The Advocate

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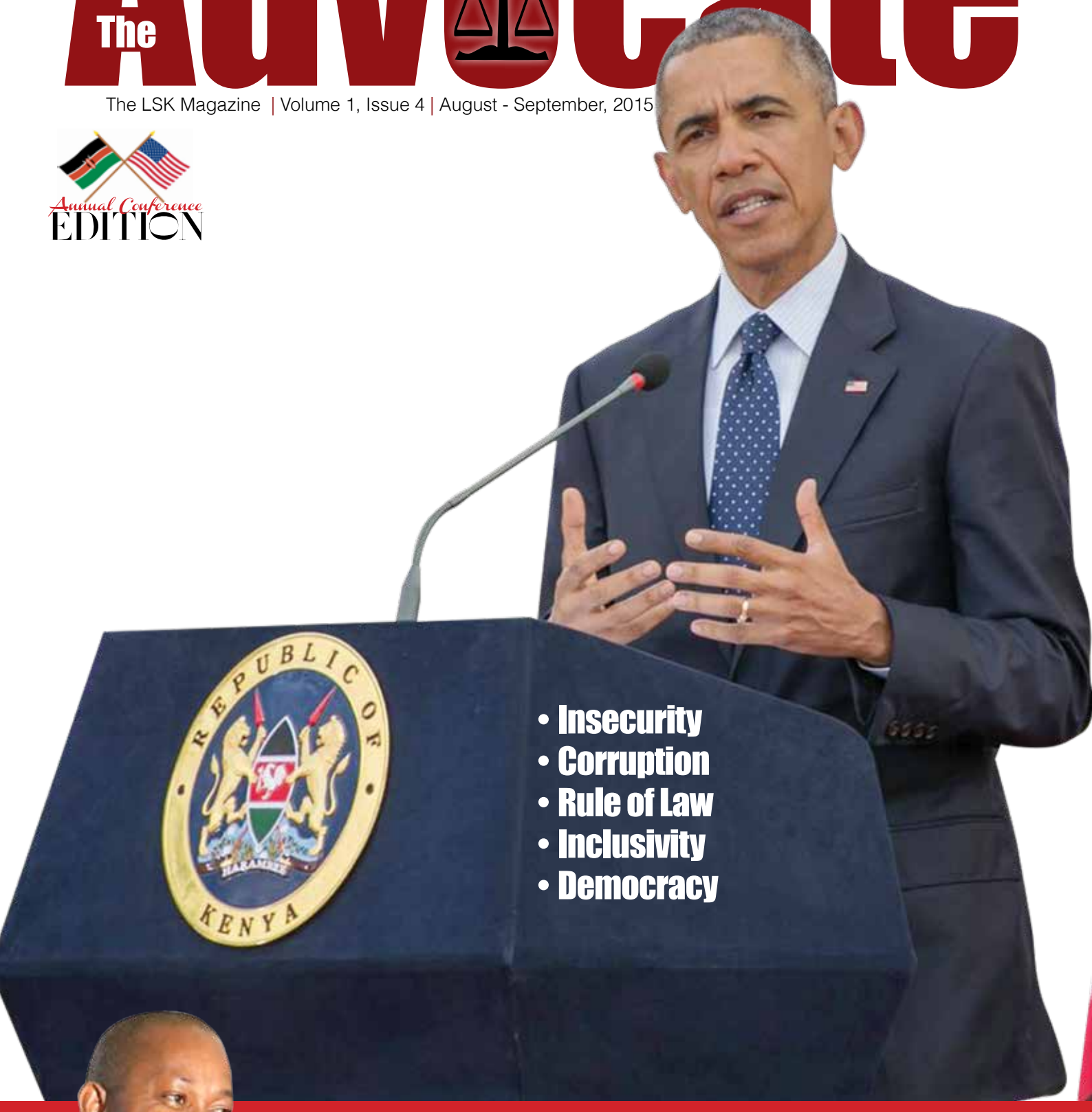
Annual Conference EDITION



- Insecurity
- Corruption
- Rule of Law
- Inclusivity
- Democracy

'It is time for national dialogue on insecurity'

– LSK President Eric Mutua

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VOX POP

"We speak up for the Rule of Law and defend constitutionalism as a rational and predictable system of organizing society because any other system – including the rule of man – is fraught with pitfalls that would threaten the viability of any nation," - Chief Justice Dr. Willy Mutunga delivering closing remarks at the Law Society of Kenya (LSK) Annual Conference at the Leisure Lodge Beach Resort & Spa, Kwale County on August 15, 2014

"The legal profession demands that one must be disciplined and have etiquette at all times. This extends to how you relate with your client, peers, seniors in the profession and the court which includes judicial officers," – The Law Society of Kenya (LSK) Vice President Ms. Lilian Renee Omondi during the admission of new advocates to the Roll at the Supreme Court of Kenya, Nairobi.

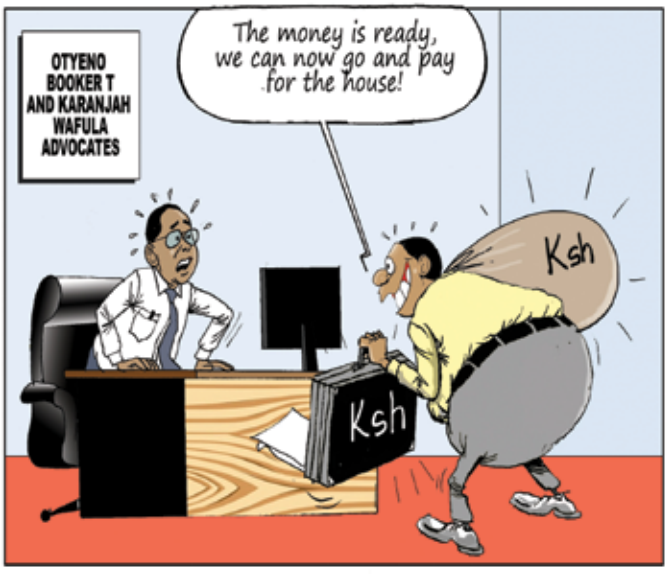
"The Judge will record any directions given or orders made on the Case Management Checklist and will inform the parties present in Court of such directions and orders," – Senior Counsel Mr. Kenneth Fraser when making a presentation during a lecture on the High Court (Commercial & Admiralty Division) New Practise Directions at the Hilton Hotel, Nairobi.

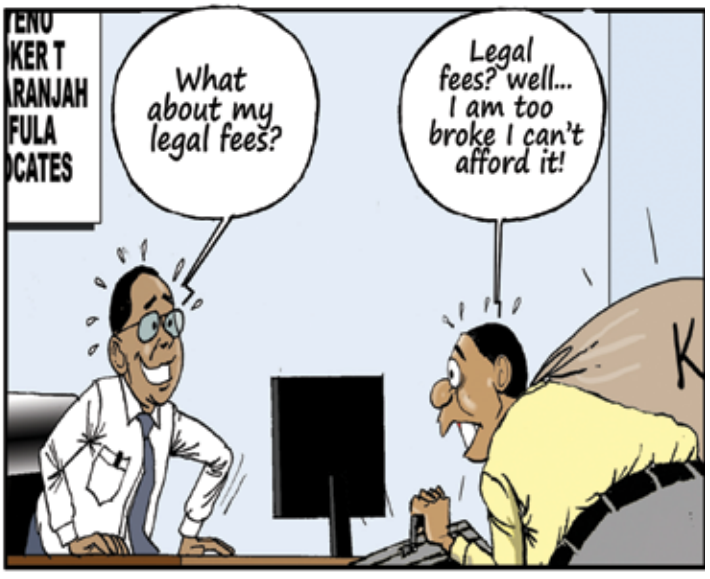
"My decisions are made without regard to political, ethnic or other external considerations. As the DPP/ODPP, our fidelity is and shall remain to the Constitution and the law." – Director of Public Prosecution (DPP) Senior Counsel Keriako Tobiko on prosecution of graft cases.

"The New Practice Direction in the High Court (Commercial & Admiralty Division) is issued for the purpose of the expeditious disposal of cases of a commercial nature and applies to suits commenced by Plaint or Originating Summons which are proceeding to hearing in the Commercial & Admiralty Division of the High Court of Kenya in Nairobi," - High Court (Commercial & Admiralty Division) Judge Lady Justice Farah Amin during a lecture on the New Practise Directions at the Hilton Hotel, Nairobi

WA-AKILI

By Stano





Terrorism tests our resolve to uphold the Rule of Law

The analysis has implications for understanding the relationship between Government actions and civil liberties in the context of terrorism prevention and times of emergencies more generally.

When democracies seek to protect their citizens against new threats posed by terrorism, right balances must be struck between preserving people's civil liberties and protecting them against terrorist violence. As Aharon Barak, the former President of the Supreme Court of Israel — a nation that has confronted this issue over many decades — once put it: "Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand." The commitment to the Rule of Law constrains democracies in fighting terrorists who have no concern for international law; yet although we must fight terrorism with one hand behind our back that does not mean that we cannot use the other hand forcefully, effectively, and legally.

The question is whether there are trade-offs between civil liberties and terrorism prevention. First, privacy and security from terrorism need not be in conflict: when accounting for strategic interactions, reducing privacy protections do not necessarily increase security from terrorism. Second, and more important, the security agencies will always want less privacy and will prefer a reduction in privacy protections even when that reduction harms security from terrorism.

The analysis has implications for understanding the relationship between Government actions and civil liberties in the context of terrorism prevention and times of emergencies more generally.

Like enforcement agencies, ordinary people consider security from terrorism a crucially important social objective, but one that must be balanced with the right to privacy from Government intrusion, a foundational right that underpins other civil rights and liberties on which liberal societies are founded. Professor Jeremy Waldron, New York University School of Law, posits that the formulation of approaches to counterterrorism policies is a balancing act between the allegedly competing values of privacy and security.

What then is the role of legal limits on executive power, if any, when citizens demand more security from terrorism, and allowing the Executive the legal flexibility of action necessary to achieve it? When the Executive faces increased electoral incentives to provide security and has legal flexibility to choose any policy it finds optimal, security from terrorism can actually decrease.

In contrast, when the Executive faces increased electoral incentives to provide security and there is an explicit legal limit on executive counterterrorism activities, security from terrorism increases. The Executive achieves the objective of terrorism prevention more effectively when there are some limitations on its counterterrorism powers.

Apollo Mboya, HSC
LSK Secretary/CEO

The Advocate

Editorial Director
Godfrey Kitiwa

Executive Editor
Apollo Mboya, HSC

Managing Editor
Harold Ayodo

Revise Editor
Sylvia Kooke

Publisher
Savvy Media Kenya Limited

Contributors
Eric Mutua, Apollo Mboya, James Mwamu, Allen Gichuhi, Prof. Sihanya, Dr. Pranav Pancholi, Kuria Waithaka, Petronella Mukaindo, Daisy Mulamuzi, Sharon Simani, , Beatrice Koske, Guandaru Thuita, Faith Simiyu, Pauline Vata, Edigah Kavulavu, Cliff Oduk, Juliet Nyang'ai, Salem Lorot, Ochieng Khairalla, Beth Michoma, Patrick Ochieng, Emmy Rono, John Diro, Peter Keya, Harold Ayodo, Felicia Mburu, Joseph Lutta, Charles Kamunya, Betty Wambua, Brian Migowe, Maureen Mwadime, Chrisphine Owiye, Joan Obiero, Collins Odhiambo,George Wakahiu and Cyril Wayong'o.

Photography
Gilbert Wamalwa

Cartoonist
Stanislaus Olonde

Graphic Designer
Williab Habwe

Law Society of Kenya (LSK) President Mr. Eric Mutua, OGW addressing members during the Annual General Meeting in March 2015.

The insecurity dialogue must now go beyond our security forces

The number of guns in the world, whether legal or otherwise has hit a billion. Everyone is a stakeholder on security matters and that is why all must play a part in tackling insecurity

"Our commitment to constitutional principles has weathered every war, and every war has come to an end. – Homegrown extremism is the future of terrorism. –Our response to terrorism cannot depend on military and law enforcement alone. We need all elements of national power to win a battle of wills, a battle of ideas.

-President Barrack Obama.

The single greatest threat to the economy of this great country, Kenya, and the very existence of the nation is insecurity brought about by repeated and petrifying terrorist attacks. The insecurity is not brought about by terrorism alone, but also due to poverty and gun violence. The April 2015 issue of the Newsweek reported that there are now nearly a billion guns in the world, meaning that there is one gun for every seven people. We may not immediately estimate the distribution of guns in Kenya, but what is clear is that there are very many guns in wrong hands.

The Government has invested substantial resources and energy to counter the runaway insecurity. How we collectively (as a nation) deal with the menace shall shape our country's destiny. Resonating with the above words by the President of the United States of America Barack Obama, it will be naïve for anyone to imagine that our security forces are the only solution to the enigma of insecurity.

A robust and reasoned national debate and dialogue may go a long way in addressing the subject of insecurity. The Law Society of Kenya is a repository of a wealth of legal and human resource. It prides itself of social scientists capable of helping the government shape a discussion on various efforts and strategies to combat insecurity. I therefore urge us to start ruminating and examining this question of insecurity.

Security Laws (Amendment) Act 2014

Informed or misinformed by failed attempts to contain insecurity (especially on terrorism) in the year 2014, the Government amended various statutes touching on security by way of enactment of The Security Laws (Amendment) Act 2014.

Following a court process, some of the provisions of the said law were declared unconstitutional hence null and void. The acrimonious parliamentary process of enacting the said law and the highly contested court proceedings and decisions is testimony of the competing social-legal interests and dynamics of the State's obligation and desire to maintain security on one hand and protection of individual freedoms on the other.

This conflict of ideology has lived in society since the later Middle Age, but it is a discourse that is relevant today as it was then. It is for this reason that the Council of the LSK has deemed it imperative to theme this year's Annual Conference as "INSECURITY AND THE RULE OF LAW". I have no doubt in my mind that the Government will benefit from the thoughts arising out of the robust discussion expected in the conference.

Criminal defence lawyers, prosecution counsels and the courts have a duty and a great role to play in the equilibrium of safeguarding constitutional principles without unnecessarily emasculating the State in its efforts to arrest insecurity.

As we advance various positions, let us learn from the words of Justice William Young of the United States of America in his Judgment while sentencing Richard Reid in March 2013. Richard Reid, a terrorist and a British citizen, had attempted to detonate a bomb while aboard a US plane by use of a fuse implanted on his shoe. The judge had this to say:

"What your able counsel and what equally able United States Attorneys have grappled with and what I have honestly tried to grapple with, is why you did something so horrific. – I have an answer for you. It may not satisfy you. –You hate our freedom. Our individual freedom. –It is because we prize individual freedom so much that you are here in this beautiful courtroom. – It is for freedoms' sake that your lawyers are striving so vigorously on your behalf and have filed appeals. We care about it. Because we all know that the way we treat you, Mr Reid, is the measure of

our own liberties. Make no mistake though. It is yet true that we will bear any burden; pay any price, to preserve our freedoms."

Case Backlog

This Dispatch will be incomplete without addressing (in brief) two issues on practice of law. Many lawyers and litigants have raised concerns over the ongoing efforts by the Judiciary to clear case backlog in the Justice@ Last Initiative (dismissal of old cases). In my view, this is a step that must be embraced by the profession. The cases which are being dismissed are the ones where parties have lost interest in prosecuting or have died. Unless we take measures towards eradicating the possibility of those cases taking up space in our daily Cause Lists, then the chances of achieving the goal of an expedited dispensation of deserving and "live" matters will be diminished. We all strive to achieve the ideal situation where cases are prosecuted within six months from the date they are filed.

This may not be realized if we do not reduce the time taken by judges in dealing (by adjourning) those old matters. This is not to mean that I do not agree with the concerns that have so far been raised to the effect that adequate notices ought to be given to both the litigants and the advocates before such drastic measures are taken.

We had proposed to the Judiciary that service of notices be undertaken by way of advertisement in the newspapers. Their response was that advertisement was a very costly exercise and further that not all people have access to newspapers. Similarly, the Judiciary explained the difficulties that it faced in sending out Notices To Show Cause to each party and advocate involved. The compromise position that was arrived at was that the notices would appear in the websites of the Judiciary, LSK and Kenya law.

Annual General Meeting

I will not write much about the events of the aborted Annual General Meeting (AGM) last March since some of the issues are under active litigation. Without apportioning blame, allow me to say that what transpired in that meeting was traumatizing. Any lawyer who desires to see the progression of a great legal profession and upholds the ethos of the calling must condemn those deeds of a few of us.

As lawyers, we must learn and practice the art of disagreeing in a civil manner. The following conduct and words of President Obama should be our guiding principle. While he was delivering a speech at the National Defense University in Washington DC on 23rd May 2013, Obama was repeatedly interrupted (nine times) by one agitated lady from the civil society.

In every interruption, the President would plead with her to let him stick to the written speech and to let him finish, but she could hear none of that. On the ninth interruption, the President chose to address her as follows: "Now ma'am, let me finish. Let me finish ma'am. Part of free speech is you being able to speak, but also, you listening and me being able to speak."

National Assembly Leader of Majority Party Hon. Aden Duale opening the LSK Annual Conference at Leisure Lodge Resort last year.

I hope in any future meetings we shall all endeavor to allow each other time to speak and to conduct ourselves with decorum. That is what the noblest of professions demands of us.

Thank you,

Eric Mutua, OGW
President, LSK.

Kenya's security in the new constitutional dispensation

The signing of the Kenya National Dialogue and Reconciliation Accord following the calamitous post-election violence set the country on a much desired path of constitutional, institutional and legal reform.

By Chrisphine Owiye

The Government is a legal institution envisioned by the Constitution as the universal provider of security and solace to the citizenry. With a highly extensive structure, it is hoped that the Government houses the requisite infrastructure, facilities and professional wealth to not only secure the borders of the country but also offer intra-country comfort to citizens.

Defence Forces

It is worth noting that the reforms hitherto witnessed in the arena of security in Kenya did not come easily. The post-election violence in 2007/2008 provided an opportunity to relook the country's security structure and abilities. Lives were lost and property worth hundreds of millions destroyed. Displacement of humanity in monumental proportions was witnessed all over. The signing of the Kenya National Dialogue and Reconciliation Accord following the calamitous post-election violence set the country on a much desired path of constitutional, institutional and legal reform.

The constitutional review process, which had witnessed several false starts, suddenly got a near all embrace culminating into the enactment and the promulgation of the Constitution in 2010. Instructively, the security sector benefitted remarkably under the new constitutional dispensation.

To begin with, Article 241 of the Constitution established the Kenya Defence Forces (KDF) which encompasses the Kenya Army, the Kenya Airforce and the Kenya Navy. The KDF is constitutionally responsible for the overall defense and protection of the sovereignity and territorial integrity the country. At the apex is the defence council responsible for the overall policy, control and supervision of the forces. The membership comprises the Cabinet Secretary for the time being responsible for defence who presides as Chairperson, the Chief of the KDF, and the Principal Secretary in the Ministry responsible for defence.

The KDF Act seeks to statutorily align the defence forces to the spirit and letter of the Constitution. Section 3 of its guiding principles requires the defence forces to respect and uphold the Bill of Rights and the values and principles enshrined in Article 10 of the Constitution.

Intelligence Service

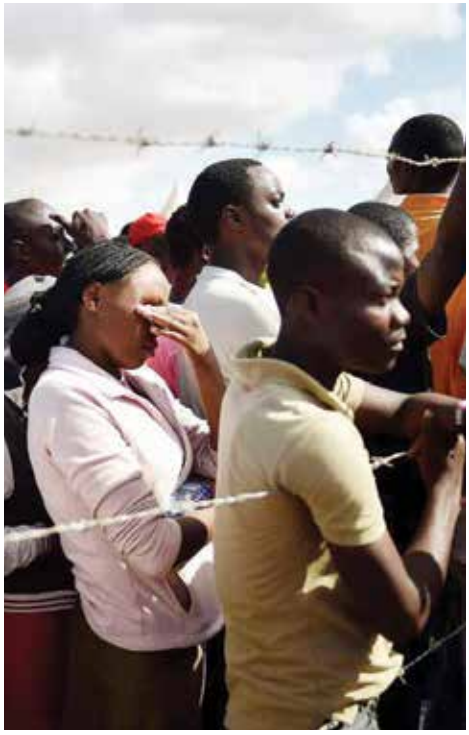
The National Intelligence Service (NIS) on the other hand previously known as the National Security Intelligence Service morphed from the then dreaded department of

As a consequence, the National Police Service Act was enacted effectively merging the Kenya Police and the Administration Police into one single establishment under the command of the Inspector General of Police.

National Police Force code name Special Branch and established in 1952 to provide intelligence to the British administration.

After independence in 1963, the special branch was transformed into the directorate of security intelligence and subsequently in 1999, the NIS was born following the enactment of the National Security Intelligence Service Act. The Constitution establishes the NIS captained by the Director General who is appointed by the President with approval of the National Assembly.

According to Article 242 of the Constitution, the chief mandate of the Service is to provide security intelligence and counter intelligence to enhance national



security. In the recent past, the NIS has been in the spotlight over giving and sharing of intelligence information on potential terrorist attacks. Probably time is nigh that we relooked the entire establishment, structure and systems of the NIS with a view of firming it up for a more effective and efficient discharge of its mandate

Police Service

The Kenya Police Service (KPS) has also travelled a tumultuous journey. The events following the post-election violence strengthened the push for police reforms. The Commission of Inquiry into Post-Election Violence (the Waki Commission) made a raft of recommendations including the initiation of reforms in the police service operations and creation of an effective system of police accountability. A subsequent United Nations special rapporteur report did similarly accuse the police of extra judicial executions hence pressed the need for an overhaul and streamlining of the existing policing rank and file.

The Government set up a task force headed by Judge Ransley to deal with the same and following its report, the Police Reform Implementation Committee was set up to oversee the implementation of the task force recommendations. As a consequence, the National Police Service Act was enacted effectively merging the Kenya Police and the Administration Police into one single establishment under the command of the Inspector General of Police. Under the new dispensation, the capacity of the criminal investigations was enhanced in terms of funding and management.

Executive Interference

In a rather progressive bid to offer civilian tab over police action, the National Police Service Commission Act was enacted. The Act establishes a civilian board tasked with the onerous responsibility of overseeing the recruitment and appointment of police officers, reviewing standards and qualifications and receipt of complaints from members of the public. Since its establishment, the National Police Service Commission has faced a myriad of challenges such as lack of quorum in its sittings and threats to the life of the chairperson. The Commission has also encountered interference from the Executive for instance on 26th march 2015, the president in the state of the nation address faulted the ongoing police vetting process presided over by the commission as slow, demoralizing and allegedly as having a negative impact on the overall reform agenda in the police service.

Oversight Authority

The Independent Policing Oversight Act No.35 of 2011 on its part establishes the Independent Oversight Authority purposed to hold police accountable to the public in the performance of their functions. The civilian Authority was established to give effect to the provisions of Article 244 of the Constitution that requires the Kenya Police Service to strive for professionalism and discipline within its membership.

Another key role of the Authority is to ensure independent oversight of the handling of complaints by the Police Service. The most celebrated intervention by the Authority is High Court Petition No. 390 of 2014 in which the Authority successfully obtained orders quashing the 2014 police recruitment process on the premise that it was marred by allegations of corruption, tribalism, nepotism, professional malpractice and kindred integrity issues.

National Government

The Fourth Schedule of the Constitution provides that functions of the National Government include national defence and police services.

This Constitutional provision limits matters security chiefly to the National Government. However, Article 189 of the Constitution makes handy provision for the co-operation between National and County Governments through support, exchange of information, coordination of policies and administration and enhancement of capacity. The two levels of Government may set up joint committees and authorities in the performance of their functions in terms of the provisions of Article 189(2) of the Constitution. Matters security under the County Governments is legally cushioned by the County Government Act.

A prime objective of county planning is to inter alia make reservations for public security thus in planning activities, the County Government must Willy- nilly make provision for County security. The provision of security vehicles by the County Governments of Machakos and Mombasa to the police as part of measures in boosting security infrastructure is an impressive showcase of this duty. In terms of Section 41 of the National Police Service Act, community policing is a flagship responsibility. The County Policing Authority chaired by Governors and with membership of persons appointed by the Inspector General, elected members nominated by the respective County Assembly and representatives of the community is a significant display of the fundamental essence of community policing at the county level.

By and large matters security are significantly addressed both in Statute and in the Constitution. It is therefore, prime that the various actors in the realm of security act in consort and with reliable consultations to enable us realize a secure and peaceful motherland-Kenya.

Mr. Owiye is the Manager in charge of Investigation and Prosecution at the Independent Electoral and Boundaries Commission (IEBC)

Interior Security Minister Hon. Maj-Gen (Rtd) Joseph Nkaissery addressing the media after the recent terrorist attack at Garissa University.

Executive must trust their choice of Security CS and IG to deliver

Prof. Ben Sihanya

The role of County Governments in security governance in Kenya has been a critical policy question since the inception of devolution. Kenya has experienced insecurity and attacks in Tana Delta, Suguta Valley, Garissa, Westgate Shopping Mall, Bungoma, Kitui, Moyale, Mpeketoni in Lamu, Mandera, and Baringo.

This essay advances three key arguments: Security is a devolved Executive function; President Kenyatta has unconstitutionally recentralized security; and Kenyatta has taken policy and administrative measures that undermine constitutional democracy and county roles in security.

Executive Powers

First, the Constitution guarantees security as a human right and devolves Executive powers including security. The National and County Government can perform this function through mutual cooperation and consultation as envisaged under Article 6 of the Constitution. Some legislation envisages security as a concurrent function. For instance, the National Police Service Act provides for county policing.

Alternatively, we argue that County governance is inextricably intertwined with national security functions. Security as a human right under Article 29 is strengthened by imposing duties on the President as President, as Commander-in-Chief, or as Chair of the National Security Council. Duties are also imposed on the Executive and Government to ensure security. Just like the Magna Carta 1215, the fact of public taxation is a foundation of human rights and security. The Constitution has also fundamentally altered the security organs that existed under the 1969 Constitution. The Kenya Police Service, Administration Police Service and the National Intelligence Service are responsible for internal security. So far, these agencies are operated as if they are only answerable to the President or National Government. These trends by President Kenyatta are the cornerstone of the emerging constitutional (dis)order in Kenya.

Kenyatta is reversing constitutional gains made under the new constitutional order faster than his preceding biological, political and god fathers of Kenyatta, Moi and Kibaki. For instance, both Inspector Generals of Police Mr Joshua Boinett and his predecessor Mr David Kimaiyo have operated as if they should be taking orders from Kenyatta. Boinett attempted to implement Kenyatta's unconstitutional order that 10, 000 recruits report for training contrary to a court order. And following the attack at Mpeketoni in Lamu, Kimaiyo imposed a curfew and gave credence to Kenyatta's partisan and tribal statements.

Kenyatta had alleged that the attack in Lamu was politically motivated ethnic violence against a Kenyan community (Kikuyu) and that it was not an Al Shabaab terrorist attack. Then attacks of non-Kikuyu followed in Mombasa and elsewhere with no protection from an ethnicised security system.

Information Sharing

Hence County Governments are denied authority on security, even on logistics and information sharing, partly due to the centralization of the security function. The refusal to consult, cooperate and coordinate with the County Government and security structure has contributed to ineffective response as was witnessed in the Garissa University College massacre.

Second, President Kenyatta's Government is increasingly ignoring key constitutional provisions on security. The Kenyatta Presidency sponsored the Security Laws (Amendment) Bill, 2014 which he promptly assented to. Significantly, High Court Judge Justice George Odunga declared eight Sections of the Security Laws unconstitutional.

The Court of Appeal has substantially upheld Justice Odunga's decision.

Kenyatta in a move to re-introduce the discredited provincial administration assigned County Commissioners new roles and made them answerable only to the President and the National Government. Progressives argue that this contravenes the Constitution and undermines the mandate and jurisdiction of the Officer Commanding Police Division, the Governor, and the relevant County Executive Committee.

This also contravenes section 17 of the Sixth Schedule which requires the National Government (not the President alone) to restructure the provincial administration to respect the devolved system of governance within five years after the effective date (my emphasis).

Third, the Government is adopting policy measures that undermine the constitutional design and intendment on security. Indeed Kenyatta is systematically reversing constitutional gains made under the Constitution as well as obstructing justice. Kenyatta aerially supervised the destruction of a ship which was to be used as evidence in the case of Republic v. Yousuf Yaqoob & 11 Others [2014].

Such actions exemplify Presidential lawlessness and are a threat to constitutional democracy, the Rule of Law and security in Kenya. This is also an invitation to civil disobedience and even revolution or the breakdown of constitutional order.

The Kenyatta Presidency is also endangering constitutional democracy by disregarding civilian oversight of security agencies as required by the Constitution. For example, the President wears military uniform in public and has increasingly militarised the public service and internal security. Remarkably the Constitution subject security to civilian oversight. Civilian oversight is growing to be an important component of external police accountability in many constitutional democracies.

In order to address these security challenges, Governors who are democratically elected are in a better position to handle security at the county level. This will help entrench the constitutional requirement that National and County governments should be inter-dependent and conduct their mutual relations on the basis of consultation and cooperation. Currently, the Governor's role that relates to security is restricted to chairing the County Policing Authorities (CPAs) whose function is mainly oversight without any role in security administration. The CPAs are yet to be operationalised.

In conclusion, the Presidency and the National Government must implement the Constitution and involve the County Government in addressing security. The practice in India, Canada, US and Nigeria with devolved systems indicates that county and public participation will help improve security in Kenya.

Prof Ben Sihanya is a Scholar, ©, Intellectual Property, Constitutional Democracy & Education Law at the University of Nairobi Law School and Public Intellectual, Mentor, Poet and Advocate at Sihanya Mentoring & Innovative Lawyering
sihanyamentoring@gmail.com

Dismissal of old cases: Judiciary working hard or hardly working?

The Judiciary must realise that substantial justice is not achieved by the volumes of cases they dismiss for want of prosecution but those of interested litigants that are resolved quickly and justiciably.

By Guandaru Thuita

Earlier this year, the High Court undertook a radical move to dismiss old cases towards clearing the back log which has been giving the Judiciary a bad name. The exercise was said to be based on the Case Audit and Institutional Survey 2014.

According to the first statement in the Foreword Section of the Survey Report authored by Chief Justice Dr. Willy Mutunga, it was stated that "…One of the barometers of effectiveness in the Judiciary is the size of the back log in the court system". Internally within the Judiciary therefore, this clog in the courts was understood to be caused by the inactive files which had continued filling up registry cabinets.

Over 15,000 Files

The Judiciary then commenced an exercise whereby the first phase involved the listing for dismissals, over 15,000 files in the Nairobi High Court Civil Division. The exercise has been replicated in other parts of the country and divisions of the court.

The question to ask is whether this is the best pill for the clog and delayed justice for litigators. To the Judiciary officials, this is the best thing that has ever happened and during the state of the Judiciary and Administration of Justice Annual Report, the Chief Justice will gladly brag about how his institution has "resolved" more that 100,000 old cases in 2015 alone. Never mind that the resolution was by mere dismissals without hearing parties.

To others however, particularly the legal practitioners, this is yet another serious goof by the Judiciary. In two weeks of February when numerous Judges congregated in Nairobi to dismiss old cases, their stations were largely left unattended and litigants in active files lost out of rare hearing dates while the dispensers of justice were away handling " dead" files whose owners had long abandoned them to die a natural death.

The Judiciary must realise that substantial justice is not achieved by the volumes of cases they dismiss for want of prosecution but those of interested litigants that are resolved quickly and justiciably.

Judicial Brag

While the Judiciary will brag about the number of cases they have dismissed, there is no reflection of joy in the populace. There is no jubilation that pending cases have been resolved. No matter how many cases are dismissed for want of prosecution, the court users shall continue crying for hearing dates for their case.

In Nairobi courts, litigants are now accustomed to the fate of having court diaries declared permanently full. Instead of wasting time on abandoned cases, it would serve the Judiciary better if they can expedite the hearings of cases that litigants are interested in.

Accordingly, as long as it keeps directing its energies in unnecessary exercises, the Judiciary will remain hardly working.

On the flipside though, the Civil Service Week between the 15th to the 19th June 2015 has shown that the exercise of dismissing old cases can serve another purpose. This process has become a training ground for newly admitted Judges. After their induction and "internship" under the old Judges, the first cases the newly admitted Judges will have to contend with are old inactive files. This is a positive step instead of having seasoned Judges leaving their busy stations to handle matters whose parties lost interest eons ago.

-Mr Thuita is an Advocate of the High Court of Kenya.
He can be reached at gourdarrow@gmail.com

Someone thank Kenya for opening her doors to Somali refugees

By Brian Migowe

Kenya has not failed its refugees and needs to be appreciated for hosting immigrants from nearby Somalia to the greater Horn of Africa for over 20 years. To the contrary, the international community has failed and continue turning a blind eye to the increasing refugee population in Daadab camp. I believe that the United Nations High Commission for Refugees (UNHCR) is not fully prepared to handle the influx of refugees at the Horn of Africa into the Kenyan territorial boundaries. For starters, Dadaab, the world's largest refugee camp, is situated in North Eastern Kenya.

Human Rights Violations

Under international law, States are prohibited from forcibly returning people to a place where they would risk human rights violations. This is known as the principle of non-refoulement. Kenya is a party to the 1951 Refugee Convention and the 1969 Organisation of African Unity Refugee Convention. Refugees are also protected under the Kenya Refugee Act 2006 from forcible return to countries where their safety is not guaranteed.

On 11 April, Deputy President William Ruto said the Government instructed the UNHCR to close Dadaab refugee camp within three months and return refugees to Somalia or else Kenya would take the initiative. The strong statement from the Executive prompted the question, 'what about non-Somali refugees? Where do they go? What considerations have been made for this process? Refugee repatriation is not voluntary when host country authorities deprive refugees of any real freedom of choice through outright coercion or measures such as, for example, reducing essential services.

Al Shabab

The Government of Somalia does not have effective control over many parts of south and central Somalia. Violence and insecurity persists and residents are frequently subjected to indiscriminate and targeted attacks. If refugees are sent back, they risk human rights abuses ranging from rape, killings and extortion. While it is unclear who is responsible for attacks on civilians in all circumstances, it is believed all parties to the conflict carry out such attacks.

A lot has been done by Kenya in efforts to secure peace for neighbouring Somali by sending the Kenya Defence Forces (KDF) to seize territories held by Al Shabaab – a Somali terror group. The most unfortunate flip-side of this are the intermittent attacks by Al Shabaab within Kenyan for vengeance. For instance, recent the killing of 147 college students at Garissa University on the 2nd of April. Garissa is 100 km from the Kenya – Somali border. The African Union under the umbrella of Amison also has troops patrolling and monitoring situations in Somalia. If anything, the presence of troops is a sign of peace and not an engagement for war. It's time for the Somali refugees to voluntarily move back to their country to help set up administrative structures and channels of authority.

Refugees at Dadaab Refugee Camp

Refugee Repatriation

This is not the first time that plans to return refugees to Somalia have been discussed. In November 2013, a tripartite agreement was signed between the Governments of Kenya, Somalia, and UNHCR, setting out a framework for the voluntary return of refugees to Somalia was agreed upon. The pilot phase began in December 2014.

For refugee repatriation to be lawful, they must be genuinely voluntary – without undue pressure and with returnees' safety and dignity guaranteed. What the Kenyan Government faces is a slow process in the voluntary return of the refugees and a continued attack on its citizens by Al Shabaab whose sympathisers allegedly entail some Somali refugees in Daadab. It is difficult to distinguish between a once innocent refugee seeking asylum and the converted Al Shabaab sympathiser in the same camp, targeting the citizens of the host country.

Militant Groups

Some of the reasons given by the detained refugees is the frustrations of staying in camps for decades with restrictions and a slow process of addressing their needs.

The needs include asylum seeking processes and a means to earn income while in the camps to which case militant groups sway them with money to turn against the host country.

These are just a few examples of collective Government failures to protect refugees. But the United Nations, United States and other Western Governments, have further failed refugees across Africa and other parts of the world by allowing them to be warehoused in camps for decades without basic human rights as freedom of movement, protection from violence, and ability to support their families.

Before Kenya is condemned in the eyes of the international community, recognition of the difficulties it faces today have to be addressed for it's a Government's duty to provide security both internally and along its territorial boundaries.

-Mr. Migowe is a Fellow at Hesselbein Global Leadership Academy currently pursuing the Advocates Training Programme at the Kenya School of Law.

We can make use of wasted brains in Dadaab

All in all, more sustainable approaches are required in counter-terrorism. With competent security agents, we should surely be able to separate the wheat from the chaff and deal with the unwanted elements in the society separately without jeopardizing the rights of other human beings.

By Maureen Mwadime

Dadaab camp is home to over 350,000 refugees fleeing from drought and the civil war in Somalia. Amongst the refugee population are professionals and individuals with very high potential of becoming useful people in the society. Apart from lawyers and doctors, the refugee population also has sons and daughters who exemplarily perform in schools.

This group is most often resettled to the developed countries like the USA, where they acquire citizenship. It is worth noting that Kenya has not embraced local integration as a sustainable solution for refugees. Subsequently, most refugees are skeptical in engaging in large scale businesses for fear of losing their investments. Consequently, most refugees opt to idle in the camp while those with outstanding skills get resettled in third-world countries where they put their skills to good use.

Kenyan Insecurity

It is clear that the security in Kenya has for some time been making the headlines on both local and international news. More often, we have pointed fingers at the refugees for the insecurity dump. Administrative, legislative and military strategies have kept on transforming to deal with the terrorists squarely.

While it might seem logical to make a conclusion that the Dadaab refugees are the cause of insecurity, we tend to forget that radicalized groups and individuals exist in our midst.

Several times, in a bid to address the insecurity issues, there have been calls by the Government to close Dadaab camps and take the Somali refugees back to home. Kenya ratified and domesticated the 1951 UN Convention by enacting the Refugee Act, 2006.

The law clearly stipulates that refugees are subject to the laws of Kenya, which means that all criminal elements can be dealt with individually under the law.

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According to an article by Muthee Kiunga published in the *Daily Nation* on 14th April, 2015, most refugees have gone through horrendous experiences of human rights violations. "For many of them, life is a daily struggle for their dignity.

While there may be elements that may be recruited into violent extremism…, it does not mean that the whole refugee community should be punished. This would be tantamount to suggesting that because the mastermind of an attack is from a certain ethnic, professional… community, all members of that community are connected to terrorism, " the article says in part.

Conversely, in 2007, the Government closed its borders at Liboi over to security reasons. This occurred before the Refugees Act became operational. In 2011 the United Nations High Commission for Refugees (UNHCR) reported that refugees fleeing hunger and conflict in Somali continued to arrive in Kenya in thousands especially at the height of the drought crisis in Somali.

According to a publication (Taking Stock, 2013) by the International Rescue Committee (IRC) the official closure of the border had the effect of refugees crossing into the country without being screened. IRC also noted that as a result of the official closure of the Liboi border, most refugees were prompted to use unofficial routes into the country which further aggravated security concerns for Kenya.

All in all more sustainable approaches are required in counter-terrorism. With competent security agents, we should surely be able to separate the wheat from the chaff and deal with the unwanted elements in the society separately without jeopardizing the rights of other human beings.

Additionally, with the Government and UNHCR's initiative to repatriate Somali refugees who volunteer to go back home, it is the hope of many that the repatriation process will be humane, uncorrupted and with dignity.

-Ms. Mwadime is an Advocate of the High Court of Kenya.

Successful terrorism trials

It is the duty of the Director of Public Prosecution (DPP) to make necessary innovative applications to ensure successful investigations and prosecution without infringing on suspect(s) constitutional rights.

By George Wakahiu

Kenya is party to several international human rights treaties. The treaties include the Universal Declaration of Human Rights, The International Convention on Civil and Political Rights and The African Charter on Human and People's among others. Chapter Four of the Kenya Constitution deals with the Bill of Rights.

Investigating, prosecuting and trying terrorists' cases invariably involve matters of the Bill of Rights. The court has to strike a balance between national security policy and the protection of the suspect's fundamental rights. The doctrine of the Equal Protection of the Law demands that terrorist suspects be treated like any other suspects with the respect and dignity afforded to all other suspects.

Constitutional Hurdles

The bombing of the American Embassy in Nairobi, Kikambala bombing in Mombasa, Westgate massacre, Mpeketoni raid and the Garissa University attack indicate that Kenya should have a policy on National Security as a top agenda. Courts acknowledged this need in the case of Salim Awadh Salim & 10 others V Commissioner of Police & three others and Zuhura Suleiman v The Commissioner of Police & three others [2010] eKLR).

The Government has made frantic efforts to track and arrest terrorists but their efforts in investigations and prosecution of the cases have met tough constitutional hurdles in the nature of Bill of Rights.

Recently, Parliament passed the Security Laws (Amendment) Act, No 19 of 2014 ("SLAA'), the compressive legislation dealing with security. In Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others [2015] eKLR the court declared some of its provisions unconstitutional.

In the case of US v. Abu Ali, 528 F.3d 210 (4th Cir. 2008), the suspect, an American went to study abroad in Saudi Arabia. Saudi authorities suspected that he had affiliations with a terrorist cell called al-Fq'asi. He was arrested in Medina by the Saudi Special Counter terrorism forces, the Mabahith and transported to Riyadh and questioned by the Mabahith whereby some Federal Bureau of Investigations (FBI) agents observed the interrogation upon a request by the US Government. Abu Ali made several incriminating statements before he was taken to the US to stand a terrorism trial and charged with terrorism-counts. The Judge introduced a deposition procedure, which enabled the US government to take the Mabahith's statements without infringing on Abu Ali's constitutional rights. The Judge gave directions that two attorneys, lead by Abu Ali's leading attorney attends the deposition in Saudi Arabia, the third attorney was sitting with Abu Ali in Virginia while two Government attorneys and an interpreter sat in Saudi Arabia.

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A live two-way video link was used to transmit the proceedings to the courtroom in Virginia where the Judge was sitting. A transcription by a court reported in real-time and separate cameras recoding the Mabahith on one side and Abu Ali on the other was accorded. The Judge found that Abu Ali's statements to the Saudi Mabahith were voluntary and not as a result of "gross abuse" or "inherently coercive conditions". The Judge eventually convicted him noting that the alleged defects in the searches and indictments "did not violate Abu Ali's rights under the Fourth or the Sixth Amendments

Successful Prosecution

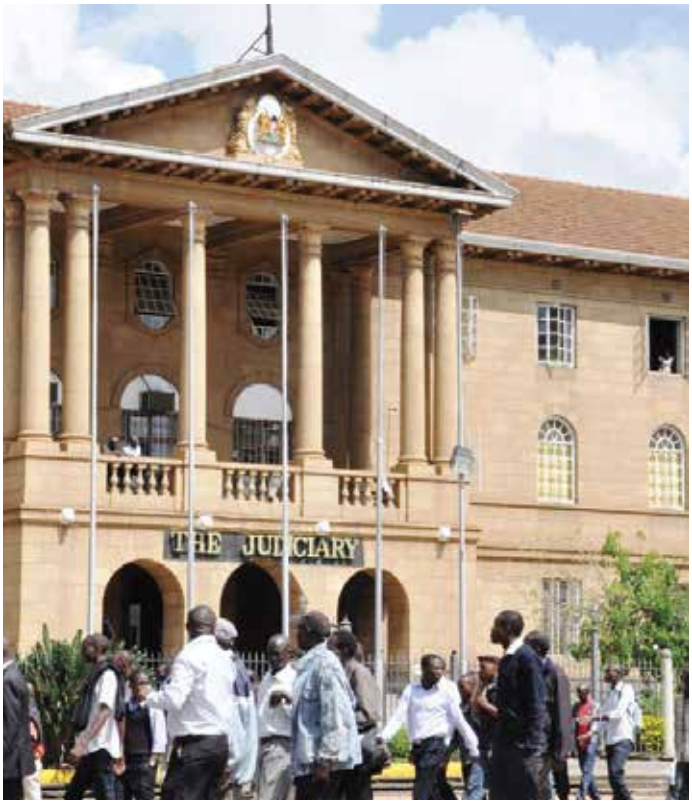
In Kenya, Article 49 of the Constitution deals with the right of an arrested person. There are also four important stages in a criminal trial which include initial investigations, arrest, further investigations while the suspect is in police custody and formal charging. The Director of Public Prosecution (DPP) and the police are fully involved in the first stage of the initial investigations. The Court comes in the second, third and fourth stages. The second and third stages are critical. It is when the investigator can get first-hand information from the suspect personally. However, there lacks self-supervision methods to monitor the police and control cases of abuse of the suspects' rights by the police. The implementation of Article 49 is entirely in the hands of the investigators.

Developed countries have devised ways of handling this dilemma of police self-supervision. There is increased need to get information from suspects without infringing on their constitutional rights to information, privacy and many others. Technology has come in as the answer.

It is the duty of the Director of Public Prosecution (DPP) to make necessary innovative applications to ensure successful investigations and prosecution without infringing on suspect(s) constitutional rights. The successful prosecution of terrorist cases will depend largely on the DPP's (and the police's) input in investigations and prosecution. This is therefore a wake –up call for the DPP to come up with more innovative methods. Prosecuting Abu Ali's case was successful because of the availability of technology, which enabled deposition and instantaneous transmission. It is for the Judiciary in Kenya to figure how adopts technological developments and innovations in the war against terrorism.

-Mr. Wakahiu is an Advocate of the High Court of Kenya

Rule of Law and Public Order: Balancing the Interests



Most important is the need for the Government to ensure respect of the rights enshrined in the Constitution and to ensure that the procedural safeguards that have been put in place for these rights to be enjoyed are respected.

By Cliff Oduk

Like many countries globally, Kenya is faced with numerous challenges related to the maintaining of public order. Various incidences of insecurity have been witnessed and various measures have been taken by the State to curb this.

Amidst this, challenges have been witnessed on how to strike a balance between maintaining of public order and ensuring that this is done within the confines of the law. It is imperative that in the quest to maintain law and order, the state is to ensure that the law is upheld at all times and that authoritarian and callous methods are done away with.

Rights and Freedoms

This therefore seeks to ensure that there is Government by law at all times. A. V. Dicey, in propounding the concept of Rule of Law stated that the three tenets of Rule of Law are supremacy of law, equality in law and equal protection by the law. In this regard, the actions by the Government towards persons within its jurisdiction, particularly those affecting their rights and freedoms, must be in accordance with previously established general rules that are widely acceptable as law.

By this, the Government is to ensure respect of the rights of all persons and limitation of these rights must be done within the confines of the law.

English Judge

As G. K. Rukwaro notes, lack of respect of the law is the greatest threat to the Rule of Law. The Government has in the past been seen to be a willing player in disregard of the law.

This has largely been evident from the disregard of the procedural requirements that have been put in place in dealing with persons accused of disrupting public order and security.

This is notwithstanding the fact that procedural aspects are important in ensuring the abiding with the rule of law and as noted by Justice Danckwerts, an English Judge;

"It is imperative that the procedure laid down in the relevant statutes should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects,"....

Most important is the need for the Government to ensure respect of the rights enshrined in the Constitution and to ensure that the procedural safeguards that have been put in place for these rights to be enjoyed are respected.

In ensuring respect of the principles of rule of law, the Government is to ensure that no person is to be convicted of an offence unless the offence is defined and penalty prescribed in a written law.

Safeguards have also been put in criminal law to ensure that an accused is accorded fair hearing within a reasonable time by an independent and impartial court established by law.

-Mr. Oduk is an Advocate of the High Court of Kenya

Understanding security and the rule of law

Failure to seriously endeavour to contextualize the Rule of Law, measure its impact if at all on security, and reshape State strategies to achieve a desirable end result for the citizenry leaves the only other option; disorder and anarchy where the State loses its legitimate monopoly as it appears to be already happening in pockets across the country.

By Joan A. Obiero

The social contract between the State and its citizenry is a trade-off. The citizenry foregoes the Hobbesian state in exchange for the State providing adequate security. Consequently, the State obtains a monopoly on the use of force to be discharged by its security agencies for the establishment of a peaceful and just public social order.

However, as the media, activists, scholars, affected citizens and rather inexplicably national and county leaders as well as security personnel continue to decry escalating cases of insecurity, it would appear that the Rule of Law in so far as it applies to security goes by a different definition in Kenya.

Rule of Law

Rule of Law is about accountability, consistency and universal application of legal and political standards backed by strong enforcement mechanisms within a system of checks and balances to secure justice for all. In discharging its responsibility to protect its citizenry, the State and its agencies has failed to check each of these boxes. Internal ethnic clashes, radicalization, assassinations, petty, violent and organized crime, extra-judicial killings and terrorist attacks rage on, raising questions about how the State defines Rule of Law in security matters.

Is there accountability where what stands out even more than the hollow, passionate declarations by responsible State officers and agencies, impotent performance reviews of security agencies and belated interventions is that incidents of insecurity are never successfully investigated and culprits brought to book? Where are consistent and universal legal standards when security agencies move in, not in response to distress calls or to dismantle conspiracies to disturb the peace, but where directed by higher-ups and sometimes to engage in cover-ups?

What political standards are in play where leaders instigate and finance security threats, even going so far as to withhold vital information when life and limb are at risk? What is the standard being applied when security agencies intimidate, maim, demand compensation for protection services and even kill protectees sometimes in the full glare of media cameras?

War Mongers

Granted, Rule of Law is an ideal, a benchmark whose realization is affected by a variety of factors. Rule of Law in security in Kenya must be viewed through the prism of human capital and training deficiencies in security agencies, poverty and developmental issues, historical injustices, tribal and ethnic factions, local norms and customs including electing to office drug-lords, warmongers and other assorted individuals who propagate a culture of unlawfulness.

So, perhaps time has come for Kenya to conduct a meaningful assessment on what the Rule of Law is, before it can ever form the premise for security operations herein. Realizing that the ideal standard of Rule of Law might currently be too high to achieve, the State has two options; shift its focus from spewing rhetoric to actually engaging in promoting ownership among Rule of Law actors and driving capacity-building initiatives. There is no magic bullet to realizing Rule of Law in security. The State must formulate key questions to ascertain the real impediments to the realization of the standard and if necessary, redefine it Kenyan style as we have done leadership and integrity and election to public service being an avenue for enrichment rather than servant hood.

Failure to seriously endeavour to contextualize the Rule of Law, measure its impact if at all on security, and reshape State strategies to achieve a desirable end result for the citizenry leaves the only other option; disorder and anarchy where the State loses its legitimate monopoly as it appears to be already happening in pockets across the country.

-Ms. Obiero is an Advocate of the High Court of Kenya

Raging debate on law and Security

By James Aggrey Mwamu

The issue of law and security is very delicate. When a man takes a fully loaded gun and walks into a crowded market and sprays innocent unsuspecting Kenya citizens - the outrage that this invokes in us cannot be put in words. Do such people deserve justice? What is the role of the Government in protecting the citizenry? Don't the police have a right to interrogate the culprit using conventional, legal and unorthodox methods to extract information? What is the role of the press? How far should they go?

Security (Amendment) Law, 2014

These are the dilemmas that the Jubilee Government was battling with when they introduced Security (Amendment) Law, 2014 to try to deal with some of the concerns in fighting and dealing with insecurity and at the same time upholding the Bill of Rights enshrined in the Constitution.

The constitutional court rightly struck down Sections 12, 15, 26, 29, 48, 56, 58 and 64 of the Act as being unconstitutional .Although a lot of water has passed under the bridge as far as those impugned Sections of the Security Amendment Act 2014 are concerned ,the debate rages on the conflict between Law and security.

Andrew C McCarthy, a former Chief Assistant U.S. Attorney in New York, best known for leading the prosecution against the Blind Sheik (Omar Abdel Rahman) and eleven other jihadists for waging a terrorist war against the United States – including the 1993 World Trade Center bombing and a plot to bomb New York City landmarks has waded in this debate. McCarthy who after the 9/11 attacks, supervised the U.S. attorney's command-post near Ground Zero and later served as an advisor to the Deputy Secretary of Defense delivered a luncheon address during the 2015 National Security Symposium on April 29 in Washington, D.C. on the topic "National Insecurity: Is the Law the Enemy's Weapon?".

He dealt with the Dilemma facing the American Government, the lawyers and courts in dealing with terrorism on the issues of due process, right to fair hearing and granting of bond. Some lawyers belong to a school of thought that believes terrorists by their very activities are not entitled to fair hearing, due process or bail.

However, there is another school of thought that believes that even the devil deserves a fair hearing and so the debate rages on.

Multi-headed Hydra

I must however, humbly submit that balancing security, privacy, and civil liberties in state policy is not a finite task; it is a perpetual struggle with a multi-headed Hydra. Difficult questions will seldom be permanently settled, and new, uncharted ambiguities will continually arise as Kenya's anti-terrorism efforts evolve. Since no one solution will end the debate, the best approach for policymakers is to apply intellectual rigor to each new dilemma. Thoughtful leaders will be guided by two bedrock principles: that concerns for security and privacy must be approached in tandem, with neither relegated to an afterthought; and that if a proposed solution abandons one goal for the other, a different solution must be sought.

"Equal and exact justice to all men, of whatever state or persuasion, religious or political; . . . freedom of religion; freedom of the press, and freedom of person under protection of habeas corpus, and trial by juries impartially selected.

The best example we have was when America was crafting law and policy for the post-9/11 world, America's leaders almost got it wrong. What terrorists can do to Kenya is sobering and awful, but bombs and murderous plots will never topple this nation. Fear that eclipses good governance, on the other hand, could.

The tragedy of the September 11th attacks was sadly compounded by a wholesale shift away from the principles that make America great in an effort to make America impenetrable—a terrible forfeiture in pursuit of an understandable, but ultimately unattainable, goal. Sacrifices must be made, and compromises must be struck, but leaders must not let the debris of our shattered safety distract us from the path to sound public policy.

If that happens, far more than security will be lost. What Kenyans must be so frequently told about the war on terrorism is this: freedom itself is at stake. While we must deal with terrorists firmly and decisively we must at the same time guard against the erosion of our freedom.

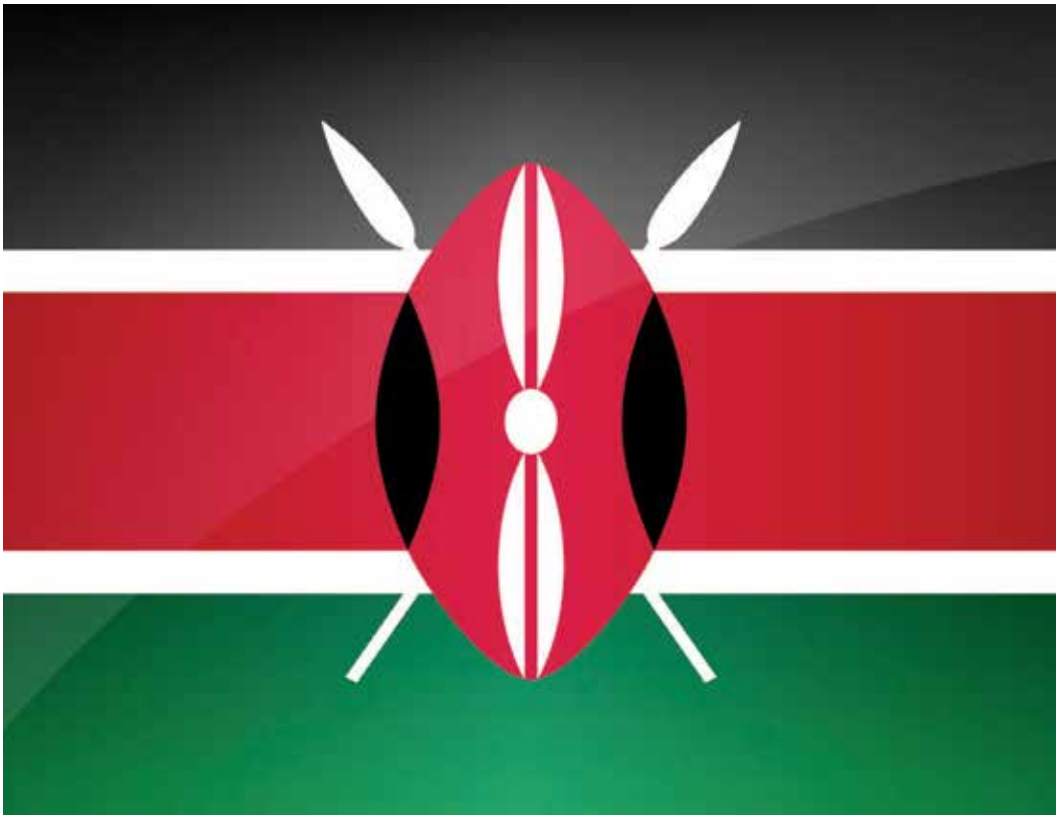
I must conclude by quoting one of the most celebrated Statesmen —Thomas Jefferson in his first inaugural address, March 4, 1801 when he uttered the following powerful words that still ring true today

"Equal and exact justice to all men, of whatever state or persuasion, religious or political; . . . freedom of religion; freedom of the press, and freedom of person under protection of habeas corpus, and trial by juries impartially selected. These principles form the bright constellation which has gone before us and guided our steps through an age of revolution and reformation. The wisdom of our sages and blood of our heroes have been devoted to their attainment. They should be the creed of our political faith, the text of civic instruction, the touchstone by which to try the services of those we trust; and should we wander from them in moments of error or of alarm, let us hasten to retrace our steps to regain the road which alone leads to peace, liberty, and safety."

-Mr. Mwamu is the immediate former President of the East Africa Law Society and current Council Member of the Law Society of Kenya

Why our National Anthem and flag will save us from Al-Shabaab

Terrorism is a global phenomenon. And it baffles the mind. Unlike crime as we know it—say theft, where a person steals to gain something— terrorism mostly does not engender material gain and is mostly precipitated by religious or political extremism.



By Salem Lorot

The Bard, William Shakespeare, through the lips of Henry in one of his plays Henry V, tells Gloucester before the battle of Agincourt, "Tis true that we are in great danger; the greater therefore should our courage be." In the same vein, as a country, like Sebastian to Alonso in Tempest, from the deepest recesses of our being we let out these words: "But one fiend at a time, I'll fight their legions o'er."
And fight the legion of terrorism we must— courageously but intelligently.

Terrorism is a global phenomenon. And it baffles the mind. Unlike crime as we know it—say theft, where a person steals to gain something— terrorism mostly does not engender material gain and is mostly precipitated by religious or political extremism. It then leads me to ask, "Why should a fellow human kill the other?" It still boggles my mind how another human would first blow up unarmed, peace-loving humans then blow up himself or herself. I am still grappling with these questions.

Mad Mullah

With Kenya's incursion into Somalia, I have taken a keen interest in knowing more about this failed state. Of Bakol. Hiran. Belet Weyne. Galgadud. Dusa Mareb. Mudug. Galkayu. Nugal. Puntland. Bulohawo. Digil Mirifle Region. Algoi. Bur. Benadir. Merca. Of pastoral life of the Somalis. Of Sayyid Mohamed Abdille Hassan (the 'Mad Mullah') who led a holy war against 'infidel' colonisers—especially Ethiopians and British. Of the birth of Djibouti in 1977 under President Hassan Guleid. Of the birth of the Somaliland Republic. Of Somalia's post 1991 political history after the overthrow of President Siyad Barre by the United Somali Congress (Hawiye) guerrillas. Of the Operation Restore Hope of 1992 by the United Nations. Of the Transitional Federal Government since 2005.

The reason why I am retreating into Somalia's history is to illustrate the point that the fight against terrorism is multi-faceted. In order to effectively deal with Al Shabaab, we need to understand Somalia and its nuances in the national psyche. We should feel its pulse at Mogadishu. It appears that as a country we have a disjointed knowledge of the Horn of Africa and an ineffective response mechanism for the Somalia question and now the Al Shabaab.

Al-Qa'ida

In Al-Qaida's Mis(Adventures) in the Horn of Africa, a project of Combat Terrorism Centre, there are important lessons to be learnt.

The report cites four reasons why Kenya is a target of terrorists: 1) due to Kenya's advanced economy and its long-standing ties with the United Kingdom, United States, and Israel; 2) a functioning Kenyan sovereign government which limits the operational freedom of Western intelligence and counterterrorism units; 3) Kenya suffers from weak governance in a number of critical areas, including security and the criminal justice system. This discourages those Kenyans who might have relevant information from providing it to the authorities; 4) the presence of a disaffected minority Muslim population, especially along the Kenyan coast, provides Al-Qa'ida operatives an environment in which they can operate with less security pressure than elsewhere in the region.
Although the report's findings are on Al-Qa'ida, it would be safe to say that the issues enumerated still apply to the Al-Shabaab. It should be noted that the greatest challenge we face today in combating terrorism is within our borders as terrorists might find logistical challenge to wage their unconventional war in Somalia. The report observes, "Weakly governed states often provide a more conducive environment for terrorists. Their sovereignty provides a measure of protection against strikes by Western forces."
Finally, in our fight against Al-Shabaab, we need to infuse within ourselves a good dose of patriotism. Our nation needs it. Direly.

-Mr. Lorot is a Legal Counsel, National Assembly

Insecurity, rule of law and constitutional transitions

Mainstreaming public participation in governance through sustained civil society engagement and civic education emerges as the most effective means of safeguarding the transitions as well instrumental in consolidating the democratic gains realized over time.

By Ochieng M.Khairalla

Navigating through a nuanced transition within multiple transitions is overly delicate and highly challenging. Kenya, it is important to note, is currently experiencing multiple constitutional transitions characterized by a cross-fire of greed, blackmail and ignorance amidst cantankerous and highly abrasive political competitions.

Multiple constitutional transitions present a difficult and fragile dispensation and if not managed properly are recipes for anarchy given the fast changing scenarios and unfolding interests (both negative and positive) as forces of resistance to change parade against transformative and progressive forces of State.

Rule of Law

These contending forces if not managed properly with a progressive tinge, are likely to manifest conflictual interactions economically, socially and politically particularly when the forces begin to do business with impunity, ultimately evolving into unmanageable state of confusion and anarchy due to destructively competing interests. The net effect is an emboldening culture of impunity characterized by little regard for the

Rule of Law and civility.

Apparently, it is the middle class and the upper class who are largely involved in these self-destructive overtures through insensitivity and greed for money or preoccupation with money making without fidelity to professional ethics, responsibility and duties particularly duty to society in strict fidelity to both the letter and spirit of the law. Interestingly, it is the same segments of society who are most affected once there is a breakdown in the system of the Rule of Law especially noting the fact that anarchy suffocates business in tragic dimensions.

As resources continue to dwindle, the situation precipitates into a state of insecurity as the competing forces begin to expose each other and trample upon each other with reckless abandon as the scramble for the fast disappearing resources assumes vicious and ruthless proportions, ultimately a culture of ruthlessness creeps in characterized by pernicious avarice, loss of value for human life, lack of respect for human rights and curtailment of individual rights and fundamental freedoms, disrespect for rules and marauding impunity. Insecurity it is largely argued is the socio-economic and political economy of impunity. Kenya is currently mired in this state of affairs.

Failure to manage boldly and swiftly with corrective resolve and firmness, the situation can evolve into a state of lawlessness with a possibility of relapsing into a failed state with debilitating and unimaginably destructive consequences. It is like watching the country helplessly hurtling to the very thin edge of the precipice. Kenya must not hurtle down the path to self-destruction.

It is therefore time to sober up, pull ourselves from the thin edge of the precipice, reclaim and consolidate the democratic dividends realized so far and in doing so, we will no doubt restore security and the Rule of Law.

Ruthless Cross-fire

Instructively, we must as a matter of urgency, call for a ceasefire from these destructive and ruthless cross-fire of greed, blackmail and ignorance and from hailstones of arrogance and impunity and in earnest begin a rigorous process of introspection, reflection and candid dialogue individually, institutionally and sectorally with unequivocal resolve of 'yes we can' usher in a paradigm shift from lawlessness to a culture of the Rule of Law, from a culture of hatred and recklessness to a culture of love and responsibility, from injustice to justice, from wastage and pilferage to a culture of prudence and conservation and from a culture of exploitation to a culture of constructive mobilization of resources for sustainability.

Mainstreaming public participation in governance through sustained civil society engagement and civic education emerges as the most effective means of safeguarding the transitions as well instrumental in consolidating the democratic gains realized over time. It is therefore time to clasp our hands together in all the things that are essential for our collective advancement noting so well that transitions require boldness, swiftness and decisiveness in strict fidelity to the greater good of all. It is the surest way of protecting ourselves against ourselves and associated vagaries!

-Mr Khairalla is an Advocate of the High Court of Kenya and CEO of the Centre for Community Dialogue & Education (CODE-Kenya)

Law mandates lawyers to fight insecurity

By Juliet Nyang'ai

Insecurity in relation to the Rule of Law can be defined as a breakdown in justice and security. All countries in the world are governed by Rule of Law which holds anyone accountable. All Government officials and agents, individual citizens and private entities are held accountable by Rule of Law. Violence and insecurity are frequent occurrences in today's world. Insecurity emerges when a Government, faced with conflict and violence (be it political, social, economic, or generated by organized crime), cannot or will not ensure the protection of its citizens, organizations and institutions against threats to their well-being and the prosperity of their communities. Such threats may come from the State itself or from non-State actors. Establishing respect for the Rule of Law is fundamental to achieving a durable peace in the aftermath of conflict.

Al Shabaab Insurgency

Kenya has experienced numerous internal and external security threats with attacks both on the security forces and the public. External insecurity in Kenya has been brought about by the Al Shabaab insurgency. It was in April this year when one of the worst ever witnessed terror attack happened in Kenya with more than 140 students killed in a terror attack in Garissa University.

On the flipside, internal insecurity is not a recent phenomenon as Kenyans face cases of insecurity within and thus internal insecurity has been to some extent underrated. Most common is cattle rustling, theft and tribal conflicts especially in Northern Rift Valley and North Eastern parts of the country. There have been claims that not much has been done to curb this. Article 40(2) of the Constitution, gives the State obligations to protect property belonging to a person in Kenya. This therefore means by such failure, the State has violated the Bill of Rights. The citizens are also subject to freedom and security of the person and thus failure to provide such security amounts to violation of Article 29 of the Constitution supra.

Kenyans are now more exposed to insecurity. What then can be done to curb insecurity without violating the Rule of Law? Even Criminals, the accused, terrorists and people who perpetrate terrorist acts do have human rights, which are clearly envisaged in the Kenya constitution.

Resourced Judiciary

A better resourced Judiciary will go a long way towards ensuring security. More prosecutors, Judges and better equipped courts are also urgently needed to provide an alternative to extrajudicial activities by frustrated security agencies. Maintaining a sound Rule of Law notably reduces the likelihood of terrorist attacks. There should be stronger coordination and liaison between the law enforcement agencies (police and Judiciary) and strengthening of anti-terrorism assistance programs, for example, the rehabilitation of radicalized youth and persons.

Resorting to repressive responses which engender further violations will fail to address the root causes of insecurity. A rights-based approach is needed to give effect to the entitlement of each person to feel secure and protected in their daily lives.

The Government has the machinery to address the issue of insecurity without violating the law and human rights. Creating public awareness about terrorism and terrorist acts and ways of curbing them is also a leap forward. Another element of this strategy is to empower affected communities by providing them with knowledge about their human rights, building their capacity to demand redress for violations of those rights and ensuring that they are consulted and involved in decision-making processes that will impact on their lives in the context of situations of violence and insecurity.

-Ms. Nyang'ai is an Advocate of the High Court of Kenya

By Dr. Charles Khamala

Protecting labour rights under the Constitution

Two types of labour control were discovered upon the 17th century European industrial revolution. Owners of the capital quickly discovered that they could use their means of production to produce what they need, rather than purchase it.

Between the strong and the weak, rich and poor, master and servant, it is law which sets free while freedom oppresses. When negotiating salary and working conditions the fundamental principle of labour legislation is to guarantee the weaker party in the labour market protection so as to create fair balance.

Regulating Contracts

The labour movement is premised on the ideal of mobilizing workers' numerical advantage to counter their employer's economic might. The State therefore, facilities the employees' freedom of association and the rights to assembly, demonstration, picketing and petition (Article 37 of the Constitution) so as to leverage its negotiation power to bargain for improved working conditions. According to Hugh Collins, the State is justified in abandoning the fictitious "sanctity of freedom of contract" in relationships concerning employment contracts for five reasons. First, because employers can impose standard-form contracts and force job-seekers to either "take it or leave it," given the desperate conditions of needing immediate income to end "tarmacking" while potential employers can afford to forfeit some short-term profits and survive. Second, because employment relations are mutually-beneficial, long-term investments which warrant "give-and-take" amid trivial inconveniences. Yet employers tend to "take" too much and "give" very little. Third, because employers often decide to make vague, incomplete contractual terms. Fourth, because workers are human beings with dignity and dependants. Fifth, because all capital is socially-produced and therefore demands equitable distribution. These characteristics of submission, subordination and unequal bargaining power inherent in the employment contract, require workers of the world to unite!

Labour Control

Two types of labour control were discovered upon the 17th century European industrial revolution. Owners of the capital quickly discovered that they could use their means of production to produce what they need, rather than purchase it. For such production to be profitable, labour has to be efficiently exploited. Thus in a liberal democracy by offering "mutual trust and confidence," capitalists induce cooperation from employees. Either rewards or directives and surveillance can control work output.

However, if such trust and confidence breaks down, then – irrespective of the wishes of the parties to an employment relationship – the court will declare the contract to have ended. "Mutual trust and confidence" go to the "fundamental root" of the employment contract – whereby an employee renders service in "good faith" – while an employer not only pays wages but also respects the employee's human dignity to participate in decisions affecting him or her. Low wage levels were critical for the growth of settler capital.

It set the pattern for the evolution of agrarian law throughout the colonial period. According to developmental economist Michael Chege, in the late 1990's, 70 percent of Kenya's GDP was agricultural – mainly coffee, tea and horticulture, while manufacturing industry accounts for a meagre 13 percent of our GDP. Tourism is also a recent, albeit currently decimated, potential foreign exchange earner,

It follows that most of the Kenyan workforce are in rural areas where they toil on large plantations and earn a pittance, while simultaneously planting crops and rear domestic animals for subsistence. Kenya has a feudal socio-economic formation.

Unskilled labourers are driven for over 8-hours – like a Ford-factory assembly-line – under supervised direction to maximize their output and work performance. How does the new Constitution facilitate organization by such workers who receive bachelor-wages and can hardly afford basic needs to keep their body and soul together?

International Sources of Labour Law

Under international law, Article 23 of the UN Declaration on Human Rights recognizes the right to work and associated rights to wit, inter alia: "(4) Everyone has the right to form and to join trade unions for the protection of his interests."

Similarly, the right to form trade unions and is expressly expounded under in Article 8 of the 1966 UN International Covenant on Economic, Social and Cultural Rights and Article 10(1) of the 1981 African Charter on Human and Peoples' Rights which recognizes that: "Every individual shall have the right to free association provided that he abides by the law." Because labour rights are human rights, the current constitutional position has vastly improved regarding the status of the right to work.

Constitutional and Statutory Basis of Labour Law

Articles (2)(5) and (6) of Kenya's new Constitution automatically domesticate all ratified international treaties. The International Labour Organisation Conventions comprise "soft laws." To expressly promote labour relations and attain labour justice, Article 41 robustly domesticates various international labour rights to guarantee that: "(1) Every person has the right to fair labour practices." This protects the worker's rights to (a) to fair remuneration; and (b) to reasonable working conditions. By filling lacunae, various labour legislations function to ensure minimum standards. By protecting the worker's right to organise, bargain collectively in trade unions and safeguarding employees from dismissal without good cause, worker empowerment corrects the power imbalance between employer and employee. Thus parties are constrained to negotiate from a position of "equality."

Otherwise, Ferdinand Lassalle's iron law of economics asserts that real wages always tend, in the long run, toward the absolute minimum wage necessary to sustain the worker's life. By restricting the freedom to contract and instead implying certain terms, worker protection prevents working conditions from deterioration beyond socially acceptable minimum standards. Moreover, over-juridification of labour disputes is to be discouraged. Therefore civil procedure and evidentiary rules may be properly excluded before the Industrial Court. Consequently, Article 162(2) further provides that "Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to …employment and labour relations." Hence the Industrial Court is elevated into a high court.

-Dr. Khamala is an Advocate and Lecturer at Kabarak University School of Law

LSK Council Member Mr. Allen Gichuhi speaking at the LSK AGM at the Hilton Hotel, Nairobi in March 2015.

Lawyers, too, caught in the act of chatting all day on social media

By Allen Gichuhi

Social Media, particularly Facebook and Twitter, have opened new frontiers for lawyers. Useful chat groups have been created where lawyers assist each other with precedents, case law and debate topical legal issues.

Some lawyers unconsciously devote more than an hour a day on social media chats or postings during office hours.

This adversely affects productivity and begs the question: When does one work? On average, social media addicts may spend between 30 to 60 hours per month on social media activities.

In effect, some end up using 30 days in a year on social media. Now if you are in employment, will your employer not notice this when productivity is affected? During this time negative postings may psychologically affect your mood and ruin your day.

Lawyers & Social Media

Many firms now have a policy that no advocate should engage in social media activities during office hours as that affects productivity and creativity.

The International Bar Association (IBA) International Principles on Social Media Conduct for the Legal Profession were adopted on 24th May 2014 by the IBA. The IBA states in its introduction that "The purpose of this statement of principles is to assist bar associations and attorney regulatory bodies around the world to promote social media conduct within the legal profession that conforms to relevant rules of professional responsibility as well as considerations of civility.

These considerations are significant because social media provides a platform for legal professionals to promote the administration of justice by engaging the public in legal practice and debate."

It is important to read the IBA guidelines, which were circulated by the LSK. The cornerstones covered in the guidelines relate to independence, integrity, responsibility, confidentiality, maintaining public confidence and policy.

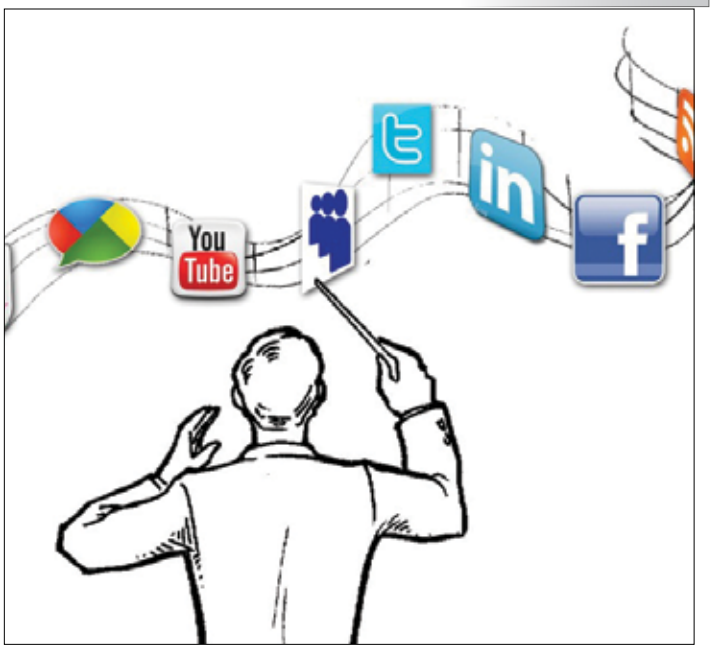
We need to adopt a common approach to social media ethical considerations and implement the IBA Guidelines in East Africa.

Libel Laws

Social media has over the years enriched the laws on libel. In England the courts have relied on the principles in the case of Norwich Pharmacal Co. v Customs and Excise Commissioners [1974] AC 133 where the House of Lords held that where an innocent third party has information relating to unlawful conduct, a court could compel them to assist the person suffering damage by giving them that information. This has successfully been used in defamation cases where the Plaintiff can obtain orders compelling – for instance, Facebook Inc for disclo-

12 GOLDEN RULES

1. Write only what is true.
2. Don't write about clients without consent.
3. Limit investigations to publicly available information.
4. Keep evidentiary information around.
5. Avoid answering legal questions.
6. Protect your own online information.
7. Keep sites updated and accurate.
8. Avoid announcing competency standards.
9. Avoid unconsented use of trademarked or copyrighted information.
10. Beware what others say on your site.
11. Be careful what you say about others.
12. Presume everyone will know everything said or done.



sure of the registration data provided by the user responsible for creating the false material, including email addresses, and the IP addresses of all computers used to access Facebook by the owner of those email addresses.

In Campbell v MGN Ltd [2002] EWHC 499 (QB) [138] the court held that aggravated damages may be awarded where there has been persistence in the accusation after the publication complained of, where that conduct has caused increased injury to the claimant's feelings. This position was also confirmed and endorsed by the House of Lords in Campbell v MGN Ltd [2004] 2 AC 457.

In Australia, in the case of Mickle v Farley [2013] NSWDC 295 a student was fined $105 000 for posting derogatory remarks about a teacher who went into a bout of depression for a year. The student, in a bout of anger following his father's dismissal, posted various defamatory comments on Facebook and Twitter. The court held that the imputations were untrue and in awarding aggravated damages took into consideration that the student was unapologetic.

Pack Mentality

Let us not be overzealous and engage in a pack mentality when hounding each other on social media. Many a times you end up regretting posting an offensive posting and wish you could unravel the pain you caused. However, it is amazing that very few would ever be magnanimous to apologise on the same platform for the pain caused to the person. Please take a step back and think of the consequences and ask yourself, '' How would I feel if someone insulted me in this manner?''

Would you legally have a defence in a libel suit if you accused a person of all manner of untruths? Social media has the tendency to instil a sense of bravado turning us into electronic supermen. In reality, rarely would that person confront you and articulate those accusations to your face.

In Australia, in the case of Mickle v Farley [2013] NSWDC 295 a student was fined $105 000 for posting derogatory remarks about a teacher who went into a bout of depression for a year. The student, in a bout of anger following his father's dismissal, posted various defamatory comments on Facebook and Twitter. The court held that the imputations were untrue and in awarding aggravated damages took into consideration that the student was unapologetic

In future your postings may come to haunt you when you go before an interview panel which simply does a back ground check on your social media history.

Remember that your privacy settings are critical in that if you are open to the public you expose yourself to scrutiny. Your social media electronic history may be your Achilles heel no matter your brilliance and simply lead to quiet disqualification in future job interviews. Never post anything that is baseless and untrue as that amounts to libel. Even if you delete the information an expert can retrieve the information if criminal and civil proceedings are instituted.

Be conscious about discussing your cases on social media. Have a policy of advocate client confidentiality with your colleagues and staff. Imagine if a member of staff innocently blurts out on social media about a confidential agreement involving the firm's client and the information goes viral? You will lose that client and even be sued for professional negligence if loss is suffered in addition to facing disciplinary proceedings.

Judicial Officer

Another pitfall is when an advocate befriends a judicial officer on social media. Christina Vassiliou wrote an excellent article on ''10 Tips for Avoiding Ethical Lapse When Using Social Media''. She cautioned about assuming that you can ''friend'' Judges and gave an example of the Florida Ethics Opinion 2009-20. The opinion concluded that a Judge cannot friend lawyers on Facebook who may appear before the Judge because doing so suggests that the lawyer is in a special position to influence the Judge. Christina also cautions about inadvertently creating an advocate client relationship on social media. Do not give legal advice online if a stranger sends a query on your firm's website or social media platform. Be careful about expressing certain views on topical legal issues. One day you may become a judicial officer and be asked to disqualify yourself for apparent bias based on your past postings.

There are 12 Tips for Reducing Online Dangers and Liabilities.'' He stated: 'Recently some lawyers have made front-page news by engaging in a wide variety of online foolishness.

Their conduct has resulted in lawsuits, discipline and even prosecutions. It has also undermined reputations and relationships with clients. What's more, it's the law firm, not the insurer, who typically must pay the bill.' I will now summarise this 12 golden Rules.

Let me conclude with a quote from Michael Downey who wrote an excellent article called '

- Mr. Gichuhi is a Council Member of the Law Society of Kenya

Profile:
Deputy Chief Justice Kalpana Rawal

By Harold Ayodo

Deputy Chief Justice Kalpana Rawal hails from a family of lawyers. She was the first woman to set up a law firm in Kenya, the K.H. Rawal Advocates in 1975 and practised until her appointment as Commissioner of Assize in 1999.

The Deputy Chief Justice and Vice President of the Supreme Court of Kenya recalls how her desire for law began as a young girl.

"I was fascinated by court scenes depicted in films and television shows and legal writings in fiction and non-fiction books," Justice Rawal reminisces.

Her father was a retired Judge of the Senior Court of Gujarat (India) and her grandfather the Deputy Law Minister in the State of Kutch, India.
"All these fanned my burning desire to be a lawyer and created an atmosphere that fate, time and effort would eventually lead to where I am today," Justice Rawal says.
She trained for three years at the Gujarat High Court under keen eyes of Hon. the Chief Justice, P.N. Bhagwati, who later became the 17th Chief Justice of India.

Justice Rawal then started practising law as a Junior Counsel in the High Court of Gujarat before coming to Kenya in 1973. "I was enrolled as an Advocate of the High Court of Kenya in July, 1975 after the Legal Council exempted me from sitting Bar exams", she recalls.

Her first appearance was before the then Hon Chief Justice Sir James Wicks when she assisted the late Mr Satish Gautama in the Election Petition against powerful politician, Hon. Paul Ngei.

"We won the Petition but he was brought back by the then President Jomo Kenyatta. It was a thrilling and fulfilling experience. It also built my confidence," Justice Rawal recalls. Justice Rawal who says that she would have studied medicine, if not law, which also serves public good explains that her role models impacted positively on her life. Her role models include

Justice P. N. Bhagwati, the retired Chief Justice of India, a champion of Human Rights as well as a doyen of constitutional law.

"My other role models include the late Lord Denning, Ex. Chief Justice Madan and C.T. Daru (a renowned Constitutional Lawyer of Gujarat) in whose office I jumpstarted my legal practice," Justice Rawal says. According to her, the role models ingrained in her the love and passion for constitutional jurisprudence as well as conscientious and fair application of laws.

The mother of two sons says that she humbly accepted her appointment as the DCJ and saw it as an enhanced opportunity to serve Kenyans more effectively.
"I always believe one could achieve anything with dedication and honesty. My father instilled in me, not a sense of entitlement, but confidence in my abilities," she says.
For Justice Rawal, it is not rocket science to balance between being a mother, wife, DCJ and Vice President of the Supreme Court.

"It is not difficult if one puts in dedicated efforts. When I became Puisne Judge, my boys were both grown up, the second one was then finalizing studies in New York University," she says.
Justice Rawal who says that her eldest son holds a Master of Arts in Law from the University of Cam-

IN BRIEF

- Deputy Chief Justice Kalpana Rawal was the first woman lawyer to set up a law firm in Kenya in 1975.
- Lady Justice Rawal holds a Bachelor of Arts degree, Bachelor of Laws (LLB) and Master of Laws degrees in Constitutional and Administrative Law (LLM).
- She joined the judicial service as a High Court Judge in 2000 and became Court of Appeal Judge in January, 2012.
- She earned the Elder of the Order of Burning Spear (EBS) in December, 2012 and the Moran of the Golden Heart (MGH) a year later.
- She took Oath of Office as the Deputy Chief Justice on June 3, 2013.
- She is a former Vice- Chair of KWJA (A Kenya Chapter of International Women Judges Association).
- She has headed several High Court Divisions including the Criminal Division, Family Division and worked as Duty Judge of the High Court of Kenya.
- She has also received various recognitions and appointed as a Liaison Judge for Hague in Children Issue for the years 2010 to 2011.
- Lady Justice Rawal has been recognized as an Ambassador for Peace from International Federation for World Peace for contribution in Jurisprudence in Kenyan Law and was also awarded ILO Wedge Social Entrepreneurship Award 2010 in recognition of her contribution to the Judiciary.

bridge (UK) and the youngest an Honor's graduate in Finance Economics from Stern School of Business studies at the University of New York, appreciates her family support. "My husband has always encouraged and assisted me. I enjoy a close knit family bond. With such support, I can fully focus on my professional duties and derive joy serving in all the three spheres. The only sacrifice I gave was my social life," says the DCJ.

Justice Rawal who is a grandmother to three children also appreciates the support she has received from Mary, her long serving house help for over 40 years.Justice Rawal who has a passion for the cause of especially women and children says women generally have come far, but notes that there are some miles yet to be covered to empower them fully. Justice Rawal decries the increasing cases of sexual violence in the country particularly defilement: "It breaks my heart. In a tour of the Western region with the Hon Chief Justice earlier in the year, it was really worrisome to note that the defilement cases were on the rise. The trend is true in other regions. It is a crisis. We are killing a generation. And as a society we need to do something. And urgently so as to put a stop to this menace" She advises.

When not writing Rulings or doing administrative duties at the Supreme Court, Justice Rawal reads law and spiritual books and also watches motivational television shows.
"My dad instilled in me the love of books and I thank God for helping me remain true to my values and principles throughout my life. I think that is my greatest lifetime success."
To improve legal practice and the Rule of Law, Justice Rawal says that lawyers should perpetually strive to infuse more professionalism in their duties. "They are taught professional ethics in school of law. Even so, the legal profession is a calling that requires sacrifice and steadfastness," she says.

She explains that lawyers need to be consistently true to their profession and reliable men and women of integrity. "Lawyers should always remember that they are not just in the business of law, but are most importantly officers of the court with values and oaths of office to protect and abide by. If nothing else, this is rewarding in the long run," Justice Rawal says.
On comparison between modern day legal practice and her time as an advocate and later a Puisine Judge, she says it has been both challenging and fulfilling. However, Justice Rawal says, it was harder to be established as a woman in practice than it is today. "We had warm relations and very satisfying experience between the Bar and Bench. The challenges of course were and are similar," she recalls. "We were few lawyers and knew each other by names. The level of trust was also high, there was more loyalty to profession. We could for instance give an undertaking to other lawyers by word of mouth and that was abided and honoured," she recalls. Justice Rawal says that competition at the Bar was also more ethical and professional before the virtues changed over time and corruption crept in.

"In the 1980s, I left criminal practice to focus more on civil, family and conveyancing areas of practice," she says. "I dreamt to be a Judge so that in my small chamber, I could continue fulfilling my call and serving wider Kenya," she says. Her wishes came true and in June 1999, the then Chief Justice Zaccheus Chesoni appointed her a Commissioner of Assize and after that, she was appointed as a Puisne Judge the following year. Justice Rawal who was appointed a Judge in the Court of Appeal of Kenya in January, 2012 earned the Elder of the Order of Burning Spear (EBS) the same year and the Order of Moran of Golden Heart (MGH) in 2013. She took Oath of Office as the Deputy Chief Justice on June 3, 2013.
Even with her strides in both the Bar and the Bench, life was not just a piece of cake in a profession that was male dominated.

We had warm relations and very satisfying experience between the Bar and Bench. The challenges of course were and are similar,we were few lawyers and knew each other by names. The level of trust was also high, there was more loyalty to profession. We could for instance give an undertaking to other lawyers by word of mouth and that was abided and honoured; competition at the Bar was also more ethical and professional before the virtues changed over time and corruption crept in.-Justice Rawal

"There were only two female Judges at the Bench, Lady Justice (Rtd) Effie Owuor and Lady Justice Joyce Aluoch in the 1970s," Justice Rawal says recalling of her appointment as a Judge.
She kept on climbing the ladder until her appointment as DCJ which she says has seen several successes in the Judiciary. "There is a lot more stakeholder engagement, openness by the judicial institution. This is not just a constitutional demand but a conscious resolve by the Judiciary under its transformation framework spearheaded by the Hon. Chief Justice Dr. Willy Mutunga," she says. Justice Rawal also says that Judges are now less intimidating and more responsive and proactive as an independent arm of Government.

"That is not to say we are already there as there are yet a few more miles to go. Internally, there is an improved organizational culture," Justice Rawal adds.
She says that the Hon Chief Justice recently launched Performance Management and Measurement Understandings, an accountability framework intended to boost performance, enhance efficiency and effectiveness in case management and inject transparency.

"The Judiciary has also been able to spearhead various projects within its mandate in partnership with development partners, including the IDLO, UNDP, UNODC and the World Bank," she says.
The DCJ says that she has overseen various projects Including Prison Legal Awareness, Development of guidelines on criminal procedure, development of the Bail and Bond Policy Guidelines and currently developing a Bench Book on Sexual offenses. "I have diligently assisted the Hon Chief Justice in implementing the vision of the Judiciary under the Judiciary Transformation Framework," concludes the DCJ.

-Mr. Ayodo is the Managing Editor of The Advocate Magazine.

Graft in projects is real, kick it out!

Roles should be provided with clearly defined structures, which hold committees accountable to the agreed objectives

During closure, drawings, plans, manuals and maintenance manuals may be handed over to the clients. Corruption at this stage may be seen in failure to issue completion certificates or issuance of completion certificates while work is actually not complete, delays in closure and preparation and issue of final contract accounts and failure to issue necessary project documents like operational manuals, guarantees, warranties, certification an as built drawings.

By Beatrice Chebelyon Koske

Former Nigerian President General Olusegun Obasanjo defined corruption thus: ***"The misuse of public office for profit or advantage acts of commission and omission in your employment resulting in loss or disadvantage to your employer and provide gain to you or any other person associated with you"***

The World Bank defines corruption as the abuse of power most often for personal gain or for the benefit of a group to which one owes allegiance. It can be motivated by greed, the desire to retain or increase one's power or perversely enough by the belief in a supposed greater good. While the term corruption is most often applied to abuse of public power by politicians or civil servants, it describes a pattern of behavior that can be found in every sphere of life.

Corruption aside, the success of any project depends on adequate conception, definition, planning, organization, implementation and closure.

Accountability, transparency and integrity, which are the pillars of good governance in the management of projects, lead to effective and efficient use of project resources.

This culminates into success in achieving projected results/goals. Project management is the planning, monitoring and control of all aspects of a project and the motivation of all those involved to achieve the objectives on time and specified cost, quality and performance.

A successful project is one which has been finished on time, is within its cost budget and satisfies the end user within its resource and quality constraints.

Corrupt practices can be found at any stage of the project cycle and it is important to have preventive measures.

Prefeasibility Study

It is necessary to conduct prefeasibility studies to determine whether the project is worthwhile or if further studies need to be done. Corruption may rear its ugly head at this stage through inconsistency of project objectives with organizational goals, interference by interested groups and individuals such as politicians, planners or administrators, lack of transparency & accountability resulting in undisclosed co- financing and wastage and unrealistic deadlines and falsified needs.

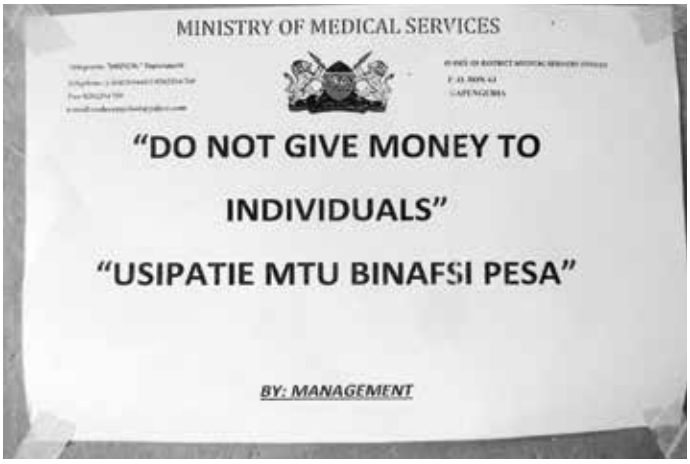
To prevent these, organizations must ensure that project identification is based on real and felt needs and is consistent with organizations' vision, mission, innovations, good governance and goals. The institution may also ensure that a checklist of what information needs to be conveyed to projects participants is developed and decisions are made by committees composed of stakeholders, relevant professionals with sufficient authority and made of people of integrity.

Tendering Process

The risk elements during the tendering process are insufficient time allowed for tender preparation and contract agreement not based on standard contract document, collusion with contractors, invitation tender rigging and biased specification/excessive standards/ requirements to favour colluded contractors and tender splitting. To avert these, corruption risks the institutions may put measures in place like policy on conflict of interest should be documented and well circulated. Organization must also have a gift policy so that their staffs are not comprised through purported gifts. Standard Tender documents must be comprehensively prepared and proof read by legal experts.

Implementation Phase

The implementation process involves coordinating resources both human and materials as well as integrating and performing the activities of the project in accordance



A successful project is one which has been finished on time, is within its cost budget and satisfies the end user within its resource and quality constraints.

with project plan. Forms of corruption that may be spotted at this stage are non-fulfillment of specified project rules and regulations as laid out in the PPDA 2005 and Procurement Regulations 2006, unjustified valuations, deviations, delays and abandonment, misuse of project resources, materials and labour and inadequate supervision, documentation, testing and falsification of records of inputs thus creating poor quality output. To safeguard against such loopholes, the institutions may put in place a well defined management responsibilities and accountabilities for the project with appropriate checks and balances, clear definition of policies and operational procedures including personnel management practices and ensure monitoring and evaluation of project activities is undertaken against planned implementation schedules.

Closure and Maintenance

Closure includes the formal acceptance of the project and the ending. It may involve the commissioning, testing and final handover. During closure, drawings, plans, manuals and maintenance manuals may be handed over to the clients. Corruption at this stage may be seen in failure to issue completion certificates or issuance of completion certificates while work is actually not complete, delays in closure and preparation and issue of final contract accounts and failure to issue necessary project documents like operational manuals, guarantees, warranties, certification an as built drawings. Others include hiding project documents, soliciting bribes, destruction of information or falsification of or tampering with records. To prevent some of these risks the organization should ensure that completion certificates are issued on time once the project is completed and final accounts are prepared and issued on time and proper records are kept during the implementation of the project. It should also ensure that necessary documents are issued such as operational manuals guarantees, warranties certification as built drawing and procurement of maintenance contractors as per the relevant procedure

In order to manage projects effectively, roles should be provided with clearly defined structures which hold committees accountable to the agreed objectives. The project roles add clarity to the project definition and projected outcomes and further depth to the plans to achieve those outcomes. Success at executing, monitoring and evaluation stages is facilitated by good plans. Monitoring and evaluation of all the stages is crucial to verify and offer checks and controls.

Lessons learned in the project cycle should be utilized to improve future plans.

-Ms. Koske is an Advocate of the High Court of Kenya

Is the State turning its back on thirsty citizens with right to water?

By Pauline Vata

Everywhere, at least rhetorically, Governments now accept the necessity of enshrining rights in national constitutions. This is one of the remarkable changes that have taken place in the short span of half a century. Overall then, it seems as though we should be celebrating the unqualified success of the human rights idea. The bad news, however, is that amidst it all, world poverty is increasing, inequality is on the rise, and the quality of life for a large percentage of humanity is getting worse.

As we celebrated the International World Water day on 22nd March the Kenyan Government left a lot to be desired in its commitment to achieve this right. Nairobi has a daily supply of 550,000 cubic metres against a daily demand of 690,000 cubic metres, with a paltry 40 per cent of those with residential connections receiving water continuously. The United Nations classifies Kenya as a water-poor country.

At about 650 cubic metres per capita, Kenya's annual water supply is well below the benchmark of 1,000 cubic metres. This figure is set to decline further as the population rises.

Infant Mortality

What is more, unmet basic needs, uncontrolled discharge of wastewater into water bodies and climate change stand in the way of peaceful development in the country. Inadequate access to drinking water is an especially serious concern in urban areas. About 80 per cent of all illnesses in Kenya are directly connected to poor water supply and sanitation. The poor population, which makes up almost half of Kenya's 40 million people, is especially hard hit. Annual population growth sometimes exceeds 10 per cent in poor urban areas.

The constant growth in population density is making hygiene conditions even worse. Infant mortality is higher than the national average in these most rapidly growing areas countrywide.

Poor people are deprived of their human rights to water supply and sanitation following their reliance on informal services in towns and cities. Women and girls are particularly affected by poor urban sanitation: after dark, they are unable to answer the call of nature outside their homes for safety reasons.

Constitutional Rights

Kenya is a signatory to the International Covenant on Economic, Social and Cultural Rights and the Convention on the rights of the Child. Article 2(6) of the Constitution of Kenya recognizes international law as part of the country's legal system. The human right to water and sanitation is entrenched under Article 43 1 (b) (d) of the Constitution.

To this extent the Government therefore, has legal obligations to take concrete and deliberate steps to ensure the progressive realization of the human rights to water and sanitation. In the case of Satrose Ayuma and 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme and 2 others (Muthurwa Case), Justice Lenaola, while lauding the entrenchment of the right to water in the Constitution noted that this was not enough.

He noted that courts have a duty to develop the normative content of the right to enable the state to fulfill its obligations. More importantly, the learned judge noted that the water sector laws should be reviewed to incorporate the right to water and provide for detailed means for its realization.

Urban Slum Dwellers

In 2011 the Government committed that by 2015, an additional 20 million people will gain access to sanitation and 16 million people will gain access to water countrywide. Presently, the figures stand at 68 percent of people living without access to water and sanitation and the most affected are urban slum dwellers and marginalized rural communities.

The United Nations Special Rapporteur for the Human Right to Safe Drinking Water and Sanitation Catarina de Albuquerque undertook an official mission to Kenya from 22 to 29 July 2014 to assess the country's achievements and challenges in realizing the human rights to water and sanitation. Catarina looked at disparities in sanitation access especially between rural and urban settings. Additionally, she gave a lot of emphasis on marginalized groups particularly those in poor urban informal settlements and minorities principally those living in Arid and Semi-Arid Lands (ASALs).

As we fast forward her sentiments to 2015, the total budget for state department for water and regional for FY 2014/2015 stood at 25 billion Kenya shillings but the Government has nothing much to show for implemented projects during that period. Ironically, the ASAL areas that are hard hit with water scarcity have earmarked Government flagship projects with budgetary allocations in the

Everywhere, at least rhetorically, Governments now accept the necessity of enshrining rights in national constitutions. This is one of the remarkable changes that have taken place in the short span of half a century. Overall then, it seems as though we should be celebrating the unqualified success of the human rights idea. The bad news, however, is that amidst it all, world poverty is increasing, inequality is on the rise, and the quality of life for a large percentage of humanity is getting worse.

billions shillings. Right to water is equated to right to life, to communities living in those areas it is important for them to have basic needs to enjoy these billion shillings projects, does the government have its priorities wrong?

Water Cartels

In 1999 water and sanitation services were privatized in an effort to provide better services, while applauding the government's determination to supply adequate water in both urban and rural areas, privatization efforts have been hampered by lack of resources, administrative incompetence, bad governance and dwindling funds against an ever-increasing demand for water to meet consumption. In informal settlements we have a lot of illegal connections and water cartels that sell a jerrican of water twice the normal price. Illegal connections are mainly attributed to the private companies' refusal to connect water meters simply because there is no security of land tenure. Shocking as it may seem for one to have a water meter in Kenya, you need to provide a title deed to your land or house. The State may privatize the supply of water, but it remains under obligation to make sure that the poor are not deprived of the quantum of water they need for their survival and to maintain an adequate standard of living. In fact, under the Maastricht Guidelines, the State has an obligation to refrain from interfering with the enjoyment of ESC rights; to prevent third parties from violating such rights; and to take measures towards the full realization of ESC rights.

While global efforts to address some of these problems through initiatives such as the Millennium Development Goals (MDGs) are in vogue, the horror of extreme poverty and the associated violations of economic and social rights are yet to acquire the priority they deserve in national human rights discourse. Human rights movements are yet to succeed in mobilizing anger and moral disgust over violations of economic and social rights as it has often done in the case of civil and political rights.

-Ms. Vata, an Advocate of the High Court of Kenya is the acting Director of the Economic and Social Rights Centre-Hakijamii

Vicious cycle of child crime in slums

The number of children involved in crime in Kenya today and all over Africa has reached the peak and the rhetoric is whether there is any one asking questions which relate to their redemption and justice.

By Daisy Mulamuzi

Kenyan domestic law, like international law, recognises the vulnerability and special needs of children. Kenya's primary legislation concerning children is the Children Act, which came into effect on March 1st 2002.
The number of children involved in crime in Kenya today and all over Africa has reached the peak and the rhetoric is whether there is any one asking questions that relate to their redemption and justice.

Petty Robbers

According to the International Journal of Current Research, most children committing crimes hail from slum areas of Kibera, Mathare, Korogocho and Mukuru in Nairobi. The children who grow up in these slums are exposed to dangerous behaviour because the mode of survival in the areas is often through crime. In his research Article, *Crime Causes and Victimisation in Nairobi City Slums*, Rev. Fr. Dr. Ndikaru Wa Teresia affirms that crime is mainly associated with unemployed youth.

It should be noted that the youth also have children who will grow up in such an environment. The child will see what his/her parent is doing and probably emulate. Many times these children are used as weapons of theft by the older ones. Occasionally, they are staged on the streets to beg for money before starting to assault both pedestrians and passengers. They graduate into petty robbers who end up committing aggravated robbery; this of course makes them child offenders at an early age.

Hardcore Criminals

Some of the crimes committed include homicide, assault, defilement, and many others. With all these, the country is bound to have many child offenders who will grow up to become hard core criminals terrorising the country. I cannot start to count the number of times my colleagues have advised me to hold my bag tight while travelling in a matatu or wind my window up as we drive around the Central Business District.

This is indeed absurd because it has become a norm, it is even expected that if you do not hold your bag tight it will be snatched from you. There are places in Nairobi where you go at the risk of being robbed without expecting help. The rhetoric's in these averments are; how did we get here? Have we lost hope? Can we still save the children?
The law has tried to lay down deliberate structures on how to prosecute a child offender in a manner that will cause restitution and despite the elaborate model legislation; the juvenile justice system in Kenya is far from ideal.
It is therefore our role as lawyers to safe guard the future: Represent a child offender as and when you can, advocate for legal aid schemes, get involved in amending legislation and this simple act will save a life.

In conclusion, this discovery simply gives us a narration that the legislation has been provided but the illusion is in the implementation of the same, there is therefore, need for both the Government and concerned stake holders to work together and breath life to the Sections of the Children Act.

-Ms. Mulamuzi is a lawyer

Single mothers' pain of raising child solo eased

Article 53 (e) of the Constitution which provides that every child has a right to parental care and protection which includes equal responsibility of the mother and father to provide for the child, whether married to each other or not.

By Sharon Simani

Birth registration is a fundamental human right. It not only gives a child a recognized legal existence and identity, it is the sign that a child 'belongs' to a family, a community and a nation. It shows that a child has a place, and a stake, in all three.

Before the promulgation of the Kenyan Constitution 2010, no right on support and maintenance of a child born out of wedlock accrued on the father where there was no legal relationship between the mother and the father. The only remedy that the mother had was in the customary law, which provides for pregnancy compensation, but the compensation is usually paid directly to the mother parents, and does not necessarily benefit the child. Name and Nationality Article 53(1) (a) of the Constitution guarantees every child the right to a name and nationality from birth.

The legal position after the promulgation of the Constitution is that the position of joint responsibility of both parents, whether married to each other or not, is guided by Article 53 (e) of the Constitution, which provides that every child has a right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child.

This provision was upheld in a landmark case of Zak & Another vs. The Attorney General & Another (2013) KLR. In this case, the petitioner challenged the Constitutionalism of Section 24(3) of the Children Act and Section 25. She argued that these sections infringed Article 27(1) of the Constitution, which states that every person is equal before the law and has a right to equal protection and equal benefit of the law. In line with that argument, Justice Mumbi Ngugi stated that it was unconstitutional for the Children Act placing the responsibility of the children born outside marriage only on the mother. In this regard, the provisions of section 90(a) and (e) of the Children Act were unconstitutional, considered alongside the provisions of Section 24(3), which places the responsibility of the child on the mother at the first instance where the mother and the father are not married.

Father and Mother

Under Section 12 of Births and Deaths Registration Act, no person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom. The foregoing provision indirectly shelters the man who gets children out of wedlock. This provision in effect ends up punishing and disadvantaging not only the child but also the mother of the child born out of wedlock.

Under Article 27(4), the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth.

Section 5 of The Children's Act says no child shall be subjected to discrimination on the ground of origin, sex, religion, creed, custom, language, opinion, conscience, color, birth, social, political, economic or other status, race, disability, tribe, residence or local connection.

Obviously the child's surname flows from the parents' family names. The fact that they are born out of wedlock should not form the basis for discrimination at all. A statute that countenances and allows the non disclosure of the father simply because the parents are not married has to be interrogated. Basically there is a need to protect these children under Article 27 of the constitution and Section 5 of the Children's Act so as to bring them to par with the children born within the marriage.

– Ms. Simani is a lawyer

LSK Vice President Lilian Renee Omondi addressing newly admitted Advocates of the High Court of Kenya at the Supreme Court grounds in Nairobi recently.

Integrity still key for learned friends

A lawyer's duty to the community in his role in national development is far much higher than that of the ordinary citizen because of the kind of training and specialised knowledge they are exposed to

By John Joel Diro

The legal profession is notoriously becoming lethargic and losing its fabric. A lawyer's character should, like Caesar's wife, be above reproach. It should be blended with honesty, reliability, confidentiality and trustworthiness all juxtaposed with integrity. Lawyers should promote high standards of competence and ethics. We are referred to as learned friends because we are the custodians of emotional intelligence.

It has been observed that a lawyer's duty to the community in his role in national development is higher than that of the ordinary citizen because of training and specialised knowledge. A higher requirement of integrity and personal discipline is demanded of a lawyer.

Mushrooming Colleges

Do we still have lawyers who carry out extensive research in either the library or internet? Are our lecturers qualified enough to train? Can we still trust our lecturers to bake our lawyers? Are our law schools adequately equipped to handle the blotted numbers in the lecture halls?

Are we allowing too many mushrooming colleges to offer law at the expense of quality? Is the Chief Justice admitting lawyers too frequently hence the culture shock? Are our lawyers doing law as their first choice or parental preference?

The Council of Legal Education (CLE) needs to re-evaluate its curriculum and mode of teaching at the Kenya School of Law (KSL) with emphasis on Professional Ethics? Has sharp practice become the weigh scale of rating a successful and brilliant lawyer? Have the Senior lawyers given up mentoring the young ones? And what are we doing about it?

Truth be told the society is also to blame for placing too much pressure on us?

There is a general presumption from both relatives and friends that we are 'loaded'. We therefore try to impress and maintain the false standards. However, we must rise above severe tests and temptations which come our way because of the fiduciary relationship.

The object of the rules of ethics in the legal profession, and indeed in any other profession, is to protect the public by ensuring the highest standards of competence, honesty, integrity, discipline and confidentiality.

Shouting and Heckling

Of late, we have resorted to solving problems by shouting and heckling. No one can tolerate a heckling lawyer who solves matters through shouting and heckling?

No one can forgive us after spending more than six years studying dispute resolution but prefer applying mob Justice? My learned friends, we must do soul searching. We must ask ourselves painful questions?

What became of our professional ethics and integrity that were well spelt out under the Rules of Professional Practice, Conduct and Etiquette (Code of Ethics)? Etiquette demands good manners as the legal profession is supposed to be manned by gentle persons. Are we still admired and respected by the society? Lawyers have come to hate strict magistrates and Judges who follow the procedure of practice; they demand for their transfer.

It appears that problems begin from our upbringing through the university and Kenya School of Law. Unfortunately, every institution today with the acronym 'University' or 'Polytechnic' offers LLB. How many medical or engineering schools do we have? We have cheapened the noble profession. Argwings Kodhek is turning in his grave.

Training on etiquette needs to be pushed a notch higher. The legal profession is the only trade where seniority is supreme.

Lawyers must be reminded that the Khaminwas, Gibson Kurias, Oraros and Nowrojees among others embody the suffering, dedication, sacrifice, discipline and respect.

Surely, these are the lawyers' lawyers and must be respected regardless. That is why, when in the same restaurant, the senior clears the juniors' bills. Seniority means occupying the front benches. And just to remind the bench, it means giving seniors privileges in court in first mentioning or hearing matters handled by senior counsel. A senior in the profession means any advocate who takes the oath of admission immediately before you and subsequently therefore.

We are identified by our dress code. That is why disagree with the Chief Justice for changing the dress code and destroying the tradition of our identity. Every profession protects its identity and tradition.

What we are witnessing is a lost cause; some lawyers are misled to believe that rebellion is 'swagariffic'. We are the umpires of the society and if we cannot solve our differences amicably. Then the world will only look at us and pass the verdict that something has either gone terribly wrong with either our profession or upbringing.

Mr Diro is an Advocate of the High Court of Kenya

Enactment of petroleum local content laws to protect Kenya's interests

Law firms, insurance brokerage firms and financial institutions having their principal offices located in Kenya will substantially benefit from the industry since oil companies will not be permitted to procure their respective professional services from elsewhere.

Charles Kamunya

The oil and gas industry's growth in Kenya is gaining pace going by recent stakeholder initiatives to prepare the country for production. Attention is being placed in local content regulation as evident from the petroleum law and policy reforms currently underway.

Local content regulation mandates foreign investors to socially and economically contribute to a host country's growth. The World Bank describes local content policy as a way to harness oil, gas and mining resources for sustained and inclusive growth in resource-rich countries by generating endogenous growth based on increased domestic content for economic diversification. Good local content regulation must therefore provide for employment of nationals, human resource development and sourcing of goods and services from local businesses.

Petroleum Act

The Petroleum (Exploration & Production) Act does not bind oil companies to local content obligations. It only requires them to give preference to employment and training of Kenyans. The Act provides for establishment of a training fund which would help progressively equip locals with the requisite knowledge in petroleum operations. Unfortunately, the Act focuses on the financial administration of the fund as opposed to the modalities of training the beneficiaries thereof.

Kenya is now aligning its petroleum legal regime to international standards. State departments led by the Ministry of Energy and Petroleum and the State Law Office have drafted the Petroleum Exploration, Development and Production (Local Content) Regulations, 2014.

The proposed laws will make it mandatory for oil companies to open project or site offices where employment and procurement decisions favouring citizens and businesses are to be made. They also bind oil companies to give priority to qualified citizens and indigenous Kenyan companies in employment and procurement decisions. Middle and junior level positions will be reserved for nationals.

Oil Companies

For businesses, the laws propose introduction of a competitive bidding process to provide goods, works and services to oil companies. Priority must be given to services provided within the country and goods manufactured in the country where applicable. Oil companies will also be required to transfer technology to Kenyan businesses.

The proposed laws will make it mandatory for oil companies to open project or site offices where employment and procurement decisions favouring citizens and businesses are to be made.

Law firms, insurance brokerage firms and financial institutions having their principal offices located in Kenya will substantially benefit from the industry since oil companies will not be permitted to procure their respective professional services from elsewhere.

At the bidding of every PSC, all oil companies will be required to submit a local content plan demonstrating compliance with the Kenyan local content requirements whose implementation will be reported quarterly.

Oil companies will ultimately bear an additional compliance burden. The proposed laws however, give statutory guidelines and time restrictions binding on the regulator thereby maintaining an acceptable balance of power. For instance, the proposed laws provide guidelines that the regulator must adhere to in considering all submitted plans.

Similarly, if the regulator fails to act on any submitted plan within a prescribed period of time, such plan will automatically be deemed as approved. Its powers are not discretionary.

In summation, the proposed framework is a commendable and practical solution for meeting local content objectives through legislation. It however appears to focus more on economic development at the expense of social development. Community development is an integral part of local content in the extractive industry especially in developing economies. Specific to Kenya, economic development might not suffice particularly where exploration is taking place in community land as defined by the Constitution. Social development activities ought to be provided for in such areas since the interests of communities therein prevail over the Government's.

-Mr. Kamunya, an Advocate of the High Court of Kenya specialises in Oil and Gas Law. Email: charles.kamunya@gmail.com

The cost of Life vs Intellectual Property Rights

The TRIPS agreement came into force on 1st January 1995 and ensures that member nations of the WTO adhere to defined standards of patent protection.

By Beth Michoma

It is estimated that HIV /Aids killed more than three million people ten years ago with half of the casualties hailing from sub Saharan Africa. This was due to a lack of essential antiretroviral drugs. Fatalities of this magnitude would have been avoided but for stringent patent laws.

These laws are entrenched in the agreement known as the Trade-Related Aspects of Intellectual Property Rights (TRIPS) ratified by member countries of the World Trade Organization (WTO) of which Kenya is a member. As a consequence of the TRIPS agreement a long drawn out battle between pharmaceutical companies and third world countries ensued and is still ongoing.

TRIPS

The TRIPS agreement came into force on 1st January 1995 and ensures that member nations of the WTO adhere to defined standards of patent protection.

Article 27 of the agreement requires member nations to ensure that patents would be available for any inventions, whether products or processes, in all fields of technology, provided that they were new, involved an inventive step and capable of industrial application.

However, conflict arose ten years ago from stipulations of Article 28 of the agreement which confers to the patent holder exclusive ownership rights for twenty years. Article 28(1)(a) in particular, prevents third parties who do not have the owner's consent from making, using, offering for sale, selling, or importing where the subject matter of the patent is a product.

Drug Prices

As a perk of the twenty year patent term and Article 28, pharmaceutical companies have the incentive to maintain high drug prices citing production costs. This perk poses serious problems for patients in developing countries who cannot afford brand name drugs. For instance, exorbitant prices of ARVs ten years ago ensured that developing countries could not provide the drugs to the population and any attempts to procure generic drugs to feel the gap were met with threats of sanctions by developed countries.

A generic drug is defined as a drug product that is comparable to a brand/reference listed drug product in dosage form, strength, quality and performance characteristics, and intended use. It should be noted that generic drugs are less expensive than patented drugs but most important a generic drug can only be produced when a patent term has expired. With this obvious dilemma it would seem that there is no hope for relief for developing countries.

Norm Exceptions

Developing countries believe that they should be allowed to override patent rights of large pharmaceutical companies where there is a public health emergency as provided for by Article 31 of TRIPS. Article 31 of TRIPS clearly states that a patent owner's right can be waived in the face of a national emergency by a country or other circumstances of extreme urgency. However, countries must inform the patent holder immediately of this breach.

Nevertheless, that breaching of the exclusive rights of a patent holder is not merely an issue of law. Article 31 poses a more nefarious threat to developing countries that have to consider political pressure and threat of litigation from developed countries. This institutes a never ending debate of whether TRIPS does offer any exceptions under Article 31.

It is alarming that developing countries have asked for more time to implement the TRIPS agreement instead of addressing the fundamental concerns raised. Developing countries should instead take into account their lack of manufacturing prowess in tandem with their lack of bargaining power in this agreement and endeavor to shift the balance of power in their favor.

-Ms. Michoma is an Advocate of the high court of Kenya and can be contacted on bmichoma@gmail.com

Mental, legal capacity as distinct legal concepts

The law limits certain rights of persons with intellectual or psychosocial disability through guardianship laws.

By Felecia Mburu

Most lawyers understand legal capacity from the perspective of the Law of Contract. Legal capacity was defined as the ability to sign a contract with rules, requirements, case law and exceptions to the rule. In particular, was the rule that one has to be of sound mind to sign a contract.

Therefore, what is legal capacity? There is no law or policy in Kenya that defines legal capacity, yet each day we are faced with situations that require legal capacity. In family law, legal capacity is the ability to get married (Marriage Act). In succession, it is the ability to write a will or inherit (Law of Succession) In Finance, it is as simple as opening a bank account while in insurance it is taking out a life policy (Contract Law) . In democracy, elections, it is the ability to cast a vote or run for office (Constitution of Kenya Article 100) while in health law it is the ability to consent to medical treatment (Constitution of Kenya Article 31). In criminal law, it is the right to a fair trial (Constitution of Kenya, Article 51).

Intellectual Disability

However, these freedoms on legal capacity do not suffice for persons with disability, in particular persons with psychosocial and intellectual disability. Kenya relies on the medical method of disability where the medical diagnosis of a condition becomes the person's identity.

Thus, the law limits certain rights of persons with intellectual or psychosocial disability through guardianship laws.

Under the current Mental Health Act, a court can give an order to have one institutionalized based on the doctor's recommendation. Yet most psychosocial disabilities can be managed with various supports and in some cases, medication. Section 167 of the Criminal Procedure Code states that a person of unsound mind can be sentenced at the pleasure of the President.

Yet for a person of sound mind, the sentence has to be definitive. The law states that persons of unsound mind cannot get married, yet persons with intellectual disability have the mental capacity to get married. Persons with psychosocial disabilities cannot be registered as voters or run for office yet in the 2013 elections, the electorate were voting based on political affiliations rather than informed choices.

It is clear that persons with mental disability are held to a higher standard on legal capacity which should not be the case. The law assumes that mental capacity is similar to legal capacity.

Article 12 of the Convention of the Rights of Persons with Disabilities recognizes the right to equal recognition before the law. The United Nations Draft General Comment on Article 12 elaborates on legal capacity v. mental capacity as follows:

Legal capacity and mental capacity are distinct concepts. Legal capacity is the ability to hold rights and duties (legal standing) and to exercise these rights and duties (legal agency). It is the key to accessing meaningful participation in society.

Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors. Under article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.

The world is moving towards supported decision making where persons with psychosocial and intellectual disabilities can have more control over their life, incomes and family life and Kenya should look into similar models as she reviews her Mental Health Act and Persons with Disabilities Act.

Ms. Mburu (LLM, International Human Rights Law) is an Advocate of the High Court of Kenya.

How ODPP salvaged my legal practise

I was not getting any peace at home either. Truphena kept asking me to get a real job. Her biological clock was ticking. I would explain to her that a man must keep his word.

By Betty Wambua

When I received a call from the Office of the Director of Public Prosecution (ODPP) asking me to pick my appointment letter, I literally saw a light at the end of a tunnel. I immediately rushed to the headquarters - lest something happened and jinxed my appointment – and gasped for breath as I picked and perused my deployment letter. I had been posted to Samburu County. Although it was over 700km away, I did not appeal. I had a job!

Rough Legal Career

My legal career had started on a very rough patch. My friend, Mr. Baraza, had asked me to work for him upon admission to The Bar. It would be the worst decision I ever made. In a good month, he would pay me a paltry Shs.20,000.00. My salary would depend on availability of funds, but I could not leave. I owed him. I met Mr. Baraza when I joined Form One at a local Boys High School. High school bullies were nasty. Some of my classmates almost died while others lost their self-esteem to-date. Mr. Baraza took me under his wings and protected me. I was never bullied.

As fate would have it, we met again at Moi University. He was in Third year when I joined campus. He let me print my bulky assignments for free from his printer, and sometimes let me crash in his room when I couldn't afford rent for my bedsitter outside campus.

Jinxed Proprietor

So when such a man requests you to work for him, you do not say no. However, the problem was that Baraza & Company Advocates was not performing well, or at all! It was sinking deeper into debt, and no new business was forthcoming, no matter the strategies we applied. It was just the two of us at the firm - no clerk, no secretary. Occasionally, the office furniture would be auctioned to recover rent arrears. At times, I thought the poor guy was jinxed!

Meanwhile, my father-in-law, Chief Nungo, was making my life a living hell. He would not understand why I could not afford a car and a house, like 'all' other Advocates of the High Court.

He kept lamenting that his only daughter, Truphena, a trained teacher, had failed him by marrying a 'loser' like me. Trust Mr. Nungo to give ultimatums. He did. I was barred from having any children with his daughter until I bought a car and a house! Never mind that Truphena was not getting any younger!

I was not getting any peace at home either. Truphena kept asking me to get a real job. Her biological clock was ticking. I would explain to her that a man must keep his word. Mr. Baraza had been there for me when I needed him, I could not abandon him when his ship was sinking. I would help him establish the practise then leave. However, there are things that women do not understand. For instance, a man's word of honour.

ODPPs Phone Call

My honour would however, be put to test when Truphena threatened to leave. I could not lose her. She had impeccable culinary skills, and unlike women from her community, she did not boil everything. So when ODPP called, it was a second chance.

It was not just the better salary that made me abandon Mr. Baraza. It was the car loan and mortgage that had been recently approved by the Salaries and Remuneration Commission (SRC). Soon, I would afford a car and a house. Truphena and I could finally have children, and my father-in-law would stop bugging me! That's how ODPP gave me a new lease of life!

-Ms. Wambua is a State Counsel

Lawyers' Aviation Opportunities

By Kuria Waithaka

Welcome aboard the flight to the 'world of aviation'! To better appreciate the aviation industry, facts and figures provide some perspective. In 2014, over 3.3 billion passengers were carried by 1,397 airlines in 37.4 million flights using 25,232 aircrafts serving 3,864 airports through an intricate route network managed by 173 air navigation service providers.

Aviation law comes in following several areas that require the involvement of lawyers.

Air Law Conventions

There are over 50 multilateral treaties on air law, mostly relating to public international air law on aerial navigation such as the Convention on International Civil Aviation, Chicago 1944 and 19 Annexes thereunder and aviation security including the Convention on Offences and Certain other acts Committed on board Aircraft, Tokyo 1963 and Convention for the Suppression of Unlawful Seizure of Aircraft, Hague 1970.

There is also the private international air law on liability on board aircraft such as the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw 1929 and the modernised eponymous Montreal Convention1999; on the ground, namely Convention on damage caused by foreign aircraft to third parties on the surface, Rome 1952 and two relatively new treaties, unofficially known as the 'Unlawful Interference Convention' and the 'General Risks Convention' Montreal 2009; and on rights in aircraft - Convention on International Interests in Mobile equipment and the Protocol on Matters specific to Aviation equipment, Cape Town, 2001.

Advisory Services

Legal practitioners can provide advisory services to Governments, aviation regulators such as the Kenya Civil Aviation Authority (KCAA) and Kenya Airports Authority (KAA), air operators and aviation service providers on the conventions.

Lawyers can also advise and represent claimants in litigation relating to the aviation liability and also security treaties. Following the tragic aircraft accident in which a Kenya Airways Airbus crashed into the sea, off the coast of Côte d'Ivoire, on 30th January 2000, the airline engaged a Kenyan law firm to handle claims for compensation arising from the accident.

Drafting Legislation

There are opportunities for legal practitioners in drafting, advising and litigating on aviation specific legislation. Kenyan statutes on legislation include Civil Aviation Act, 2013, Carriage by Air Act, 1993, Kenya Airports Authority Act (Cap 395), Protection of Aircraft Act (Cap. 68), The International Interests in Aircraft Act, 2013 and Air Passenger Service Charge Act (Cap 475). Lawyers can advise existing and prospective air operators, aerodrome operators, aircraft maintenance organizations, aviation training organizations and aero clubs on how to set up operations and to comply with statutory requirements. With regard to economic licensing, the KCAA holds quarterly public meetings to consider representations and objections to air service licence applications.

Legal practitioners represent licence applicants or objectors at these meetings. The Civil Aviation Act establishes The National Civil Aviation Administrative Review Tribunal with jurisdiction to inter alia hear and determine complaints or appeals arising from any refusal to grant a licence, a certificate or any other authorisation by the KCAA and also consumer protection compliance and enforcement activities. Though the Tribunal is awaiting operationalization, the legal profession will be able to participate in the Tribunal's proceedings.

Accident Investigation

Kenya has domesticated Annex 13 of the Chicago Convention, on Aircraft Accident Investigation in the Civil Aviation (Aircraft Accident and Incident Investigation) Regulations 2013. Lawyers have been engaged to represent the Government, the aviation regulator and claimants at commissions of enquiry and litigation relating to aircraft accidents.

Of notable importance in Kenya were two Commissions of Enquiry into aircraft accidents in Busia in January 2003 and in Ngong Forest in June 2012, in which high ranking Government officials perished. Lawyers played an instrumental role at both Commission proceedings.

Aviation Agreements

There are various aviation based contracts which legal practitioners can advise aviation service providers on, including aircraft leases, commercial co-operation agreements such as code-share agreements and service contracts (maintenance, catering and ground handling).

In-house Counsel and Consultancy

Opportunities, though limited, exist in the industry for in-house counsel. Larger airlines in Kenya have in-house legal departments. Other entities that employ in-house lawyers include KCAA, KAA, regional bodies such as the African Civil Aviation Commission, the African Airlines Association and global organizations such as International Civil Aviation Organization and the International Air Transport Association (IATA). The said regional and international bodies do from time to time engage legal professionals on short term consultancies.

Aviation Law Training

An interested practitioner can undertake postgraduate studies in aviation law at various universities renowned for erudite teaching in this area. These include McGill University, Canada and Leiden University, The Netherlands. IATA has a comprehensive Air Law Diploma which covers inter alia Public and Private International Air Law, Airline Contracts and Aircraft Financing.

I am hoping that more Kenyan lawyers will venture into this exciting area of law.

-Mr. Waithaka is an Aviation Lawyer and Consultant, KN Associates LLP

Containing unruly flight passengers

By Cyril Wayong'o

An unruly or disruptive passenger is one who fails to respect rules of conduct at an airport or on board an aircraft or (fails) to follow instructions of the airport staff or crew members and thereby disturbs the good order and discipline at an airport or on board the aircraft, according to Annex 17 to the International Civil Aviation Convention 1944. An aircraft is considered to be in flight from the moment power is applied for the purpose of take-off until when the landing run ends.

Tokyo Convention

The Convention on Offences and Certain Acts committed on Board Aircraft (Tokyo Convention, 1963) governs the offences and other unlawful acts that occur on board an aircraft in flight, including unruly and disruptive behaviour by passengers.

Approximately 185 countries (known as contracting States) out of the 191 United Nations (UN) countries have ratified this convention making it one of the conventions with the highest number of ratifications. Kenya ratified the convention on 22nd June 1970 and it became effective on 20th September 1970.

The convention applies only to civilian aircraft and criminalizes acts which, whether or not are offences, may jeopardize the safety of the aircraft or persons or property aboard it or which jeopardize good order and discipline on board while that aircraft is in flight.

The aircraft's State of Registration is mandated to exercise jurisdiction over offences and acts committed on board and each contracting State is required to take such measures as may be necessary to establish its jurisdiction as the State of registry over offences committed on board aircraft registered in such State. The convention does not however, exclude any criminal jurisdiction exercised in accordance with national law.

Unruly Passengers

Since the entry into force of Tokyo Convention 1963 on 4th December 1969, the number and type of unruly and disruptive passenger events on commercial flights has increased steadily.

According to the International Air Transport Association (IATA) statistics, in 2010, there was one unruly passenger incident for every 1,359 flights while in 2011, there was one unruly passenger incident for every 1,200 flights.

The triggering factors are many and varied but intoxication through alcohol, narcotics or medication, often starting before a passenger boards the aircraft are the most common.

Other causes include irritation with other passengers' actions on board, frustration linked to a passenger's journey, mental breakdowns or episodes (such as acute anxiety, panic disorder or phobias), mental conditions (psychosis, dementia or bi-polar disorder), and environmental factors that surround flying,(such as gathering of large crowds at airports, sitting and travelling in a confined space, fear of flying and fear of possible unlawful interference events.

Huge Losses

Cases of disruptive passengers not only result in inconveniences to the flight and passengers but also cause huge losses in terms of costs to airlines which may run into millions of shillings. The costs include the cost of diversion. In extreme cases and where the safety of a flight is at risk, the pilot-in-command would divert a flight mid-journey to disembark an unruly passenger.

Consequently, the affected airline would suffer losses due to cost of refueling as the aircraft may be required to dump fuel for unexpected early landing for the onward journey, additional landing fees and ground handling charges at the port of disembarkation. In some cases, accommodation costs and passenger compensation may be incurred due to delays.

Additionally, new members of crew may be required in case of time out. The resultant delays may also cause missed schedules, inconveniences and have a negative impact on the airline brand and reputation.

Restraint aboard

The pilot-in-command of an aircraft is empowered under Article 6 of the Tokyo Convention 1963, when he/she has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act, to impose upon him/her reasonable measures including restraints. This is in order to protect the safety of the aircraft or of persons or property on board and further, ensure good order and discipline is maintained on board an aircraft and the Pilot-in-Command deliver such person to competent authorities or to disembark him/her in accordance with the provisions of the convention.

Airlines use different methods to restrain unruly passengers including the use of flex-cuffs (a type of plastic strap that functions as a handcuffs and easier to carry than metal handcuffs), seatbelts,

adhesive tape, shoe laces, neck ties or whatever is available to immobilize unruly passengers on the seats. In Australia, the use of stun guns (an electroshock weapons that momentarily disables a person with an electric shock) is permitted. The convention grants immunity to the aircraft commander, members of the crew, any passenger, owner or operator of the aircraft, person on whose behalf the flight was performed against any liability on account of the treatment meted on the person against whom the actions were taken in accordance with the convention.

Legal Frameworks

The Tokyo Convention 1963 does not clarify what constitutes an offence and neither is there a documented list of what constitutes an offence. The International Civil Aviation Organization (ICAO) has provided some guidance material but different States have different definitions of what acts amount to an offence. Therefore, there is no clarity in the legal framework to help define incidents of unruly passengers. However, one can generally state that it depends on the individual circumstance and the main consideration is if the behavior jeopardizes the safety of an aircraft in-flight then it is an offence under this Convention.

Common offences include illegal consumption of narcotics or cigarettes, refusal to comply with safety instructions, verbal confrontation with crew members or other passengers, physical confrontation with crew members or other passengers, uncooperative passengers, making threats that could affect the safety of crew, passengers and aircraft, sexual abuse or harassment.

Hot Water

Some reported cases of unruly behaviour include an Air Asia flight from Bangkok, Thailand to Nanjing, China in December 2014 which was forced to turn around after an irate passenger deliberately threw boiling water on a flight attendant. According to the airline, a Chinese couple who were travelling with a tour group became furious when they were seated apart. Instead of calming down when flight attendants were able to seat them together, the woman ordered instant noodles and boiling water and then proceeded to chuck the scalding water on a flight attendant after a dispute over payment.

Ebola Scare

In October 2014, a coughing and sneezing passenger flying from Philadelphia, USA to the Dominican Republic shouted "I've been to Africa and I have Ebola!" Consequently, the aircraft was held on the tarmac for more than an hour after landing, while emergency workers in hazmat suits removed the passenger from the aircraft. The passenger pleaded that he had only been joking but the airport had to take precautions.

On 9th March 2014, a groom flying from Atlanta USA to Costa Rica forced Delta Air Lines flight to divert to the Cayman Islands after he got into an argument with his new wife en route to their honeymoon. The plane then proceeded to USA with the wife on board leaving him in the custody of the Cayman Islands' authorities.

Kisumu Passenger

In Kenya, on 17th November 2014 a passenger was charged before a Kisumu Court, accused of causing a one-hour delay for 27 other passengers by smoking an electronic cigarette on KQ aircraft flight 874. According to the charge sheet, the passenger refused to follow instructions by flight authorities to stop smoking.

Legal Loopholes

The biggest challenges with the existing legal framework dealing with offences committed on board an aircraft under Article 3 of the Tokyo Convention is the limited jurisdiction. The convention only recognizes the State of registry as competent to exercise jurisdiction. This may have been true as at 1963 when the convention was negotiated but developments in the aviation sector has necessitated a review. In March/April 2014, ICAO convened a diplomatic conference in Montreal, Canada at which the contracting States came up with a protocol that among other issues addresses jurisdiction. Although the Montreal protocol, 2014 is not yet in force, it has extended jurisdiction to the State of landing (when the aircraft on board which the offence or act is committed lands in its territory with the alleged offender still on board) and to the State of the operator(when the offence or act is committed on board an aircraft leased without crew to a lessee whose principal place of business or, if the lessee has no such place of business, whose permanent residence is in that State.

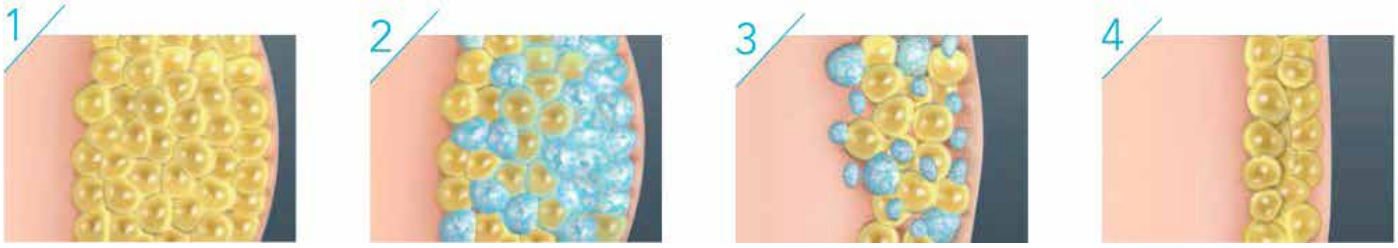
Further, the current legal framework does not provide an enumeration of offences and penalties. This may pose a challenge in some jurisdictions if their Constitutions provide that a criminal offence must be clearly stated and attendant penalty stipulated. The ICAO has provided circular number 288 to provide guidance on what constitutes an offence but that remains just guidance material and not a penal code.

Mr. Wayong'o is a Legal Officer at the Kenya Civil Aviation Authority (KCAA)

The triggering factors are many and varied but intoxication through alcohol, narcotics or medication, often starting before a passenger boards the aircraft are the most common.

Eliminating Belly Fat
CoolSculpting

The two photos (right) illustrate the impact of one treatment after three weeks



By Dr. Pranav Pancholi

Jane is a career woman and an ultimate supermom. She juggles her life between her law firm, taking care of the house and the three children. Prioritizing is extremely important as everything has to be done perfectly.

The career, kids and husband, have left her with no time for herself. She sometimes gets frustrated with the demands of the modern day mother and has started seeing the signs reflecting on her body.

Her waistline seems to be extending constantly and it is always a struggle to fit in to her clothes. Her tummy is sticking out of her clothes and the trousers are too tight. She needs to diet and exercise but there is no time for these luxuries in her demanding life as she starts early and comes home late.

By the time she answers to the needs of her family and the duties of her job, she feels exhausted and has no energy to go to the gym or to exercise.

As days pass by, Jane gets busier, her tummy gets bigger and her clothes are no more comfortable. Her body contour is changing. She wants to find a way but has no time to find solutions!-

Eliminate Belly Fat

If you are like Jane, please do not panic as science found a solution! You can now shape what you see and eliminate belly fat, love handles, back fat, bra fat, inner and outer thigh fat as well as treating moobs, without surgery, downtime or exercises thanks to the CoolSculpting.

The CoolSculpting is a non-surgical fat reduction technology that uses the cold to gently and effectively target the fat cells underneath the skin while leaving the skin itself unaffected.

The idea that cold can selectively affect fat led to the innovative cooling process developed by scientists at the Wellman Center for Photomedicine at Massachusetts General Hospital in Boston, a teaching affiliate of Harvard Medical School. CoolSculpting technology safely delivers precisely controlled cooling (cryolipolysis) to gently and effectively target the fat cells underneath the skin.

The treated fat cells crystallize, shatter then die. Over time, your body naturally processes the fat and eliminates these dead cells. And no worries, all this dead fat will not get into your bloodstream and raise your blood cholesterol level or put your liver under strain!

The studies show the immune system takes care of the fat resumption as the dead fat cells are digested by white blood cells in the immune system.

Fat Freezing Procedure

The CoolSculpting fat freezing procedure contours the body by safely and effectively freezing away unwanted fat for good without surgery, needles, scars or downtime. You can return to normal activities immediately. In the weeks and months to follow, your body naturally continues to eliminate the treated fat cells. Once the fat is gone, it is gone for good!

The effects are visible in around 3 weeks but vastly improve after around 12 to 14 weeks.

You can reduce fat on multiple areas of your body with the CoolSculpting, and additional sessions may further enhance your results. Literature shows regular results of up to 40 percent fat reduction in the area treated, that get even higher with further treatments.

Few sessions of Coolsculpting have made an enormous impact on Jane`s confidence and the difference the treatment has made is immeasurable in terms of happiness. She is now enjoying the fact all her lovely clothes fit her perfectly once again and she looks stunning in them.

With over 1 million CoolSculpting treatments performed worldwide, people like Jane, from both sexes, are getting a better view of themselves, thanks to the unique CoolSculpting procedure.

-Dr Pancholi is a Cosmetic Laser Surgeon at Avane Clinic, Yaya Centre 4th Floor in Nairobi.

Securing the profession through employment opportunities

By Peter Joseph Keya

The new constitutional dispensation following the promulgation of the Constitution in 2010 expanded the scope of the Bill of Rights. In particular, the application of the Bill of Rights under Articles 55 and 56 requires the State to make measures, including affirmative action programmes to ensure the youth, minorities and marginalized groups inter alia access employment or are provided special opportunities for access to employment. In February 2012, the retired President, Hon. Mwai Kibaki directed that 10 percent of all Government contracts be earmarked and awarded to the youth. The Policy directive was informed by the Government's realization that in order to meaningfully address the issue of youth unemployment. It is necessary to give them opportunities in Government contracts and tenders.

Procurement Rules

In 2013, President Uhuru Kenyatta, pledged that the procurement rules would be amended to allow 30 per cent of contracts to be given to the youth, women and persons with disability without competition from established firms. The President directed that the issue of 30 per cent allocation of all Government procurement to the youth should be adhered to, warning that those who will fail to effect the directive will be sacked. The President issued the directive in September 2013 during the launch of the Shs.6 Billion Uwezo Fund.

With the current demographics, the youth form a significant part of the population in Kenya. The legal profession has continued to witness the increased number of youth within its ranks and it can be reasonably inferred that the majority of the members of the society are the youth. Consequently, the youth in the profession are faced with similar if not more challenges of access to employment opportunities considering the hurdles one goes through prior to becoming an Advocate.

Admission to The Bar in itself is not a panacea as one has to grapple with the profession as a means of livelihood. With no employment guarantees, and with existing firms not necessarily being the best employers for young advocates, young lawyers are forced to set up law firms in light of the provisions of Section 50(2) of the Legal Education Act repealing Section 32 of the Advocates Act which required advocates to practice under a senior lawyer for at least two years before setting up their own practice.

Employment Authority

It is in light of the above that the profession should consider how to secure its future by securing the interests of its youth through the facilitation of access to employment and employment opportunities. For instance, Honourable Mr. Johnstone Sakaja, Member of Parliament has sponsored the National Youth Employment Authority Bill, 2015 whose principal objective is to give effect to Articles 55 (c) and 56(c) of the Constitution. The Bill proposes to establish the National Youth Employment Authority whose core mandate is to maintain a database of all youth seeking employment and facilitate their employment. The Authority shall also be tasked with facilitation of counseling and training to youth on general matters including career progression and choice of careers. Further, the Authority shall be tasked to facilitate the placement of students in positions of internship or attachment during and after completion of study. This highly relates to the placement of pupilage which is becoming an issue for students at the Kenya School of Law.

The Government as a single largest employer has continued to offer employment opportunities to Advocates through its different arms and it would be prudent to consider how to structure the same as a profession. It is imperative that the profession including its youth take an interest in such upcoming legislations with the aim of improving and streamlining them for its benefit.

Mr. Keya is an Advocate of the High Court of Kenya

Of Law and Development

By Emmy Rono

A country's legal system is fundamental to its economic growth. The basic argument accompanying is usually the Rule of Law as the backdrop against which development is hinged, as law is used as a tool to create and protect markets as well as curb market excesses and provide direct relief to the poor. The doctrine of law and development emerges from an intersection of economics, law and institutional practice.

There's further been consistent observations over time about the role the Judiciary plays as a central actor in development and that judicial reform is still a major focus of development assistance [examples including World Bank and United Nations Development Programme (UNDP) projects to reform judiciaries in various countries as triggers for development]. The Judiciary is seen as the custodian of property rights and an instrument for enforcement of contracts agreed upon by parties. It also plays the role of interpretation of regulatory laws among others. Law is therefore, at the centre of development policy making, playing a crucial role, but supported by other social, economic and political aspects of an economy.

Development has traditionally been defined solely as economic growth, and the role of law was limited to enhancing economic growth; however this approach has been changing over time to a more holistic view of development. Thinking about development holistically includes thinking about it from various interconnected perspectives including poverty, rights, legislature, political parties, business entities and non-governmental organizations. It also includes looking at development as inclusive and multidimensional.

Legal Development

Holistic Development cannot therefore be considered separate from legal development since legal development is not just about what the law is and what the judicial system formally accepts and asserts. Legal development also seeks to increase people's capacities and their ability to exercise the rights which are associated with legal progress/development.
This holistic approach informs how we frame policies, laws and approach reform.
It also directs our attention to the end goal of legal and institutional reform and hopefully aids in the accountability of the various actors in the development space to a comprehensive way of dealing with development.
We need to therefore take a more holistic view of development as encompassing all different aspects as this will push us to be comprehensive in our approach to development reforms and institutional reforms.

In addition, thinking about development in this manner and channeling our development efforts in a comprehensive manner is paramount because the success of development efforts depends, a great deal, on the productivity of the interactions between these various aspects i.e. the judiciary, the legislature, political parties, businesses and non-governmental organizations.
In thinking and acting in such a broad fashion, we avoid the pitfall of focusing on one part of the structure at the expense of another because they all play unique and inter-linked roles.

Finally, holistic development can only be achieved through creativity and a mélange of different, versatile and flexible policies that leave room for, a continuous process of learning, adapting and iterating in a bid to find the best solution for different issues in the development space rather than trying to blindly emulate others without taking into consideration context.

-Ms. Rono is an Advocate of the High Court of Kenya

What's the difference between a good lawyer and a great lawyer? A good lawyer knows the law, a great lawyer knows the Judge!

A man had been crossing a street when a car slammed into him. The pedestrian sued the motorist, whose lawyer made the following closing statement.
"Your honor, my client was not at fault. He has been driving a car for thirty years, and has never had an accident nor booked for over speeding. I do not think I need to say any more."
Unimpressed, the lawyer for the plaintiff shot up. "Your honor, since Counsel insists on bringing up the matter of experience, may I remind the court that my client has been walking for over seventy years…"

During a lecture on Law of Contracts, the lecturer at a School of Law, a lecturer asked one of her students, "If you were to give someone an orange, how would you go about it?"
The student replied, "Here's an orange."
The lecturer was enraged. "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..."

How do you make a group of lawyers to smile for a photo? Just say, "Fees."

A doctor and a lawyer in two cars collided along Thika road. The lawyer helped the doctor out of his car and offered him a drink from his hip flask. The doctor accepted and handed the flask back to the lawyer, who closed it and put it away. "Aren't you going to have a drink yourself?" asked the doctor.
"Sure, after the police leave the accident scene," replied the lawyer.

CHAMBER BREAK

A notorious pick pocket was arraigned in a packed Milimani Law Court for a series of petty crimes. After pleading guilty, the Magistrate said "Mr. Kausi, you are hereby fined Sh10,000." His lawyer stood up and said "Thanks, my Lord, however my client only has Sh4,000 on him at this time, but if you'd allow him a few minutes in the crowd. . ."

A doctor told her patient that his test results indicated that he had a rare disease and had only six months to live.
"Isn't there anything I can do?" pleaded the patient.
"Marry a lawyer," the doctor advised. "It will be the longest six months of your life."

A woman was being questioned in a court trial involving slander.
"Please repeat the slanderous statements you heard, exactly as you heard them," instructed the lawyer.
The witness hesitated. "But they are unfit for any respectable person to hear," she protested.
"Then, just whisper them to the Judge," said the lawyer

A High Court Judge was in a relaxed mood when he saw a witness looking extremely sad. He asked him, "You seem to be in some distress, anything wrong?"
The witness replied, "Well, your Honor, I swore to tell the truth, the whole truth and nothing but the truth. But every time I try, some lawyer objects."

A housewife, an accountant and a lawyer were asked "How much is 2+2?"
The housewife replies: "Four!". The accountant says: "I think it's either three or four. Let me run those figures through my spreadsheet one more time. "The lawyer pulls the drapes, dims the lights and asks in a hushed voice, "How much do you want it to be?"

Why right to adequate housing must not be a secondary right

By Ms. Pauline Vata

Kenya has ratified a number of international treaties banning forced evictions, most notably the International Covenant on Economic Social and Cultural Rights (ICESCR) which Kenya acceded to on May 1, 1972. Since then Kenya has had a chequered past that witnessed arbitrary forced evictions that had characterized the Moi and Kibaki regime and continue in the current Uhuru administration. Forced evictions in Kenya have disproportionately impacted poor, vulnerable and marginalized groups in both rural and urban areas.

Mau Evictions

In the last few weeks 5,000 settlers were inhumanely evicted from the Maasai Mau Forest following a 24-hour notice issued by the Government. The main reason advanced justifying the evictions is that it is dangerous for people to live near forests and there is need for forest conservation. That position is indisputable. However, the current situation in the forest areas is very complex because of its historical context.

Any solution for the current problem must consider the origins of settlements in the forest areas and most of those areas are considered "ancestral land" by local communities who have lived there for decades. Forced evictions of this magnitude are unprecedented in Kenya. To render tens of thousands homeless in a matter of a few days is unlawful by any standards. Furthermore, forced evictions of this nature are in breach of well-established international norms and laws which obligate the Government to provide for the affected communities with adequate and reasonable notice, genuine consultation, information on the proposed evictions and adequate alternative housing or resettlement. Ongoing and threatened demolitions have caused fear, panic and confusion among the affected communities.

Government Commitment

In May 2004, the Government an assurance to Special Rapporteur, Miloon Kothari, declaring a moratorium on evictions pending further review on procedures of eviction and implementation of Government policy. In March of 2005, the Government re-affirmed its commitment during its appearance before the UN Human Rights Committee.

The Attorney General responding to questions posed under Article 17 of the International Convention on Civil Political Rights, about a proposed eviction in Kibera informal settlement, "That the Government of Kenya had halted evictions in Kibera and other informal settlements and that future eviction, if necessary, would be done according to established international and United Nations standards on eviction."

The Human Rights Committee then recommended the Government to "develop transparent policies and procedures for dealing with evictions and ensure that evictions do not occur unless those affected have been consulted and appropriate resettlement arrangements have been made". Well fast forward 11 years later the government has not taken its commitment seriously the Eviction and Resettlement Procedures Bill 2013 has not been enacted to law and with such looming policy gaps we are yet to see the worst of evictions. The proposed bill of 2013 gives succinct modalities for humane evictions with alternative resettlement, prior notice of not less than three months, and that evictions shall not be done at night, in cold rainy weather or prior to elections.

Such an effective law has been lying in the shelves of the Cabinet Secretary Land Housing and Urban Development and it is yet to be debated in parliament two years down the line. The Constitution 2010 also affirms the right to adequate housing under Article 43 though it is silent on the element of evictions unlike the South African Constitution which under Article 26(3) expressly states that no one may be evicted from their home without a court order which should consider all relevant circumstances.

Deputy President

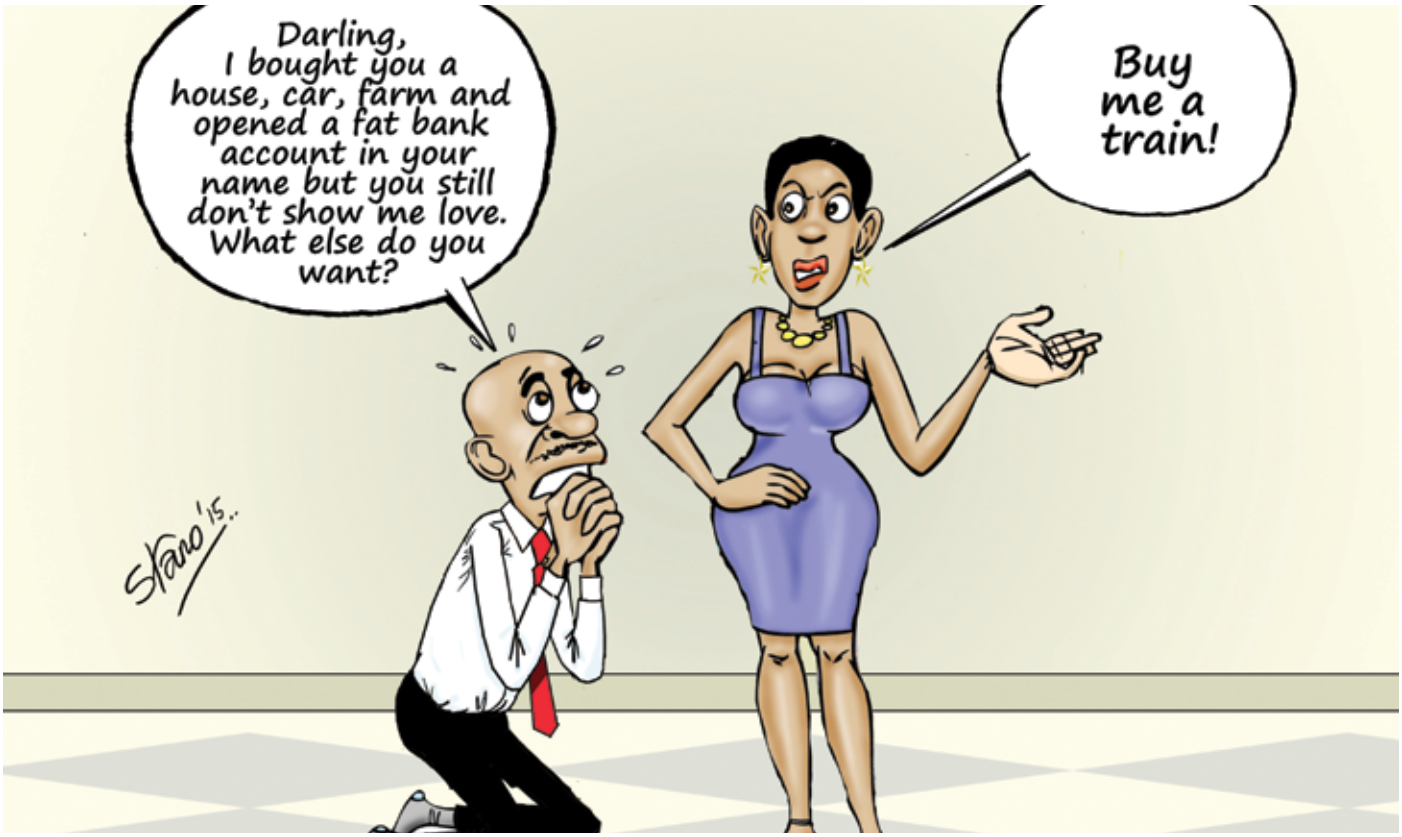
Given the above fore goings the Deputy President of the Republic of Kenya has issued a stern warning against forceful and inhumane evictions but what do we know, warnings do not amount to laws or policies. If the right to adequate housing is to be realized in Kenya this is what the Government of Kenya must do: Immediately suspend plans for any and all forced evictions; disseminate information and carry out in-depth consultations with all affected communities to find a feasible alternative to the forced evictions;

If there are no alternatives, ensure that international standards related to forced evictions are followed including but not limited to adequate and reasonable notice to all affected parties, information on the proposed evictions, consultation with the affected parties and an adequate alternative housing or resettlement. Fourthly, enact and implement the law on evictions that is consistent with local and international human rights law. The law enforcers should not implement any order for eviction, instead a coordinated and disinterested body should be made responsible for orderly and peaceful evictions. Finally the Government should appoint an inter-ministerial consultative group to coordinate any and all plans related to evictions and demolitions and provide immediate assistance to those people who have already been evicted.

-Ms. Vata is an advocate of the High Court of Kenya and the Ag. Director Economic and Social Rights Centre- Hakijamii

New feminism this century

Evidently, radical feminism fails to identify matriarchal oppression. For example women are actively involved in sexual exploitation of other women through trafficking, prostitution and even pornography.



By Joseph Lutta

In Bradwell v Illinois 83 US 130 (1873) Justice Bradley, delivered a poignant dictum that was somehow conflated with misogynistic overtones. He rhapsodically stated:

"It is true that many women are unmarried and not affected by any of the duties, complications and incapacities arising out of the married states, but these are exceptions to the general rule. The paramount destiny and mission of a woman is to fulfill the noble and benign offices of wife and mother.

This is the law of the creator. And the rules of civil society must be adapted to the general constitution of things and cannot be based upon exceptional cases."

This benighted opinion signified the institutional marginalisation of women in society. Indeed, the orthodoxy of cultural norms, Abrahamic religion and even science viewed femininity with contempt. Nonetheless, these obstacles were annihilated due to the feminist movements of the nineteenth century that gave women panoply of rights.

Wage Gap

However, it is apparent Radical-Marxism feminism evolved into subtle misandry due to the strong resentment towards masculinity. First, radical feminism doctors statistics on gender discrimination to win public sympathy.

For example 'wage gap' argument that women earn less than men within the same job description. Nonetheless, renowned economist and Stanford Fellow Professor Thomas Sowell unmasked this myth in his book Affirmative Action around the World. Sowell argues there are inherent factors such as overtime and side jobs that dynamically alter the amount of income.

Equally, the only difference in income encircles women who are mothers since they pursue careers that are coherent with the demands and dynamics of motherhood. However, the net income disparity between single women and men is naught if not marginal.

Marital Failure

Contiguously, is statistics on mortality. Statistics indicate the leading cause of death among middle aged men is suicide. This calamity stems from a myriad of issues such as marital failure, midlife crisis, job pressure and harsh economic times. Surprisingly, this information never reaches by the mainstream media which is infiltrated with feministic and gynocentric objectives.

Fourthly, is the impulsive war on the boy child. Acquiescently, there are numerous organisations and mechanisms that champion for the rights of the girl child compared to boys leaving them vulnerable and segregated. Along the same vein, is effimanisation of school syllabus and routine. Professor Christina Hoff Summers in The War on Boys contemporary school routine ridicules boys as 'deformed girls'.

Therefore, boys are forced to recant their masculinity and embrace to feminine standards and attributes. This squaring of the circle mission has contributed to poor academic performance and the mounting rate of boys dropping out of school due to loss of interest.

Evidently, radical feminism fails to identify matriarchal oppression. For example women are actively involved in sexual exploitation of other women through trafficking, prostitution and even pornography. These examples signify that men are not the sole cause for women's problems.

Cumulatively, democratic and constitutional state recognises the essence of gender equality. Nonetheless, this egalitarian objective should be approached from a complimentary rather than confrontational perspective.

Consequently, is feminism ripe for counterreformation?

-Mr. Lutta is an Advocate of the High Court of Kenya

Another judicial afternoon

The best part of being a Judge is that one can do what they damn please and justify it with all sorts of legalese.

By Patrick Ochieng

Judge Milele clenches his teeth and winces. His ulcers are playing up again. He pulls out a crumpled handkerchief and mops his brow. He peers down at the Advocate addressing him and wonders if the pompous fool knows how ridiculous he looks in the horse-hair wig that keeps sliding down his face. Why would you want to sweat under such a ridiculous contraption when the rules do not compel you to do so?

"I'll be as brief as possible," the advocate says, before embarking on an unending speech. He is now saying something about – equity and clean hands. He drones on endlessly as though he is reading from a catholic missal and only pauses for effect, before plowing on. His face glistens with sweat, but he makes no attempt to wipe it.

"May it please your Lordship; those are our submissions," he finally intones, his eyes roaming the courtroom as though daring any soul to disagree.

Barely has the first advocate's backside made contact with the wooden bench, before his adversary, a broody chap in an oversize gown and a baritone shoots up, and begins spitting fire. Judge Milele has long ceased listening or writing, but none of the two have noticed. The respondent's advocate drones on, and endlessly shuffles through his file, as though he has misplaced an important document.

Boring Counsel

Up above the court's high ceiling, a whirring fan does no more than blow hot air. The court orderly in a solitary chair in the corner has nodded off, and so has the clerk. The Judge has his gaze fixed on the wood panelling at the extreme end of his court. The workmanship has never failed to impress him. He knows exactly how many panels line out from one end to the other. He has counted them time and again. It's what he does when the boring counsels are jousting with each other or trying to corner lying litigants in cross-examination. If he were to listen to all the half-truths and outright lies litigants and their advocates reel out from 9.00am, when court convenes, till evening, he'd end up in a mental institution, or just drop dead from a coronary attack.

Mr Baritone is saying something about approbating and reprobating. He rhymes it out like he is the first to discover the words .He steals a side glance at his adversary, as though to say – beat that if you can.

...a woman in lime- green- dress breaks into a smile. She hangs on to Mr. Baritone's every word. He steals a glance in her direction before continuing with his never ending submissions.

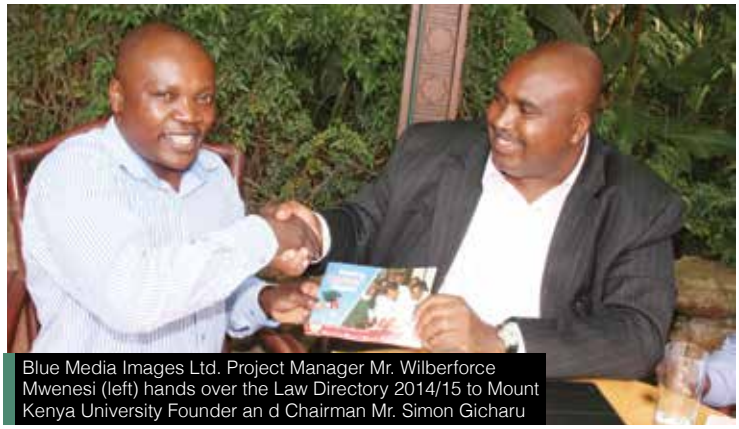
Another pass-time the Judge has devised, to while away the boredom, is to scour the faces in the gallery and to try to determine their affiliation, in regards to the case. A smile, a frown, a wince, as the case proceeds is all he requires to place them on either side of the legal battle. Of course there are those who have drifted in for lack of something better to do with their time. Those too he has learnt to identify.

A woman in lime- green- dress breaks into a smile. She hangs on to Mr. Baritone's every word. He steals a glance in her direction before continuing with his never ending submissions:

"With all due respect to my learned friend," he says, peering down at his colleague with eyes that mirror anything, but respect, and then looks over his shoulder to meet the gaze of the smiling woman in green.

Judge Milele is now alert. If there is anything he detests, it is advocates who unashamedly play to the gallery, or are over-concerned with pleasing a client. He decides there and then, he will rule against Baritone's client and if she will not be satisfied with his decision she can bloody well appeal it. The best part of being a Judge is that one can do what they damn please and justify it with all sorts of legalese. It matters not, it will be successfully appealed. His mind made up, Judge Milele again drifts away from the Judicial circus, and thinks of the long weekend ahead.

-Mr. Ochieng is an Advocate of the High Court and an award winning creative writer.



Blue Media Images Ltd. Project Manager Mr. Wilberforce Mwenesi (left) hands over the Law Directory 2014/15 to Mount Kenya University Founder an d Chairman Mr. Simon Gicharu

Regional directory to revamp legal practise

Nairobi, Kenya: It will now be easy to access law firms in East Africa following the publication of a legal directory.

The idea of the production leapt to the fore following the success of the first edition of a legal directory with details of nearly 70 percent of law firms countrywide. The Blue Media Images Ltd that produced the pioneer legal directory said that its success encouraged the firm to go regional. "We have received several compliments from several professional bodies and banks that relied on the publication to reach and access legal services efficiently," Blue Media Images Ltd Project Manager Wilberforce Akidiva Mwenesi said.

Blue Media Images Ltd Head of Business Development Mr. James Shinali said that the regional directory shall be out in 2016.

"The response from law firms interested to be featured in the East African publication is overwhelming and we are still receiving others," Mr. Shinali said.Mr. Shinali Mwenesi told The Advocate that the publication targets to complement the East Africa Community (EAC) integration.

"The legal profession plays a pivotal role in the EAC integration as regional Bar Associations ensure that their Governments uphold the Rule of Law," Mr. Mwenesi says.

Mwenesi says that the East African Legal Directory will strive to include majority of the contacts of law firms in the region.

According to the Project Manager, the growth in membership of the East Africa Law Society (EALS) to over 15,000 is an indication of a growing legal profession in East Africa.

It is not the first time for Blue Media Images Limited to publish a legal directory as the company produced its pioneer edition featuring Kenyan law firms last year. "The first edition entailed contacts of nearly 70 percent of law firms in Kenya…we were unable to cover all firms as we had only three months to produce," Mr. Mwenesi says.

According to Mr. Mwenesi, legal directories assists to disseminate information to the public, is a communication tool and publicity forum.

"It complements websites for Bar Associations like the Law Society of Kenya (LSK) by listing information and up to dated contacts on lawyers and other stakeholders," Mr. Mwenesi said.

He explains that the directory is an information source on the current location, telephone numbers and also lists specialization areas of law firms.

"The directory which also lists the Advocates Remuneration Order is one of its kind in this side of the sub-Sahara," Mr. Mwenesi says.

He says that the upcoming regional edition shall have contacts of stakeholders inter alia arbitrators, auctioneers and auditors.

"We are also burning the midnight oil to ensure that our web site www.lawdirectory.co.ke is up and running by April this year," Mr. Mwenesi says.

He says that law firms that want to feature in the publication to send their profiles to him to come up with a draft sample artwork and before he reverts for approval before publication. Mr. Mwenesi says that emails can be sent to wilber@bluemediaimages.com or lawdirectory@bluemediaimages.com.

The emails can also be sent to the Blue Media Images Head of Business Development Mr. James Shinali on shinali@bluemediaimages.com.

Mr. Mwenesi and Mr. Shinali can also be reached on +254 0703 283 660; +254 0702 764 333; 0725 918 836 or +254 0726 590 724.

Demystifying Intergovernmental Relations in Kenya's devolved framework of governance

The AFFA Act does not seem to in any way recognize the intergovernmental structures established under Section 3 of the Intergovernmental Act, 2012. By extension, these may well mean that perhaps Kenya's intergovernmental relations forum is complex and not capable of being demystified!

President Uhuru Kenyatta (left) Ethiopian Prime Minister, Hailemariam Desalegn (middle right) and Somalian President, Hassan Sheikh Mohamud (right) after the meeting of the Intergovernmental Authority on Development (IGAD) consultative meeting on the situation on South Sudan, held at State House, Nairobi, Kenya. Photo/VOA

By Faith Simiyu

The concept 'intergovernmental relations' is commonly used to refer to the relations between and within levels of Government in the attainment of common goals. Intergovernmental relations are achieved through cooperation and interactions between the different levels of government. Notably, two key approaches to intergovernmental relations are recognized worldwide namely, the Constitutional and the Legislative approaches.

The Constitutional approach asserts that since the Constitution is the basic foundation for determining intergovernmental relations, its supremacy must dictate and limits the action of Government, which actions must exist exclusively within the limits of the Constitution. The legislative approach proffers that weaknesses under the Constitution may be remedied through legislation.

Devolved Governance

Kenya's 2010 Constitution introduced devolved governance at two levels- National and County. A key constitutional requirement is that both Governments, which are functionally distinct and interdependent, are to conduct their inter-governmental relations on the basis of consultation and cooperation. Strikingly, however, Kenya's Constitution largely lacks specific provisions to reinforce a robust regime for inter-governmental relations.

Hence, the Inter-governmental Relations Act, 2012 was enacted to give effect to the Constitutional provisions and buttresses the legislative approach to intergovernmental relations. Part II of the Act establishes a framework for vertical consultation and horizontal mechanism for consultation and corporation between and amongst the two levels of Government through the establishment of 'intergovernmental structures' that comprise of :

(i) the National and County Government Co-ordinating Summit; (ii) the Council of County Governors; (iii) the Intergovernmental Relations Technical Committee and; (iii) the Intergovernmental Relations Secretariat. It is expected that governments will consult and cooperate with each other through the said Intergovernmental structures.

The AFFA Act does not seem to in any way recognize the intergovernmental structures established under Section 3 of the Intergovernmental Act, 2012. By extension, these may well mean that perhaps Kenya's intergovernmental relations forum is complex and not capable of being demystified!

Intergovernmental Relations

In retrospect, a consideration of devolved agricultural functions between the national and county government; espouses difficulties arise in conceptualizing Kenya's Constitutional/Legislative approach to intergovernmental relations.

A critical scrutiny of the key legislation governing the agriculture sector , Agriculture Fisheries and Food Authority Act(AFFFA Act) ; reveals impediments to the implementation of the legislative approach to intergovernmental relations.

The AFFA Act establishes the AFFA Authority in a manner that seemingly mimics and probably replaces, the role of Intergovernmental Structures established under the Intergovernmental Act, 2012. Specifically, Section 4 (e) provides:

The AFFA Authority shall advise the National and the County Governments on the agricultural sector. This immediate provision suggests that the AFFA Authority is to act as a sectoral consultative forum for 'advise' and for 'consultation' by the national and county governments on agricultural matters. The aspect of providing 'advise' and consultation' suggests that the AFFA Authority is perhaps an intergovernmental structure. Further, it can be implied that it introduces a sectoral inter-governmental consultative forum.

Ultimately, the striking question that remains is: what is the role of the intergovernmental structures established in the Inter-governmental Relations Act, 2012 viz the AFFA Authority?

The AFFA Act does not seem to in any way recognize the intergovernmental structures established under Section 3 of the Intergovernmental Act, 2012. By extension, these may well mean that perhaps Kenya's intergovernmental relations forum is complex and not capable of being demystified!

Ms. Simiyu, an Advocate of the High Court of Kenya is the Chairperson, Private Law Department, Jomo Kenyatta University of Agriculture and Technology and Partner at Simiyu, Opondo, Kiranga & Company Advocates. Email: Faithsimiyu@gmail.com or Faith@soklaw.co.ke

Nowrojee retraces the country history and culture in new book

As illustrated in the book, Nowrojee,SC adds that ancestors explained what they believed was important to the future generations "It is thus a public book, it is also a private book that also reflects the histories of many other families," says Nowrojee, SC.

British High Commissioner Dr Turner and Senior Counsel Mr. Pheroze Nowrojee at his book launch in Lavington, Nairobi.JPG

By Harold Ayodo

Senior Counsel Mr. Pheroze Nowrojee has launched the family account book- "A Kenyan Journey" -to narrate the country's great history and exhibit Kenya's rich culture.

Mr. Pheroze, SC says the new book traces his journey from India to Kenya under the British colonial rule, the country's great history and the rich way of life that shapes the citizens culture.

"Our ancestors did not leave eloquent writings, but they left eloquent lives. Those lives are as rich and eloquent as any words we admire in any political writing. It is our duty to read those lives, and turn their sacrifices into the national narrative and the national purposes they died for," said Pheroze, SC during the launch at Gina Din Kariuki's residence in Lavington, Nairobi Kenya.

Nowrojee, SC further exhibits the country's great history that has shaped the social and political landscape of the region at large regarded as the cradle of human kind.

"This book is about our ancestors, both family and collective. Family ancestors tell us our personal origins. This book asked and sought to explain why our family acted as it did in the past century," says Nowrojee, SC adding, "collective ancestors tell us about our national history."

As illustrated in the book, Nowrojee,SC adds that ancestors explained what they believed was important to the future generations

"It is thus a public book, it is also a private book that also reflects the histories of many other families," says Nowrojee, SC.

He further recounts the arrival of missionaries, the construction of railway, the First and Second World War, the fight for independence, the 1982 attempted coup, the transition periods, the expansion of the political landscape and the amalgamation of the new constitution.

Over these stages of the country's growth, he explains account after account the establishment of Kenya as a country, its growth and the current status. In detail, the book explores the country's great culture and how people have interacted since pre independence.

Natalya Din-Kariuki says that the book places Kenya's rich history and culture in much broader political contexts.

"The book asks philosophical questions about identity, language, empire, belonging, and exile. It explores how we change the places we travel to, and how the places we travel to change us," she says adding, "What makes it so powerful, and such an important contribution to narratives of Kenyan history is that it tells us about a part of this history that has never received enough (or any) attention.'

Natalya Din-Kariki says that the book shows that historical writing is not simply of antiquarian interest, but that it has huge political potential.

"It digs up letters, postcards, photographs, legal texts, and other kinds of records in order to paint a vivid and detailed picture of a family and a nation's experience. This book tells stories of older generations (often illiterate or otherwise disenfranchised) who were unable to record these memories for themselves, and that is where its real achievement lies," says Natalya Din-Kariuki terming the book an inspiration.

High Commissioners, senior Government officials, lawyers, Judges and scholars are among dignitaries who attended the colourful launch.

Streamlining bail and bond administration

The National Council on the Administration of Justice (NCAJ) in its recent meeting resolved to form an inclusive Committee to oversee the implementation process of the Bail and Bond Guidelines.

In addition to the traditionally used security documents- the title deeds, log books and pay slips, the Guidelines itemize bank drafts and insurance bonds as security items.

By Petronella Mukaindo

Lack of clarity in procedure and substance on how bail and bond is administered in courts and police stations coupled with inconsistencies in bail terms has created distrust in our justice system. Administration of bail terms has been unpredictable making it difficult even for advocates to advise their clients on the likely outcome of their bail applications. The bail administration at police stations has been shrouded in even more mystery. Public ignorance on administration of bail and bond terms has created perceptions of corruption. No wonder there has been increased lynching of those released on bail, as these are at times mistaken for acquittals. Of concern is also the fact that pretrial detainees make up nearly half of the prison population.

Bail and Bond Policy Guidelines

The recently launched Bail and Bond Policy Guidelines could salvage the situation. The Guidelines were preceded by a multi-sectoral Task Force, appointed by Chief Justice Dr. Willy Mutunga to develop a national bail and bond policy. The Task Force drew membership from the civil society, Directorate of Public Prosecutions, Judiciary, Prisons Service, Police Service, Probation and After Care Services and the Law Society of Kenya and presented a report of its findings and the Guidelines on 20 March 2015. The Guidelines have since been gazetted vide Gazette Notice No 4010 of 5th June 2015.

Compelling Reasons

The provision of Article 49 of the Constitution that grants arrested persons the right to be released on bond or bail 'unless there are compelling reasons' has not made decision making any easier for courts, given that what amounts to 'compelling reason' is not strictly defined. What emerges from case law, and supported by the Guidelines however, is that the burden of proof lies on the prosecution to establish the existence of compelling reasons that would justify the denial of bail. The standard of proof is on a balance of probabilities, in line with international best practice.

Terrorism Cases

Whether or not to grant bail/ bond to terrorism suspects has been a contentious issue in the wake of increasing insecurity threats. It is notable however, that unlike the former regime, the Constitution does not exclude grant of bail to capital offences or 'serious offences'. The Guidelines, stipulate that courts should not deny an accused person bail if the gravity of the charge is the only consideration before it. Thus, in the absence of any other relevant factor(s) to justify the denial of bail, 'the seriousness of the alleged crime is not sufficient, by itself'. Nonetheless, certain conditions may be imposed on the grant of bail in the case of transnational crimes. The court may also grant extension of time in custody upon request by police in line with provisions of Prevention of Terrorism Act.

In addition to the traditionally used security documents- the title deeds, log books and pay slips, the Guidelines itemize bank drafts and insurance bonds as security items.

Bail Supervision

The Policy Guidelines also recognize the importance of bail supervision. Kenya currently lacks a clear system of bail supervision. Supervision will not only ensure attendance of accused persons as and when required, but that they also abide by any conditions that the court may attach to the grant of bail. These conditions may include reporting requirements, contact with witnesses and victims, surrender of travel documents and place of residence. The lack of bail supervision is largely to blame for the high rates of absconding. The Guidelines prescribe that in appropriate cases, persons released on bail be placed under the supervision of the Probation and Aftercare Services, or even chiefs or police officers to ensure adherence to bail or bond terms.

Inter-agency Cooperation

Whilst courts and the police stations are the ports of call in bail and bond administration, the Guidelines recognize the importance of inter agency coordination amongst the justice players in the justice chain. Proper record keeping by the police and the prison authorities, proper investigation and prosecution are all critical to safeguarding the rights of pretrial detainees and securing an effective bail and bond system. The Guidelines underline the importance of interagency co-ordination right from the places of pretrial detention and even the transportation of the detainees to ensure adherence to human rights and international standards in the handling of pretrial detainees. Special category detainees such as mentally challenged persons, the elderly and lactating mothers must be accorded proper care, just as children must not be mixed with adults.

Other wins for the Guidelines include the underlining of victim participation in grant of bail/ bond to accused persons and enhanced role of bail information reports.

The Guidelines are a crucial step towards improving the bail and bond system. They trigger an array of other necessary measures. A number of administrative adjustments will need to be made by the respective agencies to achieve desired impacts. Besides harmonizing legislation governing bail and bond, proper record keeping including automation is desirable. Procedures of verification of bonds need to be simplified, just as payment and refund systems of cash bail will need to be digitized and expedited. Capacity building and improvement of conditions of pretrial detention are other measures that will have to be revisited. Public sensitization will need to be carried out and procedures on bail application clearly stipulated not only in law books but displayed in our police stations and courts.

The National Council on the Administration of Justice (NCAJ) in its recent meeting resolved to form an inclusive Committee to oversee the implementation process of the Bail and Bond Guidelines. The Committee chaired by Hon Lady Justice Lesiit draws its membership from NCAJ agencies and under the stewardship of the Hon Deputy Chief Justice Lady Justice Kalpana Rawal, is expected to periodically apprise NCAJ on the progress of implementation and mobilize its agencies towards implementation.

Electronic versions of the report of the Task Force on bail and bond and the Guidelines can be accessed athttp://www.judiciary.go.ke/portal/page/reports.

The writer, an Advocate of the High Court of Kenya, is a Researcher in the Office of the Deputy Chief Justice.

Obama to Kenyans : Strengthen rule of law, democracy, and war on corruption

"I want to thank my sister, Auma, for a wonderful introduction. I'm so glad that she could be with us here today. And it was — as she said, it was Auma who first guided me through Kenya almost 30 years ago.
To President Kenyatta, I want to thank you once again for the hospitality that you've shown to me and for our work together on this visit, and for being here today. It's a great honor.

I am proud to be the first American President to come to Kenya and, of course, I'm the first Kenyan-American to be President of the United States. That goes without saying.

But, as Auma was saying, the first time I came to Kenya, things were a little different. When I arrived at Kenyatta Airport, the airline lost my bags. (Laughter.) That doesn't happen on Air Force One. (Laughter.) They always have my luggage on Air Force One. (Laughter.) As she said, Auma picked me up in an old Volkswagen Beetle, and think the entire stay I was here it broke down four or five times. (Laughter.) We'd be on the highway, we'd have to call the juakali — he'd bring us tools. We'd be sitting there, waiting. And I slept on a cot in her apartment. Instead of eating at fancy banquets with the President, we were drinking tea and eating ***Ugali*** and ***Sukumawiki***.

So there wasn't a lot of luxury. Sometimes the lights would go out. They still do — is that what someone said? (Laughter.) But there was something more important than luxury on that first trip, and that was a sense of being recognized, being seen. I was a young man and I was just a few years out of University. I had worked as a community organizer in low-income neighborhoods in Chicago. I was about to go to law school. And when I came here, in many ways I was a Westerner, I was an American, unfamiliar with my father and his birthplace, really disconnected from half of my heritage. And at that airport, as I was trying to find my luggage, there was a woman there who worked for the airlines, and she was helping fill out the forms, and she saw my name and she looked up and she asked if I was related to my father, who she had known. And that was the first time that my name meant something. And that was recognized.
And over the course of several weeks, I'd meet my brothers and aunts and uncles. I traveled to Alego, the village where my family was from. I saw the graves of my father and my grandfather. And I learned things about their lives that I could have never learned through books. And in many ways, their lives offered snapshots of Kenya's history, but they also told us something about the future.

My father came of age as Kenyans were pursuing independence, and he was proud to be a part of that liberation generation. And next to my grandfather's papers, I found letters that he had written to 30 American universities asking for a chance to pursue his dream and get a scholarship. And ultimately, one university gave him that chance — the University in Hawaii. And he would go on to get an education and then return home.

And here, at first he found success as an economist and worked with the government. But ultimately, he found disappointment — in part because he couldn't reconcile the ideas that he had for his young country with the hard realities that had confronted him.
And I think sometimes about what these stories tell us, what the history and the past tell us about the future. They show the enormous barriers to progress that so many Kenyans faced just one or two generations ago. This is a young country. We were talking last night at dinner — the President's father was the first President. We're only a generation removed. And the daily limitations — and sometimes humiliations — of colonialism — that's recent history. The corruption and cronyism and tribalism that sometimes confront young nations — that's recent history.
But what these stories also tell us is an arch of progress — from foreign rule to independence; from isolation to education, and engagement with a wider world. It speaks of incredible progress. So we have to know the history of Kenya, just as we Americans have to know our American history. All people have to understand where they come from. But we also have to remember why these lessons are important.

We know a history so that we can learn from it. We learn our history because we understand the sacrifices that were made before, so that when we make sacrifices we understand we're doing it on behalf of future generations. There's a proverb that says, "We have not inherited this land from our forebears, we have borrowed it from our children." In other words, we

US President Barrack Obama addressing the media at State House in Nairobi

study the past so it can guide us into the future, and inspire us to do better.

And when it comes to the people of Kenya — particularly the youth — I believe there is no limit to what you can achieve. A young, ambitious Kenyan today should not have to do what my grandfather did, and serve a foreign master. You don't need to do what my father did, and leave your home in order to get a good education and access to opportunity. Because of Kenya's progress, because of your potential, you can build your future right here, right now.
Now, like any country, Kenya is far from perfect, but it has come so far in just my lifetime. After a bitter struggle, Kenyans claimed their independence just a few years after I was born. And after decades of one party-rule, Kenya embraced a multi-party system in the 1990s, just as I was beginning my own political career in the United States.

Tragically, just under a decade ago, Kenya was nearly torn apart by violence at the same time that I was running for my first campaign for President. And I remember hearing the reports of thousands of innocent people being killed or driven from their homes. And from a distance, it seemed like the Kenya that I knew — a Kenya that was able to reach beyond ethnic and tribal lines — that it might split apart across those lines of tribe and ethnicity.

But look what happened. The people of Kenya chose not to be defined by the hatreds of the past you chose a better history. The voices of ordinary people, and political leaders and civil society did not eliminate all these divisions, but you addressed the divisions and differences peacefully. And a new constitution was put in place, declaring that "every person has inherent dignity and the right to have that dignity respected and protected." A competitive election went forward — not without problems, but without the violence that so many had feared. In other words, Kenyans chose to stay together. You chose the path of Harambee.
And in part because of this political stability, Kenya's economy is also emerging — and the entrepreneurial spirit that people rely on to survive in the streets of Kibera can now be seen in new businesses across the country. From the city square to the smallest villages, MPesa is changing the way people use money. New investment is making Kenya a hub for regional trade. When I came here as a U.S. senator, I pointed out that South Korea's economy was the same as Kenya's when I was born, and then was 40 times larger than Kenya's. Think about that. It started at the same place — South Korea had gone here, and Kenya was here. But today, that gap has been cut in half just in the last decade. Which means Kenya is making progress.

And meanwhile, Kenya continues to carve out a distinct place in the community of nations: As a source of peacekeepers for places torn apart by conflict, a host for refugees driven from their homes. A leader for conservation, following the footprints of Wangari Maathai. Kenya is one of the places on this continent that truly observes freedom of the press, and their fearless journalists and courageous civil society members. And in the United States, we see the legacy of Kip Keino every time a Kenyan wins one of our marathons. And maybe the First Lady of Kenya is going to win one soon. I told the President he has to start running with his wife. We want him to stay fit. So there's much to be proud of — much progress to lift up. It's a good-news story. But we also know the progress is not complete. There are still problems that shadow ordinary Kenyans every day — challenges that can deny you your livelihood, and sometimes deny you lives.

As in America — and so many countries around the globe — economic growth has not always been broadly shared. Sometimes people at the top do very well, but ordinary people still struggle. Today, a young child in Nyanza Province is four times more likely to die than a child in Central Province — even though they are equal in dignity and the eyes of God. That's a gap that has to be closed. A girl in Rift Valley is far less likely to attend secondary school than a girl in Nairobi.

That's a gap that has to be closed. Across the country, one study shows corruption costs Kenyans 250,000 jobs every year — because


US President Barrack Obama addressing the nation at Safaricom Stadium Kasarani


US President Barrack Obama take a selfie with his sister Dr. Auma Obama


US President Barrack Obama with President Uhuru Kenyatta at State House in Nairobi

every shilling that's paid as a bribe could be put into the pocket of somebody who's actually doing an honest day's work. And despite the hard-earned political progress that I spoke of, those political gains still have to be protected. New laws and restrictions could close off the space where civil society gives individual citizens a voice and holds leaders accountable. Old tribal divisions and ethnic divisions can still be stirred up. I want to be very clear here — a politics that's based solely on tribe and ethnicity is a politics that's doomed to tear a country apart It is a failure — a failure of imagination.

Of course, here, in Kenya, we also know the specter of terrorism has touched far too many lives. And we remember the Americans and Kenyans who died side by side in the attack on our embassy in the '90s. We remember the innocent Kenyans who were taken from us at Westgate Mall. We weep for the nearly 150 people slaughtered at Garissa — including so many students who had such a bright future before them. We honor the memory of so many other innocent Kenyans whose lives have been lost in this struggle.

So Kenya is at a crossroads — a moment filled with peril, but also enormous promise. And with the rest of my time here today, I'd like to talk about how you can seize the moment, how you can make sure we leave behind a world that's better — a world that we borrowed from our children.

The pillars of success are clear: Strong democratic governance; development that provides opportunity for all people and not just some; a sense of national identity that rejects conflict for a future of peace and reconciliation.

And today, we can see that future for Kenya on the horizon. But tough choices are going to have to be made in order to arrive at that destination. In the United States, I always say that what makes America exceptional is not the fact that we're perfect, it's the fact that we struggle to improve. We're self-critical. We work to live up to our highest values and ideals, knowing that we're not always going to achieve them perfectly, but we keep on trying to perfect our union.

And what's true for America is also true for Kenya. You can't be complacent and accept the world just as it is. You have to imagine what the world might be and then push and work toward that future. Progress requires that you honestly confront the dark corners of our own past; extend rights and opportunities to more of your citizens; see the differences and diversity of this country as a strength, just as we in America try to see the diversity of our country as a strength and not a weakness. So you can choose the path to progress, but it requires making some important choices.

First and foremost, it means continuing down the path of a strong, more inclusive, more accountable and transparent democracy.

Democracy begins with a peacefully-elected government. It begins with elections. But it doesn't stop with elections. So your constitution offers a road map to governance that's more responsive to the people — through protections against unchecked power, more power in the hands of local communities. For this system to succeed, there also has to be space for citizens to exercise their rights.

And we saw the strength of Kenya's civil society in the last election, when groups collected reports of incitement so that violence could be stopped before it spun out of control. And the ability of citizens to organize and advocate for change — that's the oxygen upon which democracy depends. Democracy is sometimes messy, and for leaders, sometimes it's frustrating. Democracy means that somebody is always complaining about something. Nobody is ever happy in a democracy about their government. If you make one person happy, somebody else is unhappy. Then sometimes somebody who you made happy, later on, now they're not happy. They say, what have you done for me lately? But that's the nature of democracy. That's why it works, is because it's constantly challenging leaders to up their game and to do better.

And such civic participation and freedom is also essential for rooting out the cancer of corruption. Now, I want to be clear. Corruption is not unique to Kenya.

I mean, I want everybody to understand that there's no country that's completely free of corruption. Certainly here in the African continent there are many countries that deal with this problem.

And I want to assure you I speak about it wherever I go, not just here in Kenya. So I don't want everybody to get too sensitive. But the fact is, too often, here in Kenya — as is true in other places — corruption is tolerated because that's how things have always been done. People just think that that is sort of the normal state of affairs. And there was a time in the United States where that was true, too. My hometown of Chicago was infamous for Al Capone and the Mob and organized crime corrupting law enforcement. But what happened was that over time people got fed up, and leaders stood up and they said, we're not going to play that game anymore. And you changed a culture and you changed habits.

Here in Kenya, it's time to change habits, and decisively break that cycle. Because corruption holds back every aspect of economic and civil life. It's an anchor that weighs you down and prevents you from achieving what you could. If you need to pay a bribe and hire somebody's brother — who's not very good and doesn't come to work — in order to start a business, well, that's going to create less jobs for everybody. If electricity is going to one neighborhood because they're well-connected, and not another neighborhood, that's going to limit development of the country as a whole. (If someone in public office is taking a cut that they don't deserve, that's taking away from those who are paying their fair share.

So this is not just about changing one law — although it's important to have laws on the books that are actually being enforced. It's important that not only low-level corruption is punished, but folks at the top, if they are taking from the people, that has to be addressed as well. But it's not something that is just fixed by laws, or that any one person can fix. It requires a commitment by the entire nation — leaders and citizens — to change habits and to change culture.

Tough laws need to be on the books. And the good news is, your government is taking some important steps in the right direction. People who break the law and violate the public trust need to be prosecuted. NGOs have to be allowed to operate who shine a spotlight on what needs to change. And ordinary people have to stand up and say, enough is enough. It's time for a better future.

And as you take these steps, I promise that America will continue to be your partner in supporting investments in strong, democratic institutions.

Which way with the minimum and maximum land holding acreages bill 2015?

By Collins Harrison Odhiambo

It is worth noting that the mandate of control of public land is constitutionally vested in the National Land Commission (NLC), with the exception of incidental matters of historical injustices, with private land. Thus, the determination of minimum and maximum acreage, individual or private persons be they natural or juridical may own, is a preserve of the Chief Land Registrar.

Historically, control of land was compartmentalized into agricultural land control and land planning control. There was no specific control of the amount of acreage that a private person was entitled to or in the derivative disentitled to. This is purely a new phenomenon that has been necessitated by the phenomena of massive and threatening landlessness, which in the wider sense is also a historical injustice in nature.

In order to further control irresponsible usage and ownership of land, the Government was further empowered through Land Acquisition Act (Cap 295). This among other reasons would be done in the interest of public benefit. Public participation has thus remained a prerequisite in matters related to land ownership though in form, except for this time the law should entrench it in substance to accord to Article 1 of the Constitution of Kenya 2010, all sovereign power belongs to the people, and must be exercised in their name and interest.

This legislation is thus intent on curing the mischief occasioned by landlessness and secondly, the senseless holding of productive land without putting it to use while multitudes are deprived of the privilege of putting such big factor of production into strategic economic use.

Taxation Regime

In the United States of America, the control of acreage has been constructively done through the taxation regime. The bigger the land you own the higher the tax and the idler it is the further the tax increases. This has had the effect of discouraging hoarding the Land for speculative purposes. However, the bigger question in the current Bill is the viability of the method of regulation proposed in the legislation; this is the Part IV of the Bill. It does not propose either the minimum size or the maximum size that a person is entitled to. This is absurd since this part is the thrust of both the short and the long title of the Bill.

The foregoing notwithstanding, the Bill has made attempts in PART II at proposing a method and procedure for determining minimum and maximum acreages, only falling shy of placing an exact size that is discernable by the humble grassroots farmers. It has prescribed a litany of methodologies that make the Bill user unfriendly. Instead of placing acquisition of property subject to satisfaction of an individual's democratic tax obligation, it proposes creation of abstract mathematical formulae to be commissioned by the Cabinet Secretary as the basis of determination. This is an extreme antithesis as it is neither a constant nor a variable within the market forces of demand and supply that determine price margin for commodity value.

Actually it proposes several bureaucratic nuances that will only serve to move the matter from a simpler comprehension to a more complicated and further sophisticated process. This is done in the names of creation of Land Control Committees in PART III of the Bill. In fact it provides us with the classic example of the phrase the more things change the more they remain the same. It is typical reintroduction of the land Control Boards under the defunct provincial administration system. Is it the novel way of enhancing efficient effective and economic land management process? I guess not, for new wine in an old wine skin does not improve the broth.

It will do well to consolidate Cap 318 Laws of Kenya and Cap 302 Laws of Kenya and amalgamate it with the taxation aspects to inject marginal diminishing appetite for land for its own sake.

Land Control Bill

I propose that the title of the Bill should be reviewed and renamed Land Control Bill 2015 with inclusion of strategic and progressive aspects of Agricultural Act (Cap 318) and the Land Control Act Cap (302) which of necessity should take into consideration progressive provisions in the County Government Act as well as the Urban Areas and Cities Act.

Consequently, land whose owners may not meet the democratically imposed tax obligation may be reversed to the Land Commission upon prompt compensation. The compensation in this regard need not be adequate but sufficient enough to cover the cost of any improvement placed on the Land. With this approach the Bill will optimize the return of much misused private land to the government for strategic future planning and use.

Ultimately, it is my humble thesis that the Bill should be withdrawn and relooked in light of the progressive strategies that will encourage prudent, efficient, effective and economic use that accord with the democratic principles of the Constitution.

-Mr. Odhiambo is the Law Society of Kenya (LSK) Deputy Secretary (Parliamentary Affairs & Legislation)

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The vision of the Law Society of Kenya is to empower our members and promote good governance and the just rule of law.

OBJECTIVES

- To maintain and improve the standards of conduct and running of the legal profession in Kenya.
- To facilitate the acquisition of legal knowledge by members of the legal profession and others.
- To assist the government and the courts in matters affecting legislation and the administration of justice in Kenya.
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