing to heed to warnings from the copilot to abort landing and go around. Ultimately the plain overran the runway and traversed a perimeter fence coming to a stop at a rice plantation.

Aviation accidents usually result in a huge number of fatalities. This notwithstanding, air travel is considered to be a safe means of transportation because of the continuous and rigorous investigations of the mishaps and practical pilot training sessions aimed at curbing errors and fixing existing problem thus making air travel safer by the day.

Kenya has been running in a manner similar to the Garuda Indonesia Flight 200. We have become a people who insist that issues settled our way or not at all. In the political arena, for instance, when our leaders were voted into office, instead of working to realize the Big Four agenda, they started politicking about the 2022 political succession.

In Kenya, political positons continues to be lucrative businesses. This is not only because of the power they attracts but also due to the unprofessionalism in the manner in which the office-holders in the country operate that provides the perfect avenue to plunder public resources.

According to the Central Bank of Kenya, the country's debt now stands at over Ksh. 5.1 trillion. Money which should have been put to good use; to build schools, refurbish our hospitals with equipment and drugs, and revive factories to create employment for the youth. So that even if our grandchild will feel the pinch of this debt, they would be able to bear it happily because they enjoy its benefits. The money has, however, been looted by some individuals in government, who, at the expense of the tax-payers, have



used it for their own personal gain. Politicians are milking the country dry because their minds are fixated on amassing wealth.

Inasmuch as there is need for the culprits need to be brought to justice expeditiously, the executive's has been slow in cracking the whip on corruption. With public statements like "Nifanye nini jameni" from the Head of State, while corrupt officials still hold public office and those being investigated always finding ways to clear their names and rebranding themselves to come back as elect legislators, the cycle continues.

There is also another caliber of servicemen and women in Kenya who refuse to leave office despite incompetence and compromised integrity.

The country is thus rapidly evolving to a state of anarchy. These are the root problems that led to the Syrian war that has displaced millions of people and left a million others dead. The fixation with amassing wealth continues to wear out our moral fabric, especially for the youth, who now glorify corruption and have ceased seeing the beauty in working hard or smart in meaningful employment.

The only solution that we are left with is to to empower the voter to make sensible decision when casting their vote. We need a totally new group of people in government who have integrity and who seek to serve the country instead of pursuing selfish interest.

People should no longer allow themselves to be divided along ethnic lines since the consequences of corruption cuts across all ethnic lines. It's time people claim back their power and say no to handouts as we are not a monarchial society. Time is also ripe for the vetting of aspiring leaders to ensure that we choose those with the best interest of our future generation at heart.

Our plane is plunging. If we do not act in good time, we will become casualties to a menace that could actually be tamed. The time to believe that we have the will to do the right thing is now. Let's not be intimidated. If CS. Dr. Fred Matiang'i tamed cheating in schools when he was the Minister for Education, who are we not to tame corruption?

Judith Akoth is an Advocate of the High Court of Kenya

BY PAUL K. KAMAU

The Status of Corporate Governance Today

Though corporate governance in most of the civilised world has been required since the inception of the company phenomenon, boards and management have viewed its operation as a hindrance to, rather than an avenue of enlightened shareholder value. Perhaps this is borne not out of ignorance but particular dislike for accountability. Philip Armstrong and James Spellman in an article dated 2nd February 2009 ("the Spellman article") examine the status of corporate governance today and what needs to be done to make it work.

The Spellman article deals with several issues of corporate governance:
The first is failures in risk management and poor decisions on credit exposure. Once a board has been appointed, it assumes all the responsibilities of running the company with minimal supervision from the shareholders. For the reason that boards operate as stewards of the shareholders' equity, they ought to be composed of people skilled enough to manage risk and make sound decisions when they expose the company to credit. As Daniel Waxman observes, unlike creditors who have security for their debts, the only thing shareholders have is the right to vote. It is only fair to themselves therefore that they put skilful people in the boards. Commenting on this point, Armstrong and Spellman feel that shareholders have not exercised their power prudently in influencing board composition, conduct and decisions. Part of the problem may be the fractured nature of the body that is shareholders. Institutional investors see individual investors as pedestrian masses that have got little to offer by way of intellectual input. If all shareholders were to work in tandem and play their oversight role successfully, it would be hard for boards to deliberately or even deviously fail to keep to the straight and narrow of good corporate governance.

Armstrong and Spellman are of the view that some directors do not see shareholders as worthy peers. Perhaps one would add that this is more pronounced in the case of individual investors. By the fact that they are many and varied, it is possible that the directors take advantage of their fractured nature to escape accountability. Going forward, it is likely that this problem will recede to the backburner as institutional investors play their oversight role, as they ought.

The integrity of financial reports has also come under scrutiny in the Spellman article.
It is undeniable that some boards deliberately falsify financial reports to mislead investors. With the growing number of institutional investors, it should be expected that there could be an improvement in this area because the corporate investors are themselves bound by rules of disclosure; they should know what to expect from a financial report. As Boyan Belev says, this class of investors should be able to provide examples of good corporate governance, being corporates themselves. Whether that translates from expectation to reality is highly dependent on the personal integrity of the boards of these institutional investors.

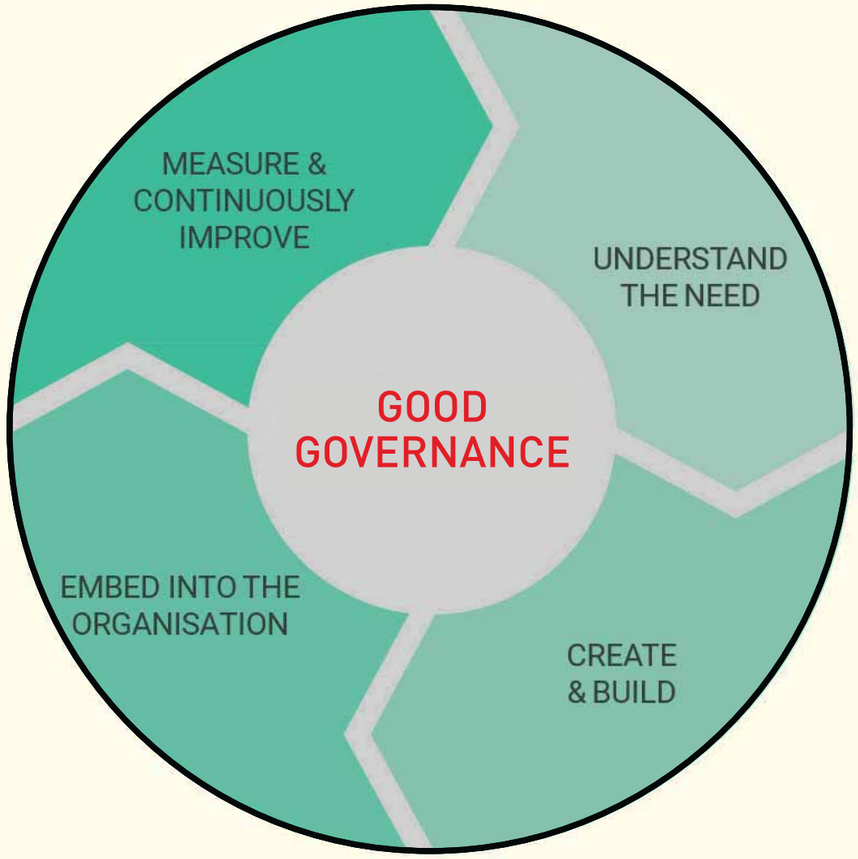
The Spellman article also touches on the role of the regulators.
It indicts them for their failure to ensure proper flow of information to stakeholders. Perhaps one way in which a regulator can be effective is to ensure the completeness of disclosure. Such disclosure could for instance include the exact source of declared corporate revenue and the level of internal borrowing by directors and staff. Appreciably though, the limitations of personnel and resources that face these regulators are a real concern. With an increase in the number of companies being incorporated every day, it can only get worse and the corporate universe just has to find workable ways of ensuring honest and complete disclosure. With the recent developments in IT, it is to be hoped that this burden on the regulators could be halved and be made more manageable.

> *"Though giant strides have been made in recent times in the area of corporate governance, a lot still needs to be done in the area of shareholder education.*

The conclusion of the article captures the true nature of the herculean task that regulators have on their shoulders. It is impossible to legislate on human character and indeed it is not the lack of legislation that has got society to where it is in terms of bad corporate governance. Rules against conflict of interests for instance, have been present since the early years of company law. This has not prevented devious directors from dishonestly benefitting from conflict situations. What the corporate universe requires is a complete paradigm shift, which, unfortunately, goes beyond the realm of the law. Laws can be learnt, but character one must possess. With this in mind, it may be said that the ultimate responsibility lies with the shareholders to take their role as owners seriously when voting for board compositions. This will ensure that boards are populated by men and women of integrity.

Though giant strides have been made in recent times in the area of corporate governance, a lot still needs to be done in the area of shareholder education. Without enlightening shareholders of their rights and responsibilities, society shall remain stuck in one gear, crying for more regulations to change the mind-set of man; that is an impossible feat. Voting when exercised by a shareholder is both a right and a responsibility and possesses great power. Educating the shareholder to see it as a responsibility to use it to foster change will go a long way in improving governance. Once that happens, there will be less concern of directors not seeing shareholders as peers because there will be no doubt who pays the piper.

Paul K. Kamau, is an Advocate of the High Court of Kenya,
LLM International Business Law, Liverpool



BY ELIZABETH OYANGE – NGANDO

The Copyright (Amendment) Bill, 2017: Clauses that Fell Between the Cracks

The Copyright (Amendment) Bill, 2017 is intended to overhaul an outdated Copyright Act. The Bill addresses contentious areas within copyright law like the fair dealing exception of computer programs, the possibility of circumvention of technological protection measures in limited circumstances, and the reproduction of materials for the visually impaired by authorized entities without liability for copyright infringement. Other favourable aspects of the Bill include the provisions on the liability of Internet Service Providers (ISPs) for copyright infringement and a process for taking down infringing online content.

Some recommendations fell through the cracks resulting to a missed opportunity for a robust Copyright Act.

The Fair Dealing Exceptions

Copyright gives an owner the exclusive right to control how their work is used and distributed and requires their express permission before use. Contravention amounts to copyright infringement, unless the work falls under some limited copyright exceptions, so that permissions are not necessary.

Scientific Research and Current News

The inaugural post-independence Copyright Act in Kenya enacted in 1966 was largely a mirror of the British Copyright, Designs and Patent Act. The British legislation stipulated that fair dealing would apply to research and private study (under section 29), criticism or review (under section 30) and to the reporting of current events. After review, the UK law acknowledges that fair dealing applies to private use and private study, research, text and data analysis for non-commercial research, criticism, review (quotation), news reporting, caricature, parody and pastiche (under sections 28B to 30A).

In Kenya, the general exceptions and limitations to copyright are set out under section 26 of the Copyright Amendment Bill, 2017 and includes works used for 'scientific research, private use, criticism or review, the reporting of current events, parody, pastiche, caricature and quoting'.

A retrospective review reveals the absence of 'scientific research' in the British copyright law making it an inexplicable obtruder.

On 'current reporting of events', some copyright materials might be used to report stories that have nothing to do with current events, but nonetheless still warrant reporting and thus risks exclusion by the restrictive criteria in the Amendment Bill.

In a memoranda submitted to the National Assembly in May 2018, recommendations were made for the amendment of these two restrictive criteria; by amending to 'news' and 'research' to ensure that all research would come under fair dealing, not just scientific research.

Teaching and Education

There was a recommendation for a new category of a teaching and education exception. Educational institutions would benefit greatly from using certain limited portions of works freely and only to the extent justified for the purpose of teaching. This should include any acts necessary to display the work, e.g. images and videos for teaching, and would address the digital copyright issues in distance learning. The second schedule of the Bill limits educational institutions to one page of literary or musical works. Without these exceptions and limitations, educators become infringers whilst imparting much needed knowledge to learners.

Libraries, Museums and Archives

There was an opportunity for a holistic clause to ensure better protection not only for libraries and archives but also for museums and galleries which are not mentioned. This would permit reproduction of materials for preservation in circumstances like; the maintenance and management of permanent collections, one copy of an original rare or out of print work which is deteriorating, damaged, lost or at risk of such if the original cannot be viewed due to its condition or atmosphere of storage; if the original is in an obsolete format due to technological advances (e.g. VHS) or to restore the original as long as no other appropriate copy is commercially available in an appropriate medium of quality.

Internet Service Providers

In as much as ISP's may remove infringing content within a set time, a mechanism for the rejection of improper notifications of takedown as well as the provision of claim forms on their websites with all the necessary information to make a valid claim is worth consideration. The ISP should upon request give the identity of the person filing a takedown request for the avoidance of malice and the recipient should be able to file an opposition against the ISP's decision to take down the data electronically shortly after the ISP notice. The ISP can then after the opposition letter either reject it and continue blockage or accept the opposition and restore the content.

Orphan Works

There is no indication or direction on what to do when one comes across an orphan work. A recommendation for mechanical licences was made. This area is in urgent need of further review. Government owns the copyright to its works. The public could benefit from reproduction and distribution of some works and the government would be welcome to adopt open government licenses.

In essence, further discussions are necessary to ensure that these issues are captured in the Copyright Act.

Elizabeth Oyange – Ngando, is an Advocate of the High Court of Kenya
Copyright Specialist, Aga Khan University

BY GATUYU JUSTICE

Revisiting Regulatory Models for Banking Sector in Kenya

The Microfinance banks in Kenya are not doing well. A report by the Central Bank of Kenya (CBK) reveals their gradual decline in profits from KES 549M in 2015 to a loss of KES 731M for the year 2017.

The CBK, in a consultative note, has formulated regulatory proposals to redeem the sector, and these include enhancing corporate governance, increasing capital and liquidity requirements and reducing reliance on deposits and borrowed funds.

In summary, CBK's proposed solution is more and more regulations. However, excessive, prescriptive, regulatory interventions in financial sectors occasion market distortions and stifle innovations. In addressing market failures, regulatory enthusiasm can trigger government failures.

The goal of financial regulation is to ensure triple object of financial stability, consumer protection and market integrity. Each of these objects ought to be pursued on a broader perspective. We illustrate.

Ensuring financial stability is essential for maintaining confidence in the economy. However, when regulators pursue financial stability as the only overarching goal, financial institutions may become overly risk averse and refrain from discharging their intermediation functions, restraining economic growth.

Prescriptive regulations may make financial institutions consider that compliance with rules is all that is expected of them. In such a case, they may not make efforts to improve their products or services to best suit the interests of customers, limiting the financial industry's contribution to the growth in national wealth. The rules must allow flexibility on banks to periodically improve their services. As regulators pursue triple objects, they should not sacrifice bid for better services by market players, effective intermediation and normal market vigour and innovation.

A cursory look at the Kenya's banking industry reveals a sector with multiple equilibria. While some institutions are making huge profits, others are struggling. A sector with multiple equilibria will be disrupted as the market strives for efficiency gain to a better equilibrium.

An efficiency shift requires change in strategy. However, prescriptive laws overhang, like in Kenya, hinder operational flexibility. The effect is that no financial institution is willing to change their strategy, as the first mover often becomes a prey to dominant firms, creating the prisoner's dilemma scenario. The result is no bank exits from the strategy. The first mover breaking away from the prevalent inefficient business model can become disadvantaged against its competitors in the short run. Smaller banks are more disadvantaged as they hold on into inefficient business models. That is why supervisory approaches have to be consistent with the ultimate goal of regulation. One way that CBK can create financial stability in banks is by addressing vulnerabilities in the financial system.

As successive collapse of Dubai Bank, Imperial Bank and near collapse of Chase bank illustrates, a bank's failure has a domino effect on other banks due to the inter-connectedness, but the management of the bank may not take this potential spill-over into consideration due to information asymmetries.

Depositors who do not have enough information to distinguish good banks from bad banks, yet bad banks may cause runs on good banks. This is the danger of information asymmetries.

In promoting better services, market forces may not necessarily foster competition towards better services. This is because financial institutions have varying asset management capabilities or their dedication to customers' interests may not be properly appreciated by customers due to, again, information asymmetries and bounded rationality, limiting differentiated growth of firms.

The question which may arise from this narrative is how the CBK can minimize government failures while addressing market failures. Sadly, the current supervisory approach by CBK on banks, as espoused in among others, prudential regulations majorly based on compliance checks and asset quality reviews, may no longer be effective.

Mechanical and repetitive application of rules makes the industry to be obsessed with compliance with the letters of the rules (focus on form), backward-looking review of the evidence of the past (focus on the past) and analysis of details and elements (focus on elements).

Focus on forms, rather than substance, makes it easier for bankers to defend their lending decisions by referring to collaterals and guarantees than by presenting bankers' own views on borrowers' future business prospects. This promotes complacency on the sustainability of banks' business models. Where a banks regulator spends much time criticizing specific past incidents of misconduct, they may fail to discuss whether firms meet the changing needs of the customers. The CBK should expand its supervisory approaches from a backward-looking, element-by-element compliance check with

> **"Ensuring financial stability is essential for maintaining confidence in the economy.**

formal requirements to substantive, forward-looking and holistic analysis and judgment. This would ensure that banks better contribute to the ultimate goal of regulation. To this extent, CBK can adopt the three pillar supervisory approach as recommended under Basel III, the international framework for prudential supervision of banks.

The first pillar is the enforcement of minimum standards. Such includes accounting standards on loan classification, loan write-offs and loan loss provisioning, capital adequacy requirements, rules on consumer protection and market integrity, internal controls, all as a precondition for adequate business management. The second pillar is the dynamic supervision. On this, CBK would avoid imposing a one-size-fits-all solution across the industry by developing approaches to engage in constructive two-way dialogue with an individual financial institution and explore solutions-tailored circumstances. The third pillar is promotion of disclosure and engagement with financial institutions to encourage them to adopt best practices.

Given the rapid evolution of financial services, financial institutions' practices will quickly become outdated if they are designed just to satisfy minimum standards. Their business models and risk management practices should be renovated day by day.

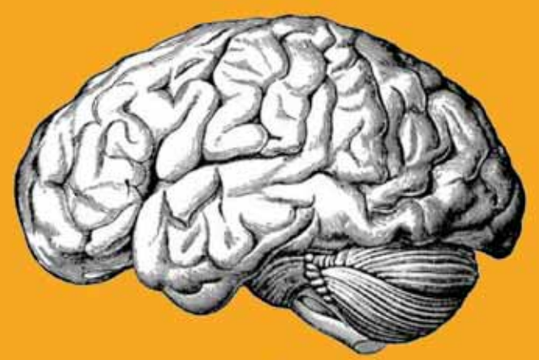
A key to establishing a virtuous cycle in financial sector is the creation of shared value. As Michael Porter and Mark Kramer argue in their article Creating Shared Value, companies can find new markets and achieve a competitive advantage by creating shared value with customers and the society in their core businesses. Hence, the CBK regulatory and supervisory approach ought to change tune.

Gatuyu Justice is an Advocate of the High Court of Kenya.
Jgatuyu@gmail.com
@gatuyu

BY ELIAS KIBATHI AND ABIGAEL KIMANZI

The Dichotomy of Consent and Mens Rea in Regard to Minors: The Sexual Offences Act, 2006 "A Case for Reform"

The passage of the Sexual Offences Act, 2006 was hailed as a landmark legislative accomplishment. The Act was intended to reverse the perceived leniency towards sexual offenders. The unprecedented Act has by large succeeded in achieving this target and has reduced judicial discretion by imposing threshold in regard to sentences to be proffered.



A thorough interrogation of the Act unceremoniously exposes a conundrum which stands to threaten the very essence of the Act. Section 43(1)(c) succinctly stipulates that an act is intentional and unlawful if it is committed in respect of a person who is incapable of appreciating the nature of an act which causes the offence. Section 43(4) captures circumstances when one can be deemed incapable of appreciating the nature of an act which causes an offence and such circumstances include inter alia where such a victim is a child.

Although there is a consequential glaring contradiction in the definition of a child as envisaged in section 2 of the Sexual Offences Act and in section 2 of the Age of Majority Act there seems to be a consensus that a child is legally disabled and incapable of appreciating the nature of an offence. This is manifest and since the law cannot eat its cake and have it, a child cannot be deemed incapable of appreciating the nature of the offence on one hand while on the flip side be deemed capable of forming the intention to commit the very offence they cannot comprehend.

It therefore follows that the oxymoron lies in establishing whether a child can commit a sexual offence under the said Act? The millennial essence of criminal law is said to be premised on the maxim – "actus non facit reum nisi mens sit rea" which translates to the fact that an evil mind is a critical ingredient for a crime to be established. This maxim has undergone a series of metamorphosis before acquiring its current state of near stability.

In order to aptly address the oxymoron, a brief history of the concept of mens rea will come in handy. The past aberrations to the maxim were as a result of the deep seated impetus to depart from the archaic English law principle of absolute liability. According to Lord Wigmore, the law back then was tailored in a way that considered immaterial the doer's intention.

The much awaited departure and liberation was actualized in the 12th century vide the influence of canon laws and the Roman law which birthed mental intent as the real criterion. According to Cicero (Pro Tullio, 22,51) it was an implied rule of mankind (tacita lex est humanitatis) to punish not the occurrence but the 'consilium,'. Further and as per the canon laws which were more influential in the departure, wish and intent became the tenets of determining culpability.

Having established the much decried change and monumental place of mens rea in criminal law, it is imperative to consider it within the Kenyan concept. The Court of Appeal confirmed this maxim in Joseph Kimani Njau V Republic [2014] eKLR holding that in all criminal trials both actus reus and mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. It can be observed without difficult that mens rea is strongly cemented in our jurisdiction and any confusion on this state of affair should be wrought out.

Though mens rea has come to be a very technical concept with diverse technical meanings it has never entirely lost its natural meaning: that the act is intentional and unlawful. Courts with cases where a child has been accused of defiling another child have perceived the issue as one of discrimination rather than one underpinned on mens rea. In P.O.O. (A Minor) v Director of Public Prosecutions & another [2017] Eklr the Court observed:

> *"Does a boy under 18 years have the legal capacity to consent to sex. Haven't both children defiled themselves? … I think that these are children in need of guidance and counselling rather than criminal penal sanctions."*

This article does not advocate for the position that a child is incapable of sexual assault. Rather, it calls for ardent reform and a harmonious reconciliation of the law. Some of the recommendations include; reducing the age of consent from 18 years to 14 years in line with the age of criminal intention, replacing the mandatory provision of Section 43 with a rebuttable presumption. Lastly, the court should be vested with the discretion to determine the issue of consent or criminal intention dependent on the prevailing circumstances of each case. The blanket application and uncertainty bedeviling the concept of mens rea should be ousted and supplanted with unquestionable certainty.

Elias Kibathi is an Advocate of the High Court of Kenya

Chamber Break

A young lawyer, starting up his private practice, was very anxious to impress potential clients. When he saw the first visitor to his office come through the door, he immediately picked up his phone and spoke into it," I'm sorry, but my caseload is so tremendous that I'm not going to be able to look into your problem for at least a month. I'll have to get back to you then." He then turned to the man who had just walked in, and said, "Now, what can I do for you?" "Nothing," replied the man. "I'm here to hook up your phone."

A lawyer boarded an airplane in Diani with a box of frozen crabs and asked a blonde stewardess to take care of them for him.

She took the box and promised to put it in the crew's refrigerator. He advised her that he was holding her personally responsible for them staying frozen, mentioning in a very haughty manner that he was a lawyer, and proceeded to rant at her about what would happen if she let them thaw out.

Needless to say, she was annoyed by his behavior. Shortly before landing in Nairobi she used the intercom to announce to the entire cabin, "Would the lawyer who gave me the crabs in Diani, please raise your hand."

Not one hand went up . . . . so she took them home and ate them.

"Excuse me," a young fellow said to an older man, "I've just moved here and I wonder if this town has any criminal lawyers?"

"Well," replied the older man, "I have lived here all my life and all I can tell you is we are pretty sure we do, but no one has been able to prove it yet."

A lawyer was filling out a job application when he came to the question, "Have you ever been arrested?" He answered, "No."

The next question, intended for applicants who had answered, "Yes," was "Why?" The lawyer answered it, "Never got caught."

One day in Contract Law class, the professor asked one of his better students, "Now if you were to give someone an orange, how would you go about it?"

The student replied, "Here's an orange."

The professor was livid. "No! No! Think like a lawyer!"

The student then recited, "Okay, I'd tell him, 'I hereby give and convey to you all and singular, my estate and interests, rights, claim, title, claim and advantages of and in, said orange, together with all its rind, juice, pulp, and seeds, and all rights and advantages with full power to bite, cut, freeze and otherwise eat, the same, or give the same away with and without the pulp, juice, rind and seeds, anything herein before or hereinafter or in any deed, or deeds, instruments of whatever nature or kind whatsoever to the contrary in anywise notwithstanding..."

One day the phone rang at a law office and when the receptionist answered a man asked to speak to Mr. Dewey. "I'm sorry, sir," the receptionist said. "Mr. Dewey passed away yesterday." "Oh, is that right? Goodbye." But every day for the next two weeks the same man called back and the same exchange occurred. Finally, the receptionist said, "Sir, I have told you repeatedly that Mr. Dewey died, why do you keep calling and asking for him?" "Oh," the man replied, "I just like to hear it."

A radical feminist is getting on a bus when, just in front of her, a man gets up from his seat. She thinks to herself, "Here's another man trying to keep up the customs of a patriarchal society by offering a poor, defenseless woman his seat," and she pushes him back onto the seat. A few minutes later, the man tries to get up again. She is insulted again and refuses to let him up. Finally, the man says, "Look, lady, you've got to let me get up. I'm two miles past my stop already."

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LAW SOCIETY OF KENYA

CORPORATE SOCIAL RESPONSIBILITY

SATURDAY 17TH AUGUST 2019

SHANZU, MOMBASA COUNTY

TIME: 10:00 AM

SHANZU ORPHANS HOME

The Law Society of Kenya will this year undertake its Annual Corporate Social Responsibility (CSR) at the Shanzu Orphans Home.

The Home has structural capacity to accommodate 33 children, however due to financial difficulties the home currently has taken up twenty (20) children only. With your support the management will be able to take 13 more distressed children into the Home.

HOW TO CONTRIBUTE:

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