The LSK Magazine | Volume 1, Issue 11 (Annual Conference Edition)| 2018

The Advocate

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+ LSK PRESIDENT ALLEN WAIYAKI GICHUHI: MY 100 DAYS IN OFFICE

+ ROLL OF HONOUR: RAUTTA ATHIAMBO

THE RULE OF LAW AND CONTESTED CONSTITUTIONALISM IN POST-2010 KENYA

Promises, Progress, Pitfalls and Prospects

CONFERENCE SUB-THEME

In-House Practice: Practice Opportunities, Challenges and Successes

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"If a case is investigated properly and sufficient evidence is presented, Kenyans will be justified in expecting a conviction,"

Chief Justice Hon. David Kenani Maraga during the swearing-in of Justice William Ouko as the President of the Court of Appeal at the Supreme Court.

"Although Kenyans file more cases than what we're able to deal with every day, if we put our feet down – because we have the power to do so – and require Counsel to proceed with their cases, we would to a very great extent reduce the number of what I consider myself to be totally unnecessary adjournments,"

Deputy Chief Justice Hon. Philomena Mwilu during the opening session of the two-day National Alternative Dispute Resolution Stakeholders' Forum jointly convened by the Alternative Dispute Resolution (ADR) Taskforce and Nairobi Centre for International Arbitration (NCIA).

"KNCHR reminds the State that reparations has not received considerable political good-will even though some politicians, family members or even communities have suffered gross human rights violations,"

Kenya National Commission on Human Rights (KNHCR) Chairperson Kagwiria Mbogori Speaking at an event to mark the International Day for the Right to Truth concerning gross human rights violations and dignity of victims.

"Nothing could be further from the truth. My strength comes from experience and conviction that justice must be for all,"

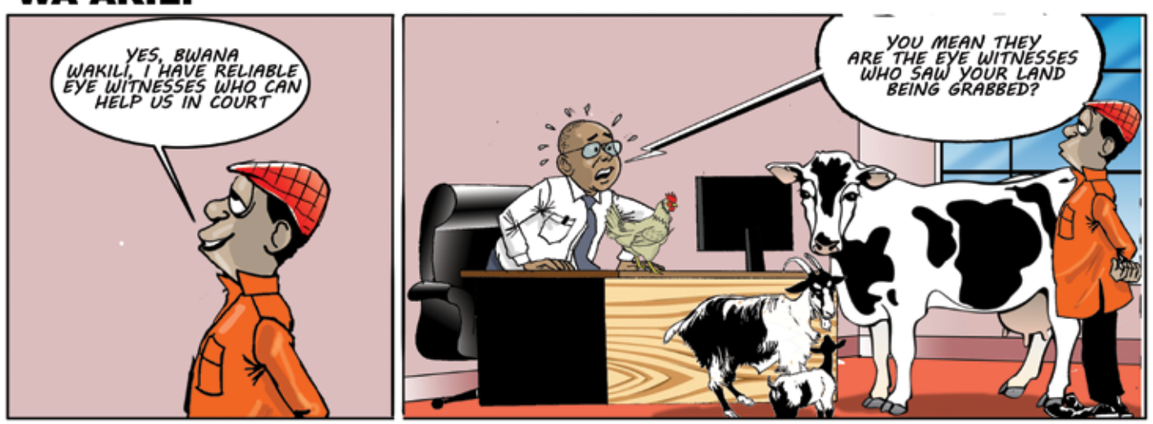
Attorney General Paul Kihara Kariuki when he took Oath of Office as the seventh AG of the Republic of Kenya at State House in Nairobi

"This has been a great fear for Fida Kenya that the country is being plunged back to the olden days when women were still treated unfairly as regards matrimonial property. Such obiter dictums cannot and should not be allowed to form precedents in Kenya,"

Fida-Kenya Chairperson Ms. Josephine Mong'are on a commenting on a recent Ruling on Division of Matrimonial Property

WA AKILI

By Stano



Message from the Executive Editor

The Constitution has been lauded globally as one of the most progressive Constitutions as it is argued to be people centered, incorporates a comprehensive Bill of Rights - with special emphasis on economic, social and cultural rights.

The Council of the Law Society of Kenya (LSK) is delighted to publish the 2018 Annual Conference Edition (Issue 11) of The Advocate Magazine.

We appreciate members who responded to our call for articles and submitted the same for consideration for publication.

This year, majority of the published articles in this edition are in line with the main conference theme: The Rule of Law and Contested Constitutionalism in Post – 2010 Kenya: Promises, Progress, Pitfalls and Prospects and sub-theme: "In-House Practice: Practice Opportunities, Challenges and Successes.

The Council of the Law Society of Kenya settled on the main theme in an effort to create discourse on the post 2010 constitutional developments.

In the run up to the enactment of the supreme law, over 67 percent of Kenyan voters approved the current Constitution in a Referendum on 4th August 2010.

Since the promulgation of the Constitution, several legislations have been enacted on judicial reform, electoral reform, internal security reform, public service reforms, promotion and protection of human rights, public finance and devolution towards operationalizing the Constitution.

The Constitution has been lauded globally as one of the most progressive Constitutions as it is argued to be people centered, incorporates a comprehensive Bill of Rights - with special emphasis on economic, social and cultural rights.

However, it is also debatable that there have been undertones on unfulfilled promises leading to recent calls for amendments to some Articles of the supreme law.

It is our hope that the Conference will guarantee fruitful discourse and good environment to network as participants unwind in Kwale County.

This year, we have included in the Programme, the In-house Lawyers Breakfast, Young Lawyers Dinner and the LSK Branch Golf Match play Tournament. We have also maintained the Women in Law Breakfast Forum due to demand by members after its introduction last year.

We thank our sponsors for their continued support and welcome participants to the 2018 LSK Annual Conference.

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PRESIDENT'S DISPATCH

BY ALLEN WAIYAKI GICHUHI

LSK President: My hundred days at the helm

My dear colleagues.

When the current Council of the Law Society of Kenya took oath of office on Saturday 24th March 2018, I set a target of 100 days to fulfil our various electoral promises made to members. I must confess that this dispatch had to be condensed from 30 pages to the current form.

The Council set out to fulfil the spirit and intent of Section 4 of the LSK Act 2014. During the first branch visit in Machakos on 8th June 2018, when I read the achievements of what Council had done since assuming office, a member was so impressed that she quipped that it felt that we had been in office for one year! My gratitude goes out to my Council members and colleagues in the profession who made the 100 days dream a reality.

The priority areas of the Council are:

- Rule of Law and Law Reform.
- Practice and Welfare Matters.
- Improving the Professional Standards in the Legal Profession.
- Unity of the Membership.
- Let me now summarize some of our achievements that form the tip of the iceberg in the transformative journey that we began.

Corporate Governance:

The Council held an induction retreat from the 17th-21stApril 2018 whereby Council members and LSK Secretariat top management team were trained on good corporate governance. The Council has also held separate consultative meetings with the Advocates Benevolent Association (ABA) Board and Branch Chairpersons to consider the LSK (General) Regulations before implementation. We agreed that the Council and branch chairs would engage regularly and meet quarterly to review the progress made on practice and welfare matters.

Reconstitution of Committees:

The Council reconstituted its Committees towards ensuring efficiency. The Committees commenced deliberations on different issues affecting the Society, its general membership and the public. The Council has further established and constituted new Committees on Audit, Tax, Budget and Finance, Development and Investment.

Let me emphasis a little about the Development and Investment Committee which has been established to provide expert impartial advice and guidance to the Council on significant development and investment proposals and other development related matters as set out in the Strategic Plan 2018-2022. The objectives are inter alia to provide the Council with high level independent expert advice and expertise on financing, development and sustainability of the LSK properties and to evaluate the viable development options for both Gitanga Road and South C properties. It should also undertake site visits and provide professional and technical advice to the Council in relation to matters relating to properties development, financing and sustainability.

Committee Successes

The Committees have so far recorded successes, which we hope will continue during the term of the Council. For instance, the Committee on Continuing Professional Development (CCPD) has fully adopted biometric registration of members at CPD seminars countrywide. The Editorial Committee is for the first time working on coming up with two themed journals on Medico- Legal and Elections issues. The Committee in partnership with the CPD Committee plans to undertake a CPD training on research and writing. The Committee is in the process of having the LSK Journal accredited by the Ministry of Education and individual universities.

The Law Reform, Devolution and Constitutional Implementation Committee underwent an advocacy competency training in order to build capacity in advocacy. The Council in conjunction with the Committee established a framework for engagement in matters of Law Reform with the Kenya Law Reform Commission and Legislation with the Senate.

The Alternative Dispute Resolution Committee is in the process of developing policy guidelines for use by the Society on ADR. It is also finalizing its Mock Mediation Sensitization Project.

The In-House Counsel Committee organized and held its first In-house Counsel Caucus in Nairobi. It has also organized an In-house Lawyers Breakfast at the 2018 LSK Annual Conference in Kwale County. The Committee is also in the process of beginning discussions on implementation of the Harmonization of Public Service Legal-Subsector Remuneration Circular that was issued on 11th June, 2010 by the then Permanent Secretary in the Ministry of Public Service. The discussions will revolve around implementation of that circular on payment of Non-Practicing Allowance for In-house Counsel and will involve the Salaries and Remuneration Commission, Attorney General and other stakeholders. The Committee is also working on Practice Guidelines for In-house and corporate counsel to cushion them from unethical practice. The Guidelines will also accord them protection within the law to offer independent legal advice to their employers.

The ICT/IP Committee had engaged with the Senate sub-committee in contribution to the Data Protection Bill. The Committee has recommended that LSK should seek a permanent seat in the Taskforce to ensure that interests of its member are addressed.

The Committee has formed four sub-committees among which is the Legislative Drafting Sub-Committee to engage Parliament on various ICT/IP related Bills. The Committee is also in the process of drafting a handbook on Intellectual Property Rights and Legislation. It is currently working on the ICT/IP newsletter to be circulated to members quarterly towards education on ICT/IP legislation and possible opportunities.

The Young Lawyers Committee has also made strides towards improving service delivery to the membership. The Committee has obtained consent from the Chief Registrar of the Judiciary to set up booths in court stations across the country to sensitize members and promote uptake of the recently unveiled Young Lawyers Medical Cover. The Committee has entered into a Memorandum of Understanding (MoU) with the Mediation Training Institute (MTI) to offer 40-hour mediation trainings to young advocates at a subsidized rate of Kshs. 40, 000. The Committee and some young lawyers were invited for the Senior Counsel Luncheon at Serena Hotel in Nairobi on 27th June 2018. They presented a Mentorship Manual to the Senior Counsel Bar for perusal and feedback in preparation for its launch during the LSK Annual Conference.

Former LSK President Mr. Isaac E.N. Okero hands over to LSK President Mr. Allen Waiyaki Gichuhi

LSK President Mr. Allen Waiyaki Gichuhi taking Oath at the AGN on Saturday 24th March 2018

The public interest litigation committee has also been involved in strategic public interest litigation cases.

The first quarterly report of all committees' work will be released in August 2018.

Practice, Ethics & Standards

The Practice Standards & Ethics Committee is in the process of reviewing the rules governing the use of social media by advocates in Kenya. The committee is preparing a proposal on the same to forward to Council for approval and further directions.

The Committee is also drafting a report on what it deems as proper Guidelines on Robing for presentation to the Council. It is also in the process of formulating comprehensive guidelines on Anti money laundering and drafting Rules and Regulations on the establishment of an Inspectorate Unit.

Seperately, the Gender Committee has made strides over the past 100 days. It drafted and forwarded to the National Assembly a Memorandum on the two-thirds Gender Rule. The Committee has deliberated on several other issues inter alia addressing sexual harassment of students, pupils and employees in law firms and having a pro bono data base for representation of gender issues only. The Committee has also assisted in the planning of the Women in Law Breakfast Forum to be held during the 2018 Annual Conference.

Partnerships

The Society has in the first quarter renewed vital partnerships with the Senate, Office of the Attorney General (AGs), Kenya Law Reform Commission, Business Registration Bureau and Amnesty International - Kenya.

These milestones from the partnership have been achieved through direct engagement by the Council, Committees of the Council or directly through the technical officers from the Secretariat. Further, the Committee on Law Reform and that of Land and Conveyancing are in the process of developing guidelines/ registration of law practices under the LLP - a factor that makes partnership with the office of the AG invaluable.

The other partnerships worth mentioning have been with Business Advocates Fund, GIZ, Ford Foundation and the UNDP. The engagement with these donors has attracted support that will run into excess of KES 35 million. This will go towards supporting projects and establishing a robust pro bono and legal aid project including capacity building. This strategy enhances diversification of funding streams and cements financial stability of the programs.

The Society has also continued with its traditional role of monitoring and reviewing Bills as they fall due both in the National Assembly and the Senate, remarkable among the reviews have been those of the Statute Law (Miscellaneous) Amendment Bill 2018, which reviewed 21 laws as well as the County Attorney's Bill 2018, respectively before the National Assembly and the Senate among other Bills in the first quarter. During this quarter the Society has also seen the enactment of the Law Society Condition of Sales 2015 as part of the new Regulations through a Legal Notice by the Cabinet Secretary in charge of Land. The Regulations have now come with new forms that enhance conveyance under the new land laws.

AGM Resolutions

The Ordinary General Meeting held on 24th March 2018 passed a Resolution for the Society to refund all advocates/persons who had made payments for the International Arbitration Centre.

Consequently, the LSK Council in its Meeting held on 19th April 2018 authorized the mechanism and procedure to be followed for the refund.

Members who wish to utilize the IAC funds for other purposes other than cash refund are encouraged to do so.

So far, we have received more than 500 applications for refund and over 450 members have received their refunds. The Secretariat is working on the requests as they are received and refunds will be done within 30 days after receipt as communicated to the members.

The Council has also petitioned Parliament to consider, review or repeal Article 171(2) (f) of the Constitution and Section 18 of the LSK ACT 2014 in line with Resolutions passed at the Ordinary General Meeting.

Back fees waiver

To encourage and assist members on matters relating to Practice; in its Meeting held on 19th April 2018, the Council resolved to grant waiver of payment of back fees to Advocates applying for Practicing Certificates under Section 25(1) (a) of the Advocates Act. The grant of waiver has seen an increase in the number of Advocates taking out Practising Certificates in the current year.

Procurement

Separately, the Council wrote a complaint letter to the Public Procurement Oversight Authority (PPOA) on pre-qualification of legal service for Kenya Power & Lighting Company. The letter was on KPLCs prequalification tender no. KP1/9A.2/PREQ/66/17- 18 for legal services that violated the law on the 30% procurement rule in favour of the youth, women and persons with disability.

LSK Representatives

The Council has enhanced transparency in appointment of LSK representatives to various boards and statutory bodies. The appointments have been through competitive processes where the positions are advertised and the position granted to the most suitable person after consideration by Council.

Bar-Bench Relationship

The Council held a Courtesy call on the Chief Justice on the 14th May 2018 and discussed the following issues;

- Having a fixed timetable when the Bar-Bench Committee in every station will sit on regular basis.
- Having a rapid response team within the Bar- Bench Committee to intervene in urgent matters affecting the administration of justice.
- Creating a forum for joint training in topical legal matters to impart useful skills to both the Bar and the Bench which will address topical concerns in the specific court station or division.
- Create a cordial atmosphere where the Bar and Bench can bond.
- Addressing various topical practice issues that impeded access to justice and delays in determining pending cases.

I was part of a team that met with the judges of the Supreme when we submitted the LSK's suggestions on the draft Supreme Court Practice Directions in April 2018.

Practicing Certificat

The Council in its joint meeting with all the Branch Chairpersons held on 20th April 2018 agreed and resolved that the LSK Secretariat shall henceforth dispatch the Practicing Certificates and Identification Cards through the various Branches with the exception of Practicing Certificates for Advocates practicing in Nairobi and Thika who shall continue to collect their PC's and ID's from the Secretariat.

So far, several other practicing certificates are being processed and members will be notified through direct email messages once the certificates are ready for collection, any member whose name does not appear in the list and would like to confirm the status of their practicing certificate is requested to get in touch with the LSK Secretariat.

PRESIDENT'S DISPATCH

BY ALLEN WAIYAKI GICHUHI

The LSK Council posing for a photo with Chief Justice Hon David Maraga after paying him a courtesy call.

To alleviate the suffering of members occasioned by the delays in the processing of practicing certificates, amendments to the Advocate Act have been drafted allowing the CEO of the LSK to be issuing practicing certificates. This is the practice in New Zealand, England and Wales, Canada, Rwanda and many other jurisdictions. This will reduce the delays from several months to hopefully a couple of days.

Branches Support

The Council has been working towards strengthening and supporting the Branches. We established a Council Devolution Committee comprising of the upcountry Council members and two other Council members Chaired by Eric Nyongesa. The Committee has in collaboration with the Branch Chairpersons developed compliance requirements for Branches in order to facilitate the release of the devolution fund. Branches that have complied with set requirements have received part of the devolution fund in addition to the one million shillings given to Branches as grant every year. More than KES 25,000,000 will be released to the Branches through the devolution fund.

Public Interest Matters and Practice Matters

The Council has undertaken the following Public Interest Matters

(a) Constitutional Petition No. 144 of 2018 Law Society of Kenya - Vs - The Attorney General, Principal Secretary Ministry of Lands, Cabinet Secretary Min. of Lands & Another. The matter is challenging the implementation of the online conveyancing transactions introduced by the Ministry of Lands.

Upon the Gazettement of the Land Registration (General) Regulations, 2017, the Council held discussions with representatives of the Ministry of Lands and agreed that a consent be filed in Court on 22nd May 2018. Subsequently, the Ministry is in the process of setting up an all-inclusive taskforce bringing representatives of all stakeholders affected by the electronic registration and conveyancing system.

The taskforce shall be mandated to come up with the guidelines for the implementation of the electronic registration and conveyancing system in compliance with Regulation 90 of the Land Registration (General) Regulations, 2017.

(b) Judicial Review Civil Application No. 159 of 2018 LSK VS NHIF

The LSK filed the matter seeking Judicial Review Orders of Certiorari to quash a directive issued by the National Health Insurance Fund (NHIF) Board, through its Chief Executive Officer on 21st February 2018 that it shall no longer recognize and accept Affidavits commissioned by qualified Advocates showing proof of marriage. A stay was granted and the matter is pending determination.

(c) Constitutional Petition LSK Vs Attorney General

The matter involves Executive Order No. 1 of 2018 signed by the President of the Republic of Kenya in June 2018 which effectively subjected independent constitutional bodies, envisaged under Chapter 15 of the Constitution, to the control and subordination of Government Departments. A conservatory order was granted.

(d) Constitutional Petition 223 of 2018 LSK Vs Attorney General

The President of the Republic of Kenya assented into law the Computer Misuse and Cybercrimes Act 2018. The LSK filed a petition challenging various offensive parts of the Act. The petition will be consolidated with Constitutional Petition 206 of 2018 Bloggers Association of Kenya (BAKE) Versus AG and 3 others that resulted in orders issued suspending various Sections of the Act.

(e) Civil Appeal No. 133 of 2011 Attorney General v LSK It was only in or about May 2018 that we became aware of the devasting impact of the Court of Appeal decision delivered in November 2017 as our advocate informed us that he had not received any notice of the delivery of the judgment as at May 2018.

The High Court in Petition 185 of 2008 declared a number of sections of the Act unconstitutional and particularly, the conferment of unlimited judicial powers on the Director. This removed the claims from the Director to the courts.

The Civil Appeal Court overturned the High Court decision and held that courts have no jurisdiction to handle workmen's compensation is governed by the Work Injuries Benefit Act of 2008.

We have since moved to the Supreme Court to seek leave to file an appeal out of time as the decision has adversely affected practice. At the same time, we are considering amendments to the Act to repeal the offending sections.

Law Reform

In January 2018, I petitioned parliament to put all credit providers, including mobile phone-based loans such as M-Shwari, under the in-duplum rule – a move that could sharply reduce interest rates payable by borrowers. I informed the Finance Committee in July that the LSK would be happy to assist in the petition which will protect the ordinary citizen from usurious interest rates.

In June, we met with the Chairman of the Kenya Law Reform Commission and his team. The meeting agreed that the LSK would send various proposals regarding the review of various statutes. The proposals would be considered for inclusion in the next Statute Miscellaneous Amendment Bill. Members are encouraged to forward on a periodic basis any proposals for law reform that the Council will take up.

Business Registration Services

The Business Registration Service (BRS) is currently experiencing major challenges which has affected and continues to affect practice at the Company Registry and ancillary matters. The Law Society of Kenya has through a letter dated 18/5/2018 to the Acting Director, General Business Registration Service raised several issues and recommended that a task force be formed to address the various concerns.

Pro bono legal services

The Council is currently in the process of setting up monitoring structures of Pro Bono service providers; establishing a Pro Bono database enlisting Advocates interested in offering voluntary legal services to assist indigent members of the public and in strategic public interest matters.

Advocates/Office Manual

Towards promotion of excellence in practice, client care and the achievement of full compliance with rules of good practice in the profession, the Council has set up a Committee to assist in the development of an Advocates/Office Manual expected to be launched in August 2018. The Committee is chaired by Richard Harney, Advocate and the manual will be launched at the Annual Conference in 2018. This has been my dream for the last 2 years to have a manual improve the standards of practice.

Review of Legislations

Through the Law Reform Committee, the Council has been involved in the process of development and review of various legislations which include:

- Statute Law (Miscellaneous Amendments) Bill No. 12 of 2018- various proposals to amend the Advocates Act
- Office of the County Attorney Bill, 2018
- Constitution of Kenya (Amendment) Bill, 2018
- Income Tax Bill
- Health Law Amendment Bill

In order to strengthen the working relationship between the LSK and Parliament, the Council is engaging Parliament with a view to establishing a Caucus of the LSK members of Parliament.

Collaboration with Stakeholders

The Council has engaged with various stakeholders like the International Development Law Organization (IDLO). The Organization hosted a section of the Council and discussed on possibilities of establishing further areas of synergy and partnership relating to enhancing application of Rule of Law, human rights, good governance and access to justice and legal aid.

I met the Cabinet Secretary of Lands Ms. Farida Karoney in connection with the online processing of land transactions. The meeting agreed that:

- The Ministry issues a Public Notice clarifying the online process and areas of concern by the LSK. The draft notice was approved by the LSK.
- A joint task force to be formed between the Ministry, National Land Commission, LSK and other relevant stakeholders to work on guidelines on online registration and transfer process.
- Monthly meeting between the Ministry and LSK Conveyancing Committee to be revived.
-

Reform in the Criminal Justice Sector

The Council paid a courtesy call on the Director of Public Prosecution (DPP) Mr. Noordin Haji and raised several concerns with a view of assisting the Government and the courts in matters relating to legislation, administration of justice and the practice of law. Of import is that a joint task force will be formed to streamline all standard form charge sheets. The intent is to eradicate duplex charge sheets that resulted in imposition of penalties that were illegal and unconstitutional. This will be a major milestone for the citizens.

HELB Loans

The LSK and Kenya School of Law (KSL) mutually petitioned the Higher Education Loans Board (HELB) through a memorandum on the need for the Government through HELB to support needy students undertaking Advocates Training Program at the Kenya School of Law in line with Government's obligation in actualizing the right to education under Article 43(1) (f).

Meeting the AG

The Council paid a Courtesy call on the Attorney General on the 11th June 2018, presented a memorandum and discussed the following issues;

- The AG proposed the establishment of a team between the Council and his office to be meeting monthly to implement issues raised in addition to any other pertinent issue that may arise.
- The collaboration shall see the implementation of collective mandate to improve the standards of practice and assist the government as per section 4 of the LSK Act.

Courtesy Calls

The Council paid a courtesy call to the Senate Standing Committee on Justice, Legal Affairs and Human Rights at the Parliament Building in Nairobi. The meeting discussed several issues including collaboration/partnership with the Senate Standing Committee on Justice Legal Affairs and Human Rights. The collaboration/partnership would seek to ensure Bills are passed, offer technical expertise needed in legislative drafting at county level, partner and influence policies for counties. The Senate proposed that LSK to have a desk person who will assist in tracking Bills.

The Council sought ways of collaboration with the Ethics and Anti- Corruption Commission (EACC) during a courtesy call. The meeting at the EACC headquarters in Nairobi looked into ways of coming up with areas of collaboration and strategic engagement to create synergies including ways of curbing runaway corruption.

The Council paid a courtesy call to then Cabinet Secretary - East African Community and Regional Development Hon. Peter Munya. During the meeting, it was agreed to work towards strengthening cross-border legal practice specifically through the on-going legal sector reforms.

Disciplinary Tribunal

The newly elected Disciplinary Tribunal Committee (DTC) was inducted in a Seminar at the Intercontinental Hotel, Nairobi. The general expectation from members was the need to revive and harmonize Disciplinary Tribunal (DT) processes and procedures, learn more about interlink between the Judiciary and the DT, appreciate the reasons behind the decisions made by the Tribunal and how best to fast-track complaints towards timely and just decisions.

In House Counsel Caucus

The Council through the In-House Counsel Committee held the inaugural In - House Counsel Caucus at Safaricom's Michael Joseph Centre in Nairobi. The forum was under the theme Governance as the Epitome of Successful Organizations - the Role of the 21st Century In - House Counsel.

Senior Counsel Luncheon

The Council in its commitment to strengthening the legal profession through inclusivity held a Senior Counsel & LSK Council Luncheon at Serena Hotel in Nairobi. The aim of the luncheon was to explore the role of the Senior Counsel in reinvigorating the legal profession and playing a more active role in the Society. This was the first time that such a meeting took place since the establishment of the Senior Bar in 2012.

Branch Visits

The Council embarked on Branch visits to interact with members. We have so far visited three Branches: South Eastern, Mt. Kenya and Coast. We and still have four more branches to go which are: North Rift, Rift Valley, West Kenya, South West Kenya and Nairobi.

Blockchain Technology

The Council - on advice of the ICT/IP Committee - wrote to the Chairman of the Taskforce for the Exploration and Analysis of Upcoming Digital Technologies for Transformation of Kenya's Economy (Taskforce on Blockchain) requesting for a permanent seat at the Taskforce to guide on legal and legislative matters. The outcome of the Blockchain Taskforce will impact various sectors and will affect members of the Society in various ways.

The Council will:

- Collect views from its membership on legislative issues concerning the adoption of blockchain technology
- Submit a memorandum highlighting the legislative issues identified
- Capacity Build its members on blockchain technology and Artificial Intelligence.

Planned Activities

- Going forward, the Council has lined up a series of activities which include:
- Review of the LSK Act.
- Develop Admiralty Rules and Procedures to establish a clear framework for admiralty practice.
- Council also plans to develop the LSK Model Standards of Practice for Alternative Dispute Resolution.
- Establishment of Advocates Assistance Program in collaboration with the Advocates Benevolent Association (ABA).
- Set up a pension scheme and medical scheme for all advocates.
- Enact anti-money laundering guidelines.
- Establish a directory for advocates involved in ADR and promote the taking up of ADR services through the LSK which in turn increases work for the members.
- Create practice directions/guidelines on public interest litigation.
- Amend the Court of Appeal Act and Rules and provide for, inter alia, the grant of injunctive relief by a single judge and transforming interlocutory applications into interlocutory appeals for expeditious determination.

The Future

I am now delighted to welcome members to the 2018 Annual Conference where we shall launch the office manual and mentorship program for young lawyers.

The Law Society has reclaimed its place at the pedestal of professional excellence and become steward of innovative transformation that will improve service delivery to its clients. Let us all arise from the ashes of complacency and lethargy and contribute to improving the standards of practice and legal transformation. The foundations of an enduring legacy will be laid for posterity when future generations will acknowledge the sacrifices made by a united membership that focused on the core values of our practice and welfare matters.

Allen Waiyaki Gichuhi C. Arb
President, LSK

LSK President Mr. Allen Waiyaki Gichuhi during a courtesy call on the Chief Justice Hon. David Maraga

Roll of Honour

The Law Society of Kenya (LSK) has this year inducted Rautta Athiambo, Advocate into its prestigious Roll of Honour.

The Convenor/Chairman of the LSK Committee on Continuing Professional Development (CPD) was inducted into the Roll during a colourful LSK Annual Dinner and Dance on 24th March, 2018 at the Hotel Intercontinental in Nairobi.

Several lawyers, Magistrates and Judges including the immediate former Chief Justice Hon. Dr Willy Mutunga and Supreme Court Judge Hon. Mohammed Ibrahim were among dignitaries who graced the grandiose occasion.

For starters, Mr. Ambrose Rachier, Advocate who read the citation explained that the criteria for nomination for induction into the Law Society of Kenya Roll of Honour include the exemplary roles played by or contributions made to the legal profession in particular by a nominee and the overall socio-economic and political advancement to the country in general.

Further, the consistency of the conduct of the candidate, especially during times of great conflict of interest and temptations is a matter of particular importance in the determination of the choice of the nominee.

"This year's nominee was subjected to a rigorous examination against the background of these parameters," Mr. Rachier said.

He described Mr. Athiambo as a seasoned lawyer, teacher, civil servant, human rights advocate, ethicist, disciplinarian, writer, publisher, husband, father and a good citizen.

"In view of his accomplishments in these roles, we could safely say that he (Mr. Athiambo) has led a total life," Mr. Rachier said.

Mr. Rautta Athiambo, Advocate receiving his award from the immediate former Chief Justice Dr. Willy Mutunga, SC as LSK Secretary CEO/Ms. Mercy Wambua, Advocate looks on at the LSK Annual Dinner & Dance at Hilton Hotel in Nairobi

PROFESSIONAL LIFE

Mr, Athiambo started his civil service career as a State Counsel (Trainee) in the Office of the Attorney General in May 1974 and was deployed in the then Crime Division (now a full Directorate of Public Prosecutions), where he handled criminal law prosecutions of all types. A year later, he moved to the Registrar General's Department to become head of the Companies Registry section, where he continued with prosecutions of defaulting companies and their officials and also undertook registration of new companies, business names and chattels transfer instruments. While in this section he also handled the then nascent Copyright desk, where he handled and advised the Government on what was the classified as Copyright & Neighbouring Rights. In this Department, Mr. Athiambo rose relatively fast from State Counsel to Assistant Registrar General and to Senior Assistant Registrar General by 1981, when he was transferred to head the Coast Provincial Office.

As head and manager of the Registrar General's Department in Coast Province, Mr. Athiambo was in charge of, performed and advised on all aspects of the functions of the Department, including Official Receivership (bankruptcies and company liquidations), Public Trustee (administration of estates of deceased persons), Registration of Births and Deaths, Registration of Marriages (solemnization of marriages), among many other duties related to that Department. Mr. Rachier disclosed that it is Mr. Athiambo who, in the late 1970s, "developed and institutionalized the file registry system in the

Companies Registry that is still in use to date, such as the now famous "CR 12".".In 1983, Mr. Athiambo took an assignment at the Lake Basin Authority on secondment, which was principally to establish a Legal Department, starting as Secretary to the Board of the Authority and Personal Assistant to the Managing Director and rising to combine the enhanced role of Authority Secretary with that of Deputy Managing Director, Finance and Administration. He returned to the Office of the Attorney General in 1993 where he served until 2002 as Chief State Counsel/Secretary to the newly established Advocates Complaints Commission, a department under the aegis of the Attorney General, whose function was and is to enquire into complaints against advocates, as well as law firms and members and employees thereof. At the Commission, he was the chief officer directly in charge of supervision of Advocates' Conduct and Services as well as Prosecution of Errant Advocates. During the time, it fell on Mr. Athiambo to develop the Commission staff structures and organogram, from three commissioners and a handful of subordinate staff to more than 30 with 20 or so State Counsel. Following an awareness campaign he instituted among public consumers of advocates services, he oversaw increase of complaints from less than 200 to over 3,000 per annum by the year 2002. By the time he left, the Commission had acquired immense powers to effectively carry out its oversight function and the then Disciplinary Committee had more teeth in the regulation of practitioners.

CONTRIBUTION TO LAW SOCIETY

According to the citation read by Mr. Rachier, while at AG's offices, Mr. Athiambo inter alia supervised Advocates' Conduct and Services and prosecuted errant advocates.

"Mr. Athiambo introduced stakeholder workshops across the country under the theme of Honesty and Excellence in the Provision of Legal Services, that included LSK, Police, Judiciary, Prisons Departments and other consumers of services offered by advocates," Mr. Rachier said.

He recalled how Mr. Athiambo introduced a popular quarterly bulletin by the Department through which members of the public and other stakeholders were regularly informed of developments relating complaints against advocates.

Mr. Athiambo was an active member of the LSK Committee dealing with ethics between 2003 and 2004. He was also a founder member of the Child Law Practitioners Committee.

DEVELOPMENT OF LEGAL EDUCATION

Mr. Athiambo has played several roles towards the development of legal education in the country. He has lectured in several institutions from 1975 to date which include, the Kenya School of Law, Kenya Polytechnic and Kenya Institute of Management. Over the same period, Mr. Athiambo also served as an examiner of the Council of Legal Education and has served as the Convenor/Chairman of the LSK Committee on Continuing Professional Development (CCPD) from 2004 to date.

Mr. Athiambo has published several legal papers under his name which include

Court Records: The Unfinished Business in the Radical Surgery; A Toothless Bulldog: Restore the

Advocate-Client Privilege Put on Trial and Ringera Report: Anatomy of Corruption or a Chronicle of Rumours?

His other notable publications include Public Affairs and Protection of Human Rights: What is the Advocate's Role?; More Questions than Answers in Goldenberg Ejection of Counsel? ;

Unqualified Advocate: Punishing the Victim, and Uncertificated: Did Your Lawyer Carry the Ticket to the Hall of Justice?

LSK Roll of Honour Inductees

Year	Inductee
2002	Samuel Waruhiu
2003	William Deverell
2004	Satish Gautama
2005	Pheroze Nowrojee,SC
2006	Samuel Kivuitu
2007	Lee G. Muthoga,SC
2008	Nzamba Kitonga,SC
2009	Prof. Githu Muigai,SC
2010	Ahmednasir Abdullahi, SC
2011	Hon. Kenneth Marende
2012	Kanaiyalal M. Pandya
2013	Judy Wanjeri Thongori
2014	John Mugalasinga Khaminwa
2015	Hon. Martha W. Karua
2016	Hon. Gitobu Imanyara
2017	Mr. George Odinga Oraro, SC
2018	Mr. Rautta Athiambo

Mr. Athiambo has also delivered numerous speeches and equally conducted numerous legal trainings for lawyers towards their professional development countrywide.

EDUCATION

Mr. Athiambo attended God Bondo Primary School between 1956-1959 and Ligisa Intermediate School between 1960 – 1963. He passed his Kenya African Primary Education (KAPE) so well that the then County Council of South Nyanza undertook to pay his secondary school fees at Mirogi Secondary School between 1964 and 1967, where he served as a school library prefect. When he sat his School certificate examinations, he obtained one of the best Cambridge School Certificate results in the country in 1967.

He later joined Kisii High School between 1968 and 1969 where he started exhibiting talents of an editor and an astute debater, a scout and a drama enthusiast.

His academic acumen was not in doubt when he obtained four principal subjects in the Advanced Level Education Examination in 1969.

His academic excellence secured his admission to study law at the prestigious University of Dar-es-Salaam (1970-1973) where he graduated with an Upper Second Class Honours Bachelor of Laws Degree in 1973. Interestingly, before he secured admissions to study law, Mr. Athiambo was enlisted as a trainee pilot with Kenya Air force.

"In Dar-es-Salaam", Mr. Rachier continued, "apart from being the Editor of the University Newspaper, the University Echo, he was an accomplished boxer and boxing coach who mentored many including the Speaker"(Rachier) in this martial sport. He indeed represented the University in boxing competition at the Universities Games held in Kampala Uganda in 1970.

In 1974, after graduating from the University of Dar-es-Salam, he joined the Kenya School of Law where he not only won the Most Progressive Student Prize for the year 1974 but also obtained a Certificate of Legal Education leading to his admission into the Roll of Advocates the same year.

ACCEPTANCE SPEECH

On his part, Mr. Athiambo appreciated the Law Society of Kenya for inducting him into the prestigious Roll of Honour.

"I want to assure you all that it is truly awesome to be appreciated, recognized and eventually to be honoured by one's professional colleagues. When I received communication about this award, I was both overwhelmed and flustered, at the same time. All I could mumble was: "This is heavy," Mr. Athiambo said as his listeners clapped continuously.

He continued," I have never done anything for recognition or praise. So, I felt a wee bit confused and even wondered if I deserved the honour. On top of this, I wondered whether a lifelong award does not suggest that one has lived long enough! I have since recovered from all those feelings and doubts,"

He recalled his experience working with lawyers towards their professional development over the past 15 years.

"I have worked with a core of legal professionals that have become virtual family to me. The members of the Committee originally known as the Committee on Continuous Legal Education (CCLE) and now Committee on Continuing Professional Development (CCPD), and which I have had the privilege to chair, is the body you have entrusted with matters of continuing professional development among you as LSK members. It is a collection of the most industrious, brilliant and exceptionally focussed members of this noble profession in Kenya. I have learned a lot from them," Mr Athiambo said.

Mr. Athiambo who was given a standing ovation after his acceptance speech appreciated the CCPD, Council of LSK led by its President, Mr. Isaac Okero, LSK Secretariat and Secretary/CEO Ms. Mercy K. Wambua, his family and wife, Dorothy, for support, without which this wonderful award would not have been possible.

"I appreciate all those who have unconditionally supported me to see the LSK CPD programme grow over the years until our introduction of biometric registration in August 2017," Mr. Athiambo said.

He assured that the CCPD will continue striving to ensure members get the best towards their professional development.

Harold Ayodo is the Managing Editor of the Advocate and LSK Programme Officer (Continuing Professional Development)

The Rule of Law and contested constitutionalism in post – 2010 Kenya

BY ATIM JOAN APUUN

Constitutionalism is a complex of ideas, attitudes and patterns of behavior elaborating the principle that the authority of Government derives from and is limited by a body of fundamental law. Accordingly, Constitutionalism is the idea that Government can, and should, be legally limited in its powers, and that its authority depends on the observance of those limitations which limits is placed upon three arms of Government that is; the Executive, Legislature and Judiciary. Therefore, the touchstone of Constitutionalism is the concept of limited Government under a higher law.

The Rule of Law on the other hand, is a leading principle of Constitutionalism and is described by Dicey in his book, Law of the Constitution, as the principle that the State and its people in spite of their social classes are subject to laid out regulations and laws hence the notion equality before the law. Dicey established three elements of the Rule of Law to include: Supremacy of the law, equality before the law and protection of rights.

Article 10(2) (d) of the Constitution of Kenya has been interpreted in a number of ways to mean predictability and coherence of the law. The Rule of Law thus is the predominance that is absolute of an ordinary law over every citizen, regardless of the power of that citizen. Indeed, the Constitution of Kenya recognizes the principle of Rule of Law as part of the national values and principles that will govern the State and its people. This means that all persons when exercising their constitutional mandate will have to comply with these fundamental principles and acting beyond or below their mandate would be infringing these requirements and that the remedy for such must be meted out accordingly.

LEAPS

Kenya has made some leaps, which may not be as big as was envisaged under the Constitution, but it is admirable. After the new Constitution was promulgated and adopted, major reforms restored public confidence in the three arms of government. Its common knowledge that the Constitution of Kenya, 2010 is among the most progressive Constitutions in the world as it envisions a society based on rule of law, non-discrimination and social justice.

However, in 2017 the test of constitutionalism and its principles especially, the rule of law was seen in the wake of the political season and was beginning to take this Country down a rough road.

Dr. Busingye Kabumba- Lecturer-in-law, Human Rights and Peace Centre (HURIPEC), Faculty of Law, Makerere University; in his article, The Illusion of the Ugandan Constitution, stated as follows, "In my view, having regard to the Constitutional and political and legal history of our country, I think it is fair to say that the 1995 Constitution is essentially an illusion," . He goes on to say that the illusion begins right from the first article which rather leads us to believe that '[a] ll power belongs to the people who shall exercise their sovereignty in accordance with this Constitution and runs on until the last provision of the document. He concluded that note by stating that; The simple unadulterated truth is that for a long time in our history this has not been the case and it is certainly not the case at the present. According to him, the Constitution itself is naked, impotent and illusory. The gun is the real source of power and authority in contemporary Uganda.

The good Professor's thoughts are not far from the truth- especially on what the actual situation is, in most African countries; Kenya not being an exception. It's not in dispute that the promulgation of the Constitution is one of Kenya's greatest achievements in history; however, realization of what it precisely stands for continues to be made manifest.

Therefore, promises, progress, pitfalls and prospects can be measured from an array of contemporary events and issues facing the country.

POLITICAL WAVE

Kenya was faced with one of the hardest times in 2017 and people are still coming to terms with the same and recovering from their losses; whether of life or property, others are nursing their wounds and, political leaders seeking reconciliation from amongst themselves and from the people at large. The country went through a period of intense political wave which saw events unfold one after another; some received applauds and international recognition whereas others received uproars and backlash from the local community. Tribalism was at the breach of tearing the country apart, police brutality was at another level, total disrespect to court orders by state organs was done with total impunity.

Justice Odunga in his many Rulings during the Controversial politician Miguna Miguna's deportation case had this to say; "the focus of the case had moved away from Dr. Miguna to the dignity of the court which, he added, has now been put to question." While pointing a finger at the executive for contempt, Justice Odunga said obedience of court orders is a value of good governance within all State organs and that the directives are not subject to interpretation by any arm of government. He accused key members of the Executive of failing to understand the Constitution and the courts and continuing with old habits of impunity. It was his considered view that those who disobey should face consequences and courts are empowered to uphold the rule of law. These all were occurrences' that were

taking the Country back to the 'dark days'; total pitfalls, a reflection of adamancy on the part of the political leaders in that they chose not to be guided by the principles of Constitutionalism especially, of rule of law.

Do we see progress and future prospects? Yes, the recent turn of events in the country; dubbed the "the handshake" made between His Excellency Uhuru Kenyatta and the Right Honourable Former Prime Minister Raila Odinga has set pace for better days ahead as political leaders across the divide are embracing the same. Whatever the motive, it is good for peace, stability and economic development.

> *"Its common knowledge that the Constitution of Kenya, 2010 is among the most progressive Constitutions in the world as it envisions a society based on rule of law, non-discrimination and social justice.*

In conclusion therefore, the leading principle of constitutionalism is the "Rule of Law". This signifies that no political authority is superior to the law itself. When and where the rule of law is in force, the rights of the citizens are not dependent upon the will of the rulers; rather their rights and duties are established by the law and protected by the independent courts.

- ***Ms. Atim is an Advocate of the High Court of Kenya practicing as such with the Firm of Lumumba & Ayieko Advocates in Nairobi, a Pro Bono Lawyer with Kituo Cha Sheria jatim92@yahoo.com , Joanatim42@gmail.com***

Experiences in the management of prisoners' vote

BY JANET MUNYWOKI

"Citizenship is not a right that expires upon misbehavior. Prisoners retain their civic status throughout their sentences ....the right to cast a ballot" Honorable Chief Justice Earl Warren (1958)

In February 2017, 5528 out of 55,000 prisoners were registered by the Independent Electoral Boundaries Commission (IEBC) to vote in the 2017 General Elections. On August 8th 2017, the IEBC reported that 4369 prisoners voted. Though a paltry sum, this number was significant in that this was the first time in Kenya's history that prisoners voted in a General Election.

The prisoners vote outcomes of 2017, reminisces the need for targeted public participation. Sadly, the milestones achieved, will go down in history as devoid of sector wide involvements leading to a disenfranchised prisoner lot.

LANDMARK JUDGMENT

Historically, prisoners vote is traced to the landmark judgment of the Interim Constitutional Dispute Resolution Court 2010 delivered on 23rd June 2010, allowing prisoners to vote for the first time in a Constitutional referendum. At the time, the Interim Independent and Electoral Commission (IIEC) was given 21 days to Gazette prisons as polling stations; to facilitate eligible prisoners to register; and that jointly and severally with key stakeholders such as the Attorney General, Kenya Prisons Service and National Registration Bureau, facilitate access to prisoners and their registration documents. It is not clear how many prisoners voted.

In 2012, the Elections Act was amended and the IEBC was required to make regulations prescribing the procedure for registration and issuance of voters' cards to prisoners, and further to provide for the progressive registration of prisoners. It was however, necessary to seek legal redress through a public interest petition and on 21st January 2013, the ground breaking judgment settled the prisoners voting rights to Referenda and General Elections. Prisoners did not vote on March 4th 2013 General Elections.

Fast forward from 2016, critical to securing the prisoners vote was ensuring an enabling legal framework. The Elections Laws (Amendment) Act 36 of 2016 amended Section 109 (1) to insert the word 'prisoner'. Further, Section 109 (3) (4) mandated the IEBC to submit regulations.

In January 2017, the IEBC publicly announced that prisoners would vote. The IEBC Elections Operation Plan 2015 – 2017 classified prisoners as voters however, it was not clear the steps, measures, strategies and methodologies in place. Consequently, it was difficult to engage, participate and communicate clear timelines leading to surprise announcements regarding the one week voter registration from 20th February 2017 to 27th February 2017. Further, announcements that voting was limited to the Presidential Election, and that voting was limited to the prisons of registration had serious ramifications. Based from the lessons learned, the IEBC has a greater threshold if it is to remain accountable in the management of the prisoners vote come 2022.

RECOMMENDATION

Prisoner regulations need to be set up before the next General Elections in 2022. The regulations should be public spirited in requiring stakeholder collaboration and engagement. The following may be considered;

Stakeholder involvement pre and post elections need concerted efforts: Provisions such as the registration of Officers In-Charge as Returning Officers have worked in other jurisdictions. Engaging non-conventional stakeholders like the Attorney General, National Council for Law Reporting and Kenya Law Reform Commission who have unique mandates in ensuring law reforms are spearheaded on timely basis for the benefit of intended constituents cannot be gainsaid.

Access to information and Voter education: Inadequate voter education may have led to the number of rejected votes at 233 out of the total cast votes. In fact, it cannot be said in certainty that these numbers represented prisoner votes only.

Boundary limitations in the classification of prison voting centers: The classification of what comprises a polling center and a polling station may apply to maximum prison facilities alone which are few.

The decision to vote for the Presidential Election disenfranchised prisoners and other Kenyans and maybe justiciable: The decision contravened the Constitution and the 2013 judgment. Although it is not clear how many prison officers voted, they were disenfranchised too because only the Presidential ballot papers were availed in prisons on elections day.

Prisoner candidates: Article 38 (3) of the Constitution provides that every adult citizen has the right without unreasonable restrictions to be a candidate for public office or office within a political party of which the citizen is a member and if elected to hold office. That said, prisoners can be candidates too. In 2017, a prisoner at the Naivasha GK Prison was cleared as a candidate for Member of Parliament. Though he did not vie, he provided a unique scenario that the IEBC needs to consider and plan for in future elections. Facilitation of prisoner candidates should be devoid of perpetrating discrimination on the basis of deprivation of liberty.

Prisoner transfers should be minimized as much as possible close to the elections day. Further, progressive provisions existing in law such as release on parole and conditional releases in the Prisons Act remain unutilized and election management authorities need to be sensitized.

Cleaning of the voter register in County Number 049 needs Prisoner involvement. IEBC can borrow a leaf from the IIEC of 2010 where prisoners' voter cards were withdrawn soon after voting. This erases fears and minimizes abuse of data. Progressive voter register cleaning should be a continuous exercise involving collaboration between the IEBC and Kenya Prisons Service.

- Ms. Munywoki is an Advocate of the High Court of Kenya and Executive Director – Legal Resources Foundation Trust

My experience on death of two successive Governors in office

BY DAVID MUGO

The Late Nyeri Governor Wahome Gakuru

I have had the misfortune of witnessing the death of two Governors in office. In the first instance, I was serving as the Speaker of the County Assembly of Nyeri while in the second instance; I was the legal advisor of the deceased Governor, the late Dr. Wahome Gakuru. The two deaths happened in close succession, in the same year -2017. The shock was profound on the citizenry and leadership of Nyeri County. Being at the helm of Nyeri leadership, I, amongst others, had the huge responsibility of ensuring a smooth and speedy transition. In both instances, it was necessary to have a speedy transition to contain the unnecessary speculations and uncertainties that come with a vacuum in a high office and to also ensure continuity in service delivery.

TRANSITION

County governments are responsible for crucial services in the counties amongst them being health that is very critical. Any sort of interruption has serious repercussions. Upon the death of a Governor in office, all the members of the County Executive Committee (County Cabinet) cease to hold office automatically in accordance with the provisions of Article 179(7) of the Constitution.

This includes the County Executive member in charge of Finance who is the head of the treasury. Without the head of the treasury, it becomes impossible for the county government to access money – county operations ground to a halt. This explains the need to expedite the transition so that the incoming Governor may re-constitute the executive committee. Further, a number of critical government decisions require the approval of the executive committee. A Governor would therefore, not be in a position to run government alone. It is noteworthy to point out that executive authority in the county is vested in, and exercised by, the county executive committee (Article 179).

NYERI GOVERNORS

The deaths of the two Nyeri Governors demonstrated the inadequacy of the Constitution and the laws in managing and guiding the transition where a vacancy arises in the office of the Governor other than by the end of the term of office.

The situation was complicated by the fact that there were no precedents in Kenya. Indeed, the only other time that Kenya had witnessed the death of a Head of Government was in 1978 when the then President of the Republic of Kenya, Mzee Jomo Kenyatta died in office. However, that was under a different constitutional dispensation.

Article 182(1) of the Constitution provides the circumstances under which the office of the Governor becomes vacant, i.e. if the officeholder;

- Dies;
- Resigns in the prescribed manner;
- Ceases to be eligible to be elected county governor;
- Is convicted of an offence punishable by imprisonment for at least 12 months;
- Is removed from office under the Constitution.

DEPUTY GOVERNOR

Where a vacancy occurs in the office of the Governor, the Deputy Governor assumes office for the remainder of the term of the Governor. Whereas this is expressly provided for in Article 182(2) of the Constitution, it seemed (and surprisingly so, on both occasions) to have taken a majority of the populace unawares. We had to explain to the press and the people of Nyeri that there would be no By-Election. Seven years after promulgation of the Constitution, Kenyans were yet to understand this unique provision. This demonstrated a great need for continuous and thorough civic education in Kenya.

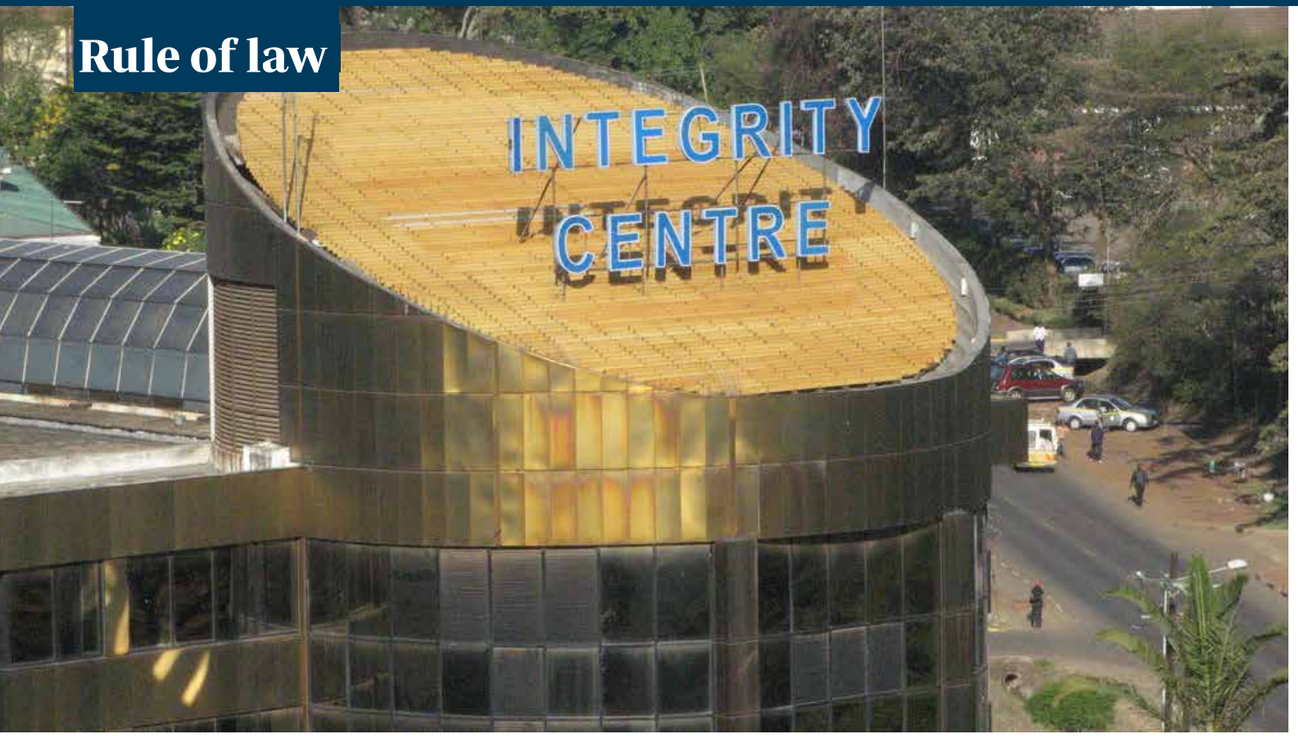
MY EXPERIENCE

There was no clear provision in law on the procedure to be followed. Parliament had not; in fact up to this moment legislated The Assumption of the Office of the County Governor Law. We had to be bold and innovative. The responsibility rested on me. Indeed at the time of the death of the first Governor of Nyeri, the late Nderitu Gachagua, the county did not have a legal officer. Being the Speaker of the county assembly and an advocate of the High court of Kenya, I took it upon myself to guide the process. I took the liberty of writing to the then Attorney General Prof. Githu Muigai, SC mainly to seek his concurrence with the decision we had already taken to have the Deputy Governor sworn in as the Governor with immediate effect. The Attorney General promptly responded agreeing fully with our decision. He went further and requested the Chief Justice to appoint a Judge to swear in the Deputy Governor as the next Governor of Nyeri. The second transition after the death of the second Governor was much easier since we had already set a precedent.

MY SUBMISSION

I submit that Parliament needs to immediately enact The Assumption of the Office of the County Governor Law to clear the grey areas in the process of swearing in the Governor both after a General Election and in the other instances contemplated under Article 182(1) of the Constitution. Finally, the provision of Article 179(7) that members of the County Executive Committee cease to hold office where a vacancy arises in the office of the Governor is unreasonable!!! This means that the Deputy Governor is literally left alone in office. This Article ought to be amended to at least allow the Executive Committee members to remain in office until the new Governor constitutes a new Executive Committee; with the option off course to retain any or all the members of the County Executive Committee.

- Mr. David M. Mugo is an Advocate of the High Court of Kenya, Legal Advisor to the Governor of Nyeri County and the first Speaker of the County Assembly of Nyeri.



REBOOTING WAR ON GRAFT: DISBAND EACC AND DISPERSE ITS FUNCTION

BY STEVE OGOLLA

The Ethics and Anti-Corruption Commission, EACC, should be disbanded for reasons that its spectacular failures are well documented and the post-2010 idea of a single 'anti-corruption agency' was ill conceived. There is need to re-imagine anti-corruption strategies with emphasis on whistle blowing/ anonymous reporting and shared responsibility for detection, prevention, and punishment of corruption.

PROBLEM OF APPROACH

To begin with, corruption is an offence punishable by law. Section 2 of the Anti-Corruption and Economic Crimes Act defines corruption to mean bribery, fraud,embezzlement, abuse of office, breach of trust, and tax evasion. The idea of assigning the investigative functional mandate, insofar as corruption related offences are concerned, to the EACC, however well intentioned, was ill conceived and bound to fail for two reasons:

Firstly, and for practical sense reasons, it is not possible to organize the entire anti-graft legal infrastructure around one institution, unless that agency is dedicated primarily to coordination of several multi-agency oversight and enforcement teams.

Secondly, it is not possible that for every offence known in law, a sectoral agency would be required;otherwise there would no limits to the number of investigative agencies established, and publicly funded.Corruption is a public sector governance problem, and logically, every state department or agency should have internal anti-corruption preventive and disruptive measures, with a possibility for external oversight to discourage complacency or connivance.

INDICTING EACC

The recent directive by the President to require lifestyle audit of all state and public officers, coming hot in the heels of another directive to vet all procurement officers and accounting officers, exposes EACC's inability to apply its mandate to the objectives for which it was founded, and in the manner in which the law intended. Whether the President's twin directives are of dubious legality or not, is an ongoing debate, but what is settled is that EACC is firmly on the spot light.

For starters, the war on corruption is supported by front-end and back-end processes, and EACC's mandate is limited to front-end processes. The front end processes include: policy and strategy formulation, developing code of ethics, sensitization, monitoring, investigation, asset freezing, and jail terms. The back-end processes largely relate to post conviction procedures that include asset recovery, realization, confiscation, and prohibition from holding public office.

By design, the law requires EACC to play a prominent role in the front-end processes. Article 79 of the Constitution establishes the EACC and mandates it to enforce the Leadership and Integrity Chapter. The Ethics and Anti-Corruption Act gives it additional functions as outlined under Section 11. The most prominent, and arguably complex, role of the EACC is to investigate and recommend to the Director of Public Prosecutions, the prosecution of any acts of corruption.

> *A debate on whether the country truly needs the EACC is as good as the idea of revamping the Commission. Importantly, as we agonize why EACC has fallen so low, so fast, and what Kenyans can do about it, it is not open to EACC to wave the sanctity of constitutional safeguards to escape possible disbandment.*

EACC Chairman Arch Bishop Dr. Eliud Wabukala

Recommendation for prosecution presupposes availability of consistent, cogent and credible evidence, not merely pushing files as part of the conveyor belt. Herein lies EACC's spectacular failures.

Firstly, there is an established pattern by the Office of the Director of Public Prosecution (ODPP) to return, upon review, EACC files for incompetent and incomplete investigations. The ODPP is required by law to make sound prosecutorial judgment on whether to prosecute or not, based on available evidence on record. Despite EACC taking years to investigate corruption offences, it has been unable to gather credible evidence to sustain conviction in grand corruption cases.

Secondly, and concurrent to recommendation for prosecution, the law allows EACC to independently institute court proceedings for preservation of assets pending trial against corrupt individuals with "unexplained assets." The Anti-Corruption and Economic Crimes Act defines "unexplained assets" as assets acquired around the time a person was reasonably suspected of corruption.

PRESERVATION ORDERS

The careful attention given to EACC is designed to ensure that it discharges its mandate, nil obstat, with nothing standing in the way. Yet, EACC is unable to show Kenyans any "Preservation Orders" pending prosecution in the high profile corruption cases. Instead, EACC has demonstrated that it is only responsive to political pressure, from the executive wing of government. In a perfect constitutional set up, the President would have no opportunity to direct anyone, least of all the EACC.

Thirdly, and more worrying, are the allegations that EACC is itself steeped in corruption, complacency and connivance. The fears that EACC has metamorphosed into a criminal enterprise cannot be dismissed as reckless and alarmist. A lifestyle audit of EACC Commissioners would itself be a welcome move if EACC were to re-establish public confidence on its mandate.

RENOVATING THE LAW

The prognosis on EACC is disheartening, if not depressing. EACC is steeped in inefficiency, incompetence, and inability to discharge its mandate. The weaknesses in the legislative design, accentuated by poor implementation strategies, means that for a long time coming, EACC will remain stranded at the margins of time—completely unable to deliver on the war on corruption.

Director of Public Prosecution Noordin Haji

A debate on whether the country truly needs the EACC is as good as the idea of revamping the Commission. Importantly, as we agonize why EACC has fallen so low, so fast, and what Kenyans can do about it, it is not open to EACC to wave the sanctity of constitutional safeguards to escape possible disbandment.

Indeed, the Constitution itself is organized around the ideology of "collaboration and dispersal of powers and functions." EACC can be re-organized and its functions reassigned to expand and improve anti-graft strategies.

POSSIBLE PATHWAYS

Firstly, there is need to reassign the front-end functions of EACC in terms of policy and strategy formulation, developing code of ethics, and sensitization to the Kenya Anti-Corruption Advisory Board. The Board is inclusive and has all critical public sector governance oversight agencies, including the Law Society of Kenya. In any event, Section 17 of theAnti-Corruption and Economic Crimes Act mandates the Board to advise EACC on its functions. This advise should now be redirected to the Multi-Agency Team.

Secondly, EACC's investigative role should, as ought to have been in the first place, be reassigned to the Inspector General of Police. The Inspector General should establish a Special Department dedicated to corruption related cases. In any case, Article 157(4) of the Constitution establishes the Inspector General of the National Police Service as the only office the ODPPmay direct to investigate any allegation of criminal conduct.

Thirdly, the ODPP should be embedded in the Special Department within the Directorate of the Criminal Investigations, for continuous review, advice and assistance to the investigating officers. This will answer to the problem of insufficient or irrelevant evidence.

Finally, EACC's mandate of monitoring as part of the preventive and disruptive measures, should be a shared and continuous responsibility among key oversight institutions, namely, Kenya Revenue Authority, Asset Recovery Centre, Director of Criminal Investigations through the Special Department, Public Service Commission, and the possible inclusion of the Ombudsman.

Importantly, all accounting officers in ministries, department, and agencies should be directly responsible for detection and deterrence of corrupt practices, and proactive disclosure of information within the terms of the Open Government Partnership, Mwongozo Code of Conduct, and Access to Information Act.

- Mr. Steve Ogolla is an Advocate of the High Court of Kenya

Awaiting legislations for Constitutional effect

BY JAMES GITHAKA

Eight years after promulgation of the Constitution, Parliament is yet to pass some legislation to give effect to the Constitution. Article 261 of the Constitution required legislation to give effect to the Constitution to take a maximum of five years for all enactment whose period could be extended by Parliament by one year .The legislations yet to be enacted are as follows:

a) Legislation to prescribe minimum and maximum land holding acreage for private land pursuant to Article 68 c (i)

The drafters of the Constitution may have upon being aware that land being a scarce resource and population continuing to increase, there was need for a legislation to deal with scarcity of land. The legislation might not have been enacted because of the fear of its effect considering the political class in Kenya's own large tracts of land and thus enactment mean they give up their excess tracts of land.

The defunct Commission on Implementation of the Constitution had prepared a Bill - The Minimum and Maximum Land Holding Bill - in 2015 but was never tabled in Parliament. However, the Land Act passed in Parliament (Section 159) gave a vague provision on minimum and maximum land holding acreages. Section 160 of the same Act gave the National Land Commission and Cabinet Secretary for Land power to make regulations to prescribe minimum and maximum land holding acreages in respect of private land. The Land Regulation 2017 made pursuant to aforementioned Section 160 which was Gazzeted on 8th December 2017 is silent on minimum and maximum landholding for private land

b) Representation of marginalized groups in Parliament

Article 100 of the Constitution gave Parliament the mandate to enact legislation to promote representation in Parliament of women, persons with disabilities, youth, ethnic minorities and marginalized communities. Article 27(8) contemplates that the State would take legislation and other measures to ensure that no more than two-thirds of membership of any elective and appointive bodies shall not be of the same gender. Article 54(2) also requires the State to ensure progressive implementation of the principle that at least five percent of members of the public in elective and appointive bodies are persons with disabilities. Efforts have been made twice to pass the Two-Third Gender Bill (famously called the Duale Bill) which was to amend Article 97 and 98 of the Constitution to make it possible for nomination of women after election to make Parliament to have one third of its members to be women. This being a constitutional amendment required a two third majority of both houses for it to pass. However, there was a shortfall of numbers in two occasions - mainly from male MPs who argued that this passing of the Bill will lead to a bloated Parliament which translated into a bloated wage bill. The current Parliament is now hearing public views on the third attempt to achieve the gender requirement. The Constitution (Amendment) Bill 2018 sponsored by National Assembly Majority leader Aden Duale, seeks to have women nominated to Parliament to top-up the gender gap and ensure that at least one-third of the MPs are women

c)Appointment of an independent Commission to facilitate alteration of County Boundaries pursuant to Article 188 (1)

The Constitution in the fifth schedule did not give the timeline for the independent Commission to be formed. However, Article 188 provides that it was to be formed by Parliament. Parliament is yet to form the said Commission despite increasing conflicts on boundaries between various counties.

Makueni Senator Mr. Mutula Kilonzo Jr., Advocate drafted a Bill dated 17th October 2017 that intended to give effect to Article 188. The Bill was introduced in Senate but was not concluded by the time Parliament broke for August 2017 General Election - meaning the Bill expired in the last Parliament and must be reintroduced. There has been tension over boundaries between various counties. Recent examples are tensions between Baringo and Turkana counties which led to killings in Kapendo area. Several other counties countrywide are involved in border disputes that are mostly fueled by the desire to control mineral deposits, natural resources as well as an urge to raise revenue.

PARTING SHOT

Parliament should hasten the process of enacting the aforementioned three legislations and processes to give effect to the Constitution. Parliament should do that in order to avoid the threat of being dissolved as per Article 261 of the Constitution. There is a Judgment by High Court Judge Justice Mativo which gave Parliament 60 days to enact the two-third gender rule. The 60 days lapsed and the Judge gave liberty to anyone to petition the Chief Justice to advise the President to dissolve Parliament.

- Mr. James Githaka is an Advocate of the High Court of Kenya and a Legal Researcher at the Law Reporting Department within the National Council for Law Reporting (Kenya Law).

Rule of Law and Contested Constitutionalism

BY CLIFF ODUK

Constitutionalism is based on the idea that the authority of Government derives from and is limited by a body of fundamental principles about the moral status of citizens as free and equal persons, translated into institutional principles such as Separation of Powers and the Rule of Law.

In a strict sense, Separation of Power dictates that, none of the three arms of the Government may exercise the power of the other and there should be complete independence without any interference whatsoever. A system of checks and balances will be created by the independence of the three arms of the Government.

Constitutionalism and Rule of Law are related ideas about how the powers of Government and State officials are to be limited. The two ideas are sometimes equated. However, constitutionalism, generally understood means Government that is not arbitrary or totalitarian. Constitutionalism holds that the exercise of Government power must be controlled in order that it should not be destructive of the very values which the Government was intended to promote. Constitutionalism requires loyalty to the Constitution. The merit of such a philosophy is seen against the background of common experience and of past models.

EQUALITY

Rule of Law on the other hand, can be defined simply as 'Government of laws, not of men' wherein all the persons are equal before the law and are equally protected, that is no one is above the law. The concept of the Rule of Law owes its origin from Greek philosophers, Aristotle in particular. Aristotle on Constitutionalism and the Rule of Law contrasted the Rule of Law and the rule of men. Although Aristotle admitted that man-made law can never attain perfect justice, he nevertheless stressed that, judicial officers should regulate only matters on which the law is silent. All Government actions must be authorized by law. Secondarily, no man is above the law and everyone, regardless of rank, is subject to ordinary laws of the land.

The various constitutional devices and procedures, such as the Separation of Powers and independence between the three arms of the Government that is the Legislature, Executive and Judiciary must be safeguarded. The independence of the Judiciary must be highly protected to safeguard the due process and fair hearing which is an absolute right as it is one of the rights which cannot be limited pursuant to Article 25 (c) of the Constitution of Kenya.

FAIR HEARING

Further, Article 50 (2) of the Constitution sets out the rights of an accused person in regards to fair hearing which inter alia include the right to be presumed innocent until the contrary is proven, to have trial begin and concluded without unreasonable delay, to have legal representation and if convicted, to appeal, or apply for review by, a higher court as prescribed by law.

The Constitution does not expressly set out the rights of the complainant. However, it cannot be construed to mean that the same does not exist. Similarly, the complainant has the right to justice as the accused person thus the Court, as an arbiter, has to take into account, the prevailing circumstances of the case and also consider both the interests of the accused and complainant. Aequalitus est quasi equitas, which translates to equity is equality in that both parties have equal rights.

FUNDAMENTAL FREEDOMS

In the case of Francis Karioko Murauatetu & Another vs Republic [2017] eKLR, the Supreme Court of Kenya while declaring Section 204 of the Penal Code, Chapter 63 of the Laws of Kenya as unconstitutional, observed the following constitutional principles. Firstly, the rights and fundamental freedoms belong to each individual. Secondly, the Bill of Rights applies to all law and binds all persons. Thirdly, all persons have inherent dignity which must be respected and protected. Fourthly, the State must ensure access to justice to all. Fifthly, every person is entitled to a fair hearing; the right to a fair trial is non-derogable. For Section 204 of the Penal Code to stand, it must be in accord with the provisions of the Constitution which is the supreme law of the land.

In the aforementioned case, it was noted that sentencing is a judicial function and while conducting a trial, the Court gathers valuable information relating to the guilt or innocence of the accused person. In the event of a conviction, such information should serve as mitigating or aggravating factors in the determination of an appropriate sentence in each case thus the mandatory death penalty under Section 204 of the Penal Code was encroached upon by the Legislature thus unconstitutional.

In conclusion, every person, as defined under Article 260 has a duty to uphold and respect the Constitution which will in turn promote constitutionalism and the Rule of Law.

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

The backbone of Kenya's governance culture

BY STEPHEN WANDETO

As we speak of good governance in Kenya, we often emphasize the hardware of governance, which is the structure of governance. We however, pay little attention to the 'software' of governance - the values and principles of governance.

The Constitution while providing a transformative structure of Government also provides us with the attendant software in Article 10. Sub-article one rightly provides that the national values and principles of governance apply to all state actors and all persons meaning that the intention was that these values are applied in our public and private life. Article 10 (2) articulates the said values and principles as patriotism, national unity, sharing and devolution of power, Rule of Law, democracy and participation of the people, human dignity, equity, social-justice, inclusiveness, equity, and human rights. Others are non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability. A cursory look at these values breathes life and optimism into any reader of our Constitution. However, the more important question should be whether these values have become part of our governance culture, eight years after the promulgation of the Constitution.

During the last eight years, we have rightly expressed our desire to live by these values. Case is point is the Taskforce on the Review of the Legal, Policy and Institutional Framework for fighting Corruption in Kenya has these reflections in its 2015 report;

"Our self-reflection did not shy away from tackling the hard questions, making radical propositions, reconstituting structures or revising mandates. The result of this effort is the hallmark of our collective implementation strategy going forward. Critical to this observation has been the obvious disregard and/or subservience of our cherished shared values including integrity, fairness, honesty, excellence, respect and discipline as part of our nation's identity kit. These values are not engrained and/or have been eroded in our personal or public interactions as a people. This is despite the fact that of all the enabler elements identified in the Kenya Vision 2030 strategy, adherence to our national values and ethics is a critical cornerstone to achieving the global competitiveness and prosperity we aspire to. The same is re-emphasized in Article 10 (National Values and Principles of Governance), Article 232 (Values and Principles of Public Service) and Chapter 6 (Leadership and Integrity) of our Constitution. It is, therefore, imperative that our fundamental grounding and national psyche as a country is re-energized towards values and ethics."

The Judiciary has also interpreted the Constitution while emphasizing the need for value-based governance anchored on Article 10, particularly when interpreting the Bill of Rights. In the case of Peter Solomon Gichira –v- IEBC, the Court stated that

"Our Constitution has been hailed as being a transformative Constitution since as opposed to a structural Constitution, it is a value-oriented one. Its interpretation and application must therefore not be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as engrained in the national values and principles of governance espoused in the preamble and inter alia Article 10 of the Constitution"

The Supreme Court in its advisory opinion on Gender representation also made a pronouncement founded on Article 10, as follows:-

"A consideration of different constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and interact among themselves and with their public institutions."

GRAND CORRUPTION

The above notwithstanding, the implementation of these values started eluding us when we started adding onto the architecture 'hardware' of our laws as a way of entrenching the above values and principles. Section 3 (2) of the Leadership and Integrity Act for example provides that a state officer shall respect the national values and principles under Article 10. This however, has not resulted into the values becoming part of our governance system as corruption, abuse of the law, impunity and inefficiency have continued to be a challenge to all arms of government. Our Nation's indifference to Article 10 values has become more pronounced through run-away corruption and general lawlessness and unwillingness to adhere to even the most basic rules such as the traffic code.

True and meaningful change in the governance of the Executive, Legislature and Judiciary will only be realized if Article 10 becomes a way of life for all Kenyans. We need to embrace a value-based culture that remains faithful to Article 10 of the Constitution.

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Constitutionalism and Separation of Power

BY KAMAU WAMBUI

Separation of power as highlighted by Montesquieu is a principle of the equal sharing and division of powers between three arms of Government. The essence of the principle was to avoid concentration of powers to one arm of Government, hence establishing a neutral aspect. The Separation of Power does not only ensure avoidance, collision and incursion but also protects interference by another organ.

According to De Smith, in his article Common Wealth and its Constitutions, the idea of constitutionalism involves the proposition that exercise of Governmental power shall be bound by rules prescribing the procedure according to which legislative and executive acts are performed and delimiting their permissible content. Therefore, constitutionalism is the advocacy of a form of ideas and principles to be followed as stipulated by the written or the subjected Constitution. Constitutionalism also elaborates the protection and enhancement of the Rule of Law. This is to show that it brings the recognition of people and the concept of law that is accepted and bestowed to them.

MAGNA CARTA

The Magna Carta of 1214 elaborated the descriptive issues, which were; the principles of people's freedom, consent participation and privileges of the Bill of Rights which were initially used in English laws. This stimulated the struggle to uphold the principle of humanity and the recognition of people's rights in a qualitative manner.

The prescriptive connotation is how the Constitution should communicate. According to Waluchow, the Government can and should be legally limited on its powers and the authority depends on how it oversees the power limitation. This then explains why the Government should limit its powers and narrow the demerit factor of central interest.

In the case of Njoya and others v the Attorney General, it was held that "Article 2 of the Constitution highlights the autochthonism of the law and the people such as; Constitution is the supreme law of the Republic, is equal to all and it provides for State authority. Literally, any law inconsistence with Constitution is null and void. So the aspect of constitutionalism is the subject of:

a) Equality and protection to all

b) Binding people and State organs under one rank, hence no one is above the law. As Montesquieu would have it, "law should be like death, which spares no one."

SEPARATION OF POWER AND INSTITUTIONALISM

Montesquieu initiates the Separation of Powers as the guard against tyranny and preservation of liberty in the Spirit of law. Separation of Power is also said to oversee on the issue of checks and balances.

In the United Kingdom, a strict Separation of Power is a fundamental constitutional principle which creates a fusion of power and balance between the Crown which is the Government and Parliament. In Kenya, the Constitution provides for the aspect of the Separation of Power. But, the initiation of this aspect has not been made, thus creating loops in the three arms being said to be independent.

EXECUTIVE & LEGISLATURE

Article 129 of the Constitution provides that, the Executive is comprised of the President and the Deputy President, who are mainly elected separately from other Members of Parliament. Usually, the President does not seat in the Parliamentary Boards in relation to law making. But pursuant to Article 132 of the Constitution, the President shall address a special siting of Parliament once every year. The Legislature is mainly set to delegate laws and procedures.

JUDICIARY

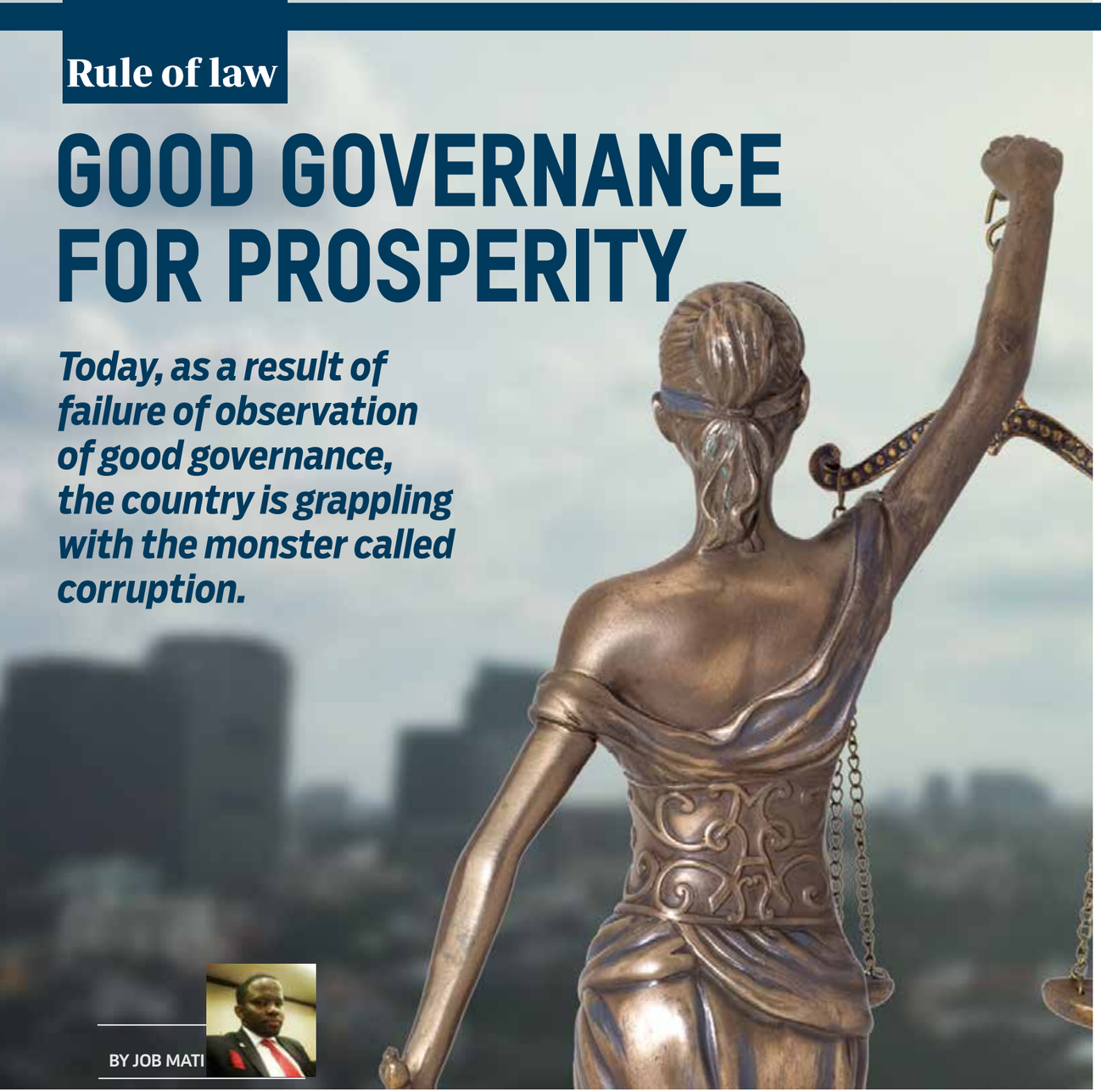
Alexander Hamilton argues that; "Whoever considers the different departments of power must conceive that the Judiciary from the nature of its function will always be the least dangerous to the political rights of the Constitution". Thus, the Judiciary is an organ on its own which, shall not be interfered with by political parties.

In Marbury v Madison, the Court held that, the Judiciary shall be subjected to interpret the law and only how it is as outlined under Article 183 and 185. Montesquieu argues that "there is no liberty if judicial organ shall not be separate to that of Legislature and Executive" - this simply illustrates the rationale of the law, state and the individual.

- Kamau Wambui is a Third Year Law Student at Kabarak University

GOOD GOVERNANCE FOR PROSPERITY

Today, as a result of failure of observation of good governance, the country is grappling with the monster called corruption.



BY JOB MATI

The Constitution of Kenya 2010 could not have come at a better time than it did. Its promulgation came at a time when many Kenyans, were yearning for respect of Rule of Law. Democratic space was fast shrinking while transparency, regular, free and fair election were elusive.

DEMOCRATIC SPACE

Coming from a backdrop of a one party State, which had a very thin line between dictatorship and firm leadership; then closely followed by a multiparty system that had only been theoretically acknowledged but not practically appreciated and embraced; respect of human rights was but a nightmare. Upon promulgation of the Constitution of Kenya 2010; a glimmer of hope was within sight. Democracy which had being on its deathbed, seemed to have been resuscitated and handed another lifeline. Kenyans could now engage in mature dialogue about pertinent public interest issues openly. However, this did not come on a silver platter. It has had its fair share of challenges. Media faced rough times. Time and again, we witnessed shutdown of media houses. The most vivid case was in 30th January 2018 that saw the media shutdown prior and immediately after the former Prime Minister's mock swearing as the 'Peoples' President' at Uhuru Park. Such actions have not been within the spirit of constitutionalism.

ELECTIONS

Looking at our previous elections, would it be in order to say that we have come of age?

In my considered opinion, coming of age of a Nation cannot be said to have occurred, unless a country is able to hold regular, free and fair elections. Globally, elections are considered to be a tool for change. However, in Africa with the exception of one or two countries, elections are just but a mere formality. Leaders are chosen by a few "aristocrats" and then legitimized in the so called election. This is usually a mockery to the people.

In light of this, Kenya has not been an exception to bad governance. We have had a number of elections that have not gone has per the plan. The most notable was the 2007 General Election that almost brought our country to its knee. As a precautionary measure, in each General Election; we have ousted electoral Commissioners but that seems not to be the cure to our electoral problems. Bad electoral cycles have always put investors in a catch twenty two situation. They are usually not sure whether to invest or even continue investing in our country. Such situations have continued to hurt our economy, whereas it ought to be avoided for purposes of stability and economic growth.

TRANSPARENCY

Transparency is easily understood but difficult to bind by it. Today, as a result of failure of observation of good governance, the country is grappling with the monster called corruption. We have too many laws, policies; even the Mwongozo Code of Governance for State Corporation seems to have fallen in blind eyes. Public service has become a"fat cash cow" for a few people who not only have an imposed sense of importance, but also greedy and ready to fleece national coffers dry. This has resulted to mega scandals that if not addressed with great care, might bring the country's economy to its knees. Notably, among the never ending scandals are the "National Youth Service scandal, commonly known as NYS one" and still fresh in our minds is the "National Youth Service scandal, commonly known as NYS two." We have also had others scandals like the maize scandal that have seen massive looting of public resources.

GOVERNANCE

Good governance seems to be the way out. It is high time for all agencies bestowed with responsibility of fighting corruption, rolled up their sleeves. This is the only way to eradicate the cancer of corruption. Companies like Nakumatt and Uchumi chain supermarkets are winding up, due to poor governance and corruption. However, the appointed of new Director of Public Prosecution, Director of Criminal Investigation and the firm stand taken by the court seems to be bearing fruits. This shows that it is not business as usual. For instance, the initial decline by the court in the matter of Republic vs Lilian Mbogo Omollo and 31 Others Anti-corruption case No. 8 of 2018 to grant bail was a good starting point.

As a Nation, we are at a tipping point; bad politics is negatively affecting our country. Corruption is also slowly but surely killing what was remaining of our economy. I am now persuaded by the words of the late Mwalimu Julius Nyerere - "Kenya is a man eat man society".

- Mr. Job Mati is an Advocate of the High Court of Kenya and Consultant in Strategy and Governance.

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Realpolitik between Kenya and South Sudan

James Gatdet Dak

Riek Machar

Salva Kiir

BY DR. CHARLES A. KHAMALA

Realists claim that international politics lacks justice, characterized by potential or active conflict among States. Such skepticism allocates the sphere of ethical norms to relations among States, as opposed tolaw and authority guiding national politics.

State self-interest explains recent relations between Kenya and South Sudan. International cooperation yielded mutual State benefits by securing some liberties at the expense of other unfortunate individuals. The relevant realpolitik episode began in July 2016, when South Sudanese refugee James Gatdet Dak posted a Facebook scare that former Vice President Dr. Riek Macharwas being lured into a trap. Meanwhile Machar, the Sudan People's Liberation Movement/Army-in-Opposition's leader, was holding peace talks with President Salva Kiir. Desperately bidding to rescue Machar, 21 SPLM-IO armoredtrucks broke through the presidential gates, re-igniting Nuer-Dinka fighting. 150 people were killed within four months.

RETALIATION

Then United Nations Secretary General Ban Ki-Moon demanded accountability for his officers' failure to contain the ethnic conflicts. Drastically, he summarily dismissed Kenya's newly-appointed Lieutenant-General Johnson Ondieki as commander of the UN peacekeeping force in South Sudan.By withdrawing 995 Kenya Defence Force soldiers, President Uhuru Kenyatta counter-retaliated against Ondieki's 'scapegoating', which he termed an insult to Kenya's "dignity, honour and pride." However, adding insult to injury, Dak welcomed "the change in the UNMISS" because "The peacekeeper failed to protect civilians during the crisis" and hoped "a new force commander...will be more responsive and take actions to protect the civilians at risk."This second Facebook post triggered Dak's arrest from hisplush Lavington, Nairobi, sub-urban residence by Kenya's police and unceremonious deposit into Kirr's waiting hands at Juba. Following seven months in solitary detention, he underwent an Arabic trial of equivalent duration, from which his lawyers withdrew in protest. Tragically, in February 2018, South Sudan's High Court convicted and sentenced Dak to death under the 2008 Penal Code for inciting treason and 21 years imprisonment for disseminating false information to the detriment of South Sudanese national security and insulting the President.Human rights groups accuse Kenya of violating the 1984 UN Convention against Torture, which prohibits states from returning a person to a state where there is a risk of being subjected to torture, cruel or unusual punishment. Is this accusation justifiable or are there any mitigating circumstances?

REFOULEMENT

Being no alien, Dak was not deported from Kenya. Because the two countries have no prisoner-exchange treaty, neither was he extradited. He was a refugee. Consequently, Kenya's actions of returning him to a state where he had a well-founded fear of persecution –based on his tribe, SPLM-IO affiliation and political allegiance to Machar – constitute "refoulement."Can exceptional circumstances excuse Kenya from its state responsibility, under the 1951 UN Refugees Convention, which attributes this wrongful act to it? Refoulement is permissible on two grounds. First, the "serious crimes-exception." However, this does not apply. Dak has not been convicted of any offence in Kenya. Besides, at the time of his November expulsion, the act of "false publications" was not even criminalized. Perhaps in future,electronic news fakers could be prosecuted under the new Computer and Cybercrimes Act, 2018. Hardly a serious crime, it attractsa mere two years' imprisonment for: "A person who intentionally publishes false, misleading or fictitious data or misinforms with intent that the data shall be considered or acted upon as authentic."Second, the "national security-exception." It is possible for his first Facebook post, purporting Machar's impending entrapment, to be considered as encouraging an imminent armed attack against South Sudan. Presume that President Kiir's besieged Government had construed Kenya as harbouring Dak as a terrorist. Then, the right toself-defense may warrant invading Kenya, for "aiding or abetting" alleged terrorism thus targeting SPLM-IO fugitives as "non-state actors."Kenya's national security was threatened, albeit remotely. Strategically, Kiir saw no need to use force. Proportionately, he instead pursued "peace diplomacy" negotiations.

RECOGNITION

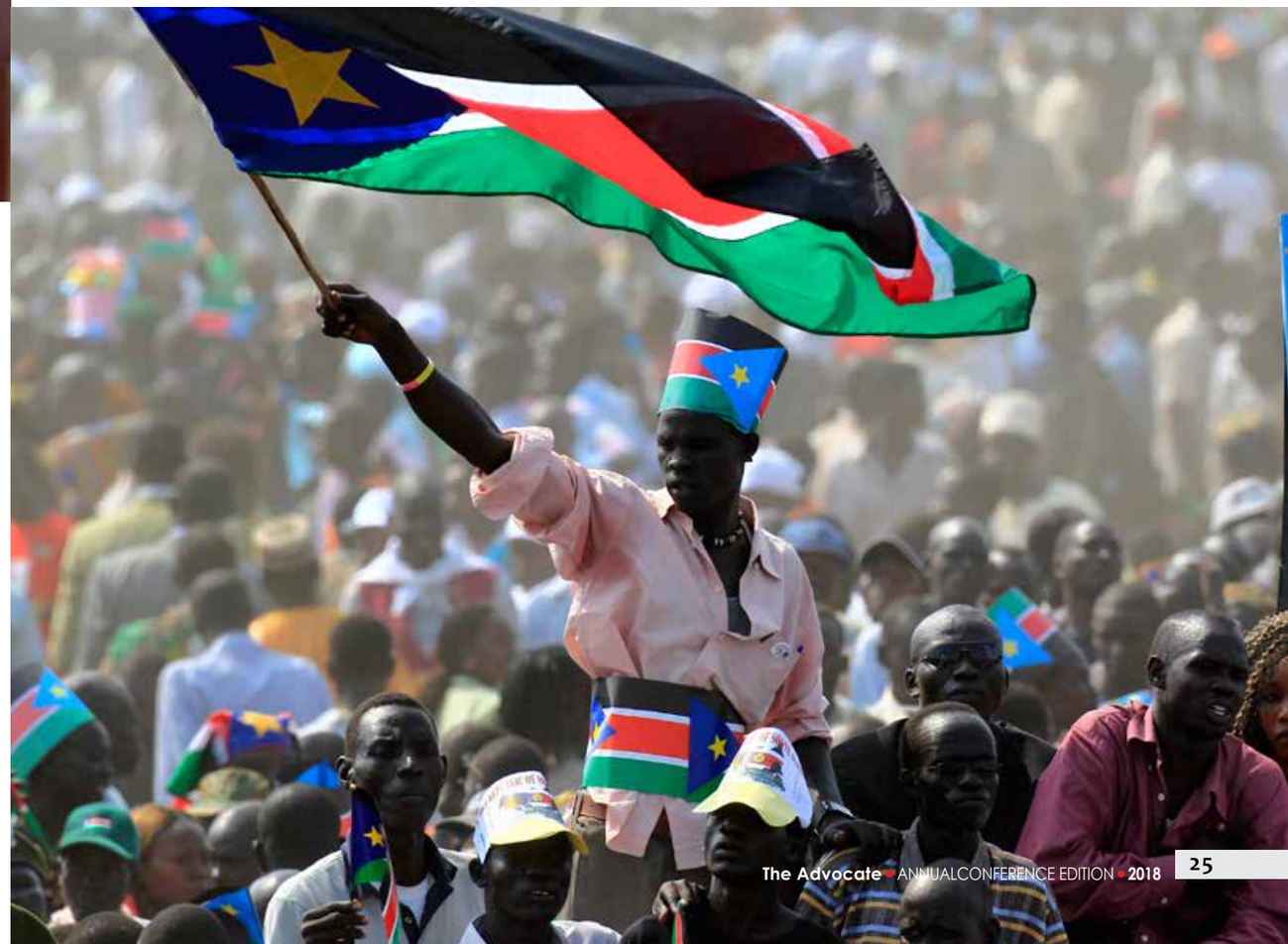
Contrary to cooperation under international idealism or liberalism, realism instead highlights the competitive and conflictual side of international politics. Responding to two issues, President Kenyatta therefore chose to recognize Kiir's Government and not SPLM-IO. One: What does diplomatic "recognition" of governments in international law mean? Two: What effect does non-recognition of the legal status of governments-in-exile, particularly of Dak as SPLM-IO spokesman, have? In answer to the first question, SPLM-IO claims power in a manner not prescribed by South Sudan's domestic legal order. During such an "extra-constitutional "situation, other states' attitudes towards Machar's revolutionary authority determine his international legal standing. Kenya had a spectrum of possible options towards Dak's respective reckless and irritating Facebook utterances, including maintaining pre-existing diplomatic relations with Kiir. Invariably, national interest is a key criterion for recognition. In answer to the second question, Kenya's decision not to recognize Machar reflects state practice to express policies of recognizing states, not governments, on a case-by-case basis.

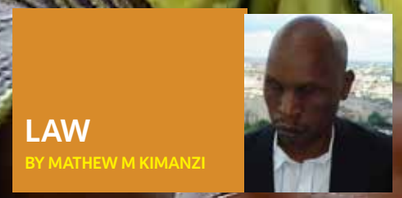
Trading-off of Dak without due process may violate not only the international torture prohibition, but also Kenya's own Constitution. For according to article 25 of the new dispensation, both fair trial rights as well as freedom from torture are non-derogable. Moreover, Machar's loyalist rebels validly express "disappointment" that the capital punishment Dak faces contravenes the ceasefire pact the feuding tribes signed incorporating a commitment to release detainees. Nonetheless, last December President Kiir reciprocated by freeing four Kenyans languishing in South Sudanese jails, serving life sentences since2014 for swindling US $ 15 million US dollars from his Presidency .In this respect ,refoulement had collateral benefits.

RANSOM

Unlike President Kiir's apparent benefit-in-kind, Machar ostensibly benefited from Kenyan reciprocity in-cash. One week after Dak's conviction, two Kenyan pilots were also released. They had been detained by Machar's rebels in Akobo, the Greater Upper Nile region of South Sudan, for a month following their plane crash. Officially, Kenya's Foreign Affairs Cabinet Secretary Monica Juma deplored "the unfriendly and inhumane response of the SPLM-IO to what was an unfortunate accident." In that instance, the captain and his co-pilot were returned after the Kenya government and the rebels negotiated an agreed monetary sum as "compensation" for a woman who was killed, and for others who lost livestock, when the aircraft crashed in early January. The Cessna Caravan's proprietor disclosed that the rebels were paid US $107,743 by UAP insurance company. Officiously, Lam Paul Gabriel, SPLM-IO deputy spokesman confirmed that the captives were "released by the local leaders of Akobo after they received a full compensation from the Kenya delegates." Denying that it was "ransom," he insists that that money was "requested not by the SPLA-IO but by the families of the deceased and the owners of the properties. All we did as SPLM-IO is just to facilitate the exchange and provide security for the pilots."The above incidents indicate that despite Dak's electronic remarks provoking risky international realpolitik responses, Kenya-South Sudanese relations remain cordial. Instead, casual use of social media to promote a revolutionary agenda backfired with numerous deaths and grave individual criminal responsibility.

-Dr. Charles A. Khamala is a Senior Lecturer, Africa Nazarene University Law School and an Advocate of the High Court of Kenya





LAW

BY MATHEW M KIMANZI

Domesticate the Marrakesh Treaty

The Marrakesh Treaty, formally known as the Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities, is an international legal instrument in copyright, adopted in Marrakesh, Morocco on June 27th, 2013.

It comprises a set of rules and principles developed by the World Intellectual Property Organization, (WIPO), a division of the United Nations (UN) that helps alleviate cross-border Intellectual Property (IP) issues. It achieved the deposit of 20 instruments of ratification or accession by eligible parties needed for entry into force on June 30, 2016. The Treaty came into force on 30th September 2016.

The Treaty clarifies that beneficiary persons are those affected by a range of disabilities that interfere with the effective reading of printed material. The broad definition includes persons who are blind, visually impaired, or print disabled or persons with a physical disability that prevents them from holding and manipulating a book.

The challenge of access to published works by blind and visually impaired persons is not confined to Kenya only. It is estimated that less than seven per cent of all books are published in accessible formats. The same situation in Sub-Saharan Africa is far less favourable, where most States have lower information access rates, estimated at less than two per cent. Consequently, only a negligible proportion of persons with visual disabilities are able to access information in suitable formats such as Braille or DAISY.

FREEDOM OF EXPRESSION

The Marrakesh Treaty reaffirms the principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society. It further recognizes the challenges that are prejudicial to the complete development of persons with visual impairments or with other print disabilities that limit their freedom of expression, including their freedom to seek, receive and impart ideas of all kinds on an equal basis with others, including through all forms of communication of their choice, their enjoyment of the right to education, and the opportunity to conduct research.

What's the goal of the Treaty?

The goal of the Treaty is to help end the book famine suffered by people who are blind, visually impaired or otherwise print disabled. Currently only some 1-7per cent of the world's published books ever make it into accessible formats. This is partly due to legal restrictions and other access barriers inherent in copyright law, something the treaty helps to mitigate. It does that in two main ways.

Firstly, by requiring States which ratify the Treaty to incorporate specific concrete exceptions in their domestic copyright law for the benefit of the visually impaired and print disabled people. This entails that States which ratify the treaty are obligated to develop their laws so as to permit blind people and their organisations transcribe publications in accessible formats without necessarily first seeking consent from the author or publisher of such books.

Secondly, by proactively facilitating the free import and export of accessible versions of books and other relevant copyrighted materials, again without the prior consent of the copyright holder. This has the advantage of minimizing possibilities of duplicating transcription endeavours in different jurisdictions, while allowing those with larger collections of accessible books to share them with visually impaired persons in countries with lesser capacities. The Treaty provides that only "Authorized Entities" like blind people or their organizations may seek the benefits accruing therefrom.

The treaty is administered by WIPO and has a clear humanitarian and social development dimension and its main goal is to create a set of mandatory limitations and exceptions for the benefit of the blind, visually impaired and otherwise print disabled. It requires Contracting Parties to introduce a standard set of limitations and exceptions to copyright rules in order to permit reproduction, distribution and making available of published works in formats designed to be accessible to VIPs, and to permit exchange of these works across borders by organizations that serve those beneficiaries .

The Treaty establishes an Assembly of the Contracting Parties whose main task is to address matters concerning the maintenance and development of the Treaty. It also entrusts to the Secretariat of WIPO the administrative tasks concerning the Treaty .

In 2016, in recognition of the need to promote the right of persons who are blind or partially sighted in Africa to access published materials, the African Union of the Blind (AFUB), with the support of the World Blind Union (WBU), initiated a campaign for the ratification and implementation of the Marrakesh Treaty by African States. Kenya is one of the Campaign target countries in this regard. The Kenya Union of the Blind (KUB) and the Society of Professionals with Visual Disabilities (SOPVID) constitute the core of the Kenyan Treaty Campaign Committee and the Right to Read Campaign Team, with technical support and input from AFUB and the Ecumenical Disability Advocates Network (EDAN).

There were several activities by the Campaign Team towards ratification of the Treaty, including discussions with copyright holders as well as the Kenya Copyright Board. Consequently, Kenya ratified the Treaty in June 2017. Canada's accession to the Treaty on 30thJune 2016 as the 20th Country had already brought the Treaty into force. As of 30th November 2017, only eight countries in Africa had ratified the Treaty, Kenya included.

Since it came into force several countries have ratified the treaty while others have signed the treaty. The countries that have ratified it include;

Argentina, Australia, Botswana, Brazil, Burkina Faso, Canada, Chile, Costa Rica, Democratic people's Republic of Korea, Ecuador, El Salvador, Guatemala, Honduras, India, Israel, Kenya, Liberia, Malawi, Mali, Mexico, Mongolia, Nigeria, Panama, Paraguay, Peru, Republic of Korea, Republic of Moldova, Russia, Sri Lanka, Tunisia, Uruguay, United Arab Emirates, Singapore,St. Vincent and the Grenadines, Kyrgyzstan.

IMPACT OF THE TREATY ON PUBLICATIONS

More than 90% of all published materials are not accessible to the blind or partially sighted. There is a need to be able to produce these materials in accessible formats, such as Braille, large print or audio editions, but the current copyright rules did not allow this.

This limited the number of books to which blind students could have access to, to further their studies and training WBU led the international campaign in partnership with WIPO to achieve the development of the Marrakesh Treaty and put an end to the current thirst for books .

The treaty requires Contracting Parties to allow the import and export of accessible format copies under certain conditions. Regarding importation, when an accessible format copy can be made pursuant to national law, a copy may also be imported without right holder authorization. With reference to exportation, accessible format copies made under a limitation or exception or other law can be distributed or made available by an authorized entity to a beneficiary person or authorized entity in another Contracting Party. This specific limitation or exception requires the exclusive use of the works by beneficiary persons, and the MVT also clarifies that, prior to such distribution or making available, the authorized entity must not know or have reasonable grounds to know that the accessible format copy would be used by others .

Many publishers in the UK have already been working with the support and guidance of the Publishers Association (PA) to provide accessible copies of their publications following the introduction into UK law in 2002 of an exception for the benefit of visually impaired persons. All publishers will need to review their workflows to prepare for being able to publish in accessible formats. As part of the international publishing community, the PA has been stressing the importance of cooperation between publishers and authorised entities to achieve the ultimate objective of the Marrakesh Treaty to make books accessible to blind, visually impaired, and otherwise print disabled persons both in the UK and across borders .

The conditions for distribution include having lawful access to the work, introducing only those changes needed to make the work accessible, and supplying the copies only for use by beneficiary persons. This will help to avoid the duplication of transcription efforts in different countries, and also allow Contracting Parties the freedom to implement its provisions taking into account their own legal systems and practices, including determinations on fair practices, dealings or uses, provided they comply with their three-step test obligations under other treaties.

The three-step test is a basic principle used to determine whether or not an exception or limitation is permissible under the international norms on copyright and related rights. It includes three elements; any exception or limitation: (1) shall cover only certain special cases; (2) shall not conflict with the normal exploitation of the work; and (3) shall not unreasonably prejudice the legitimate interests of the right holder.

It is important to note that the definition of literal works covers books; periodicals and other similar textual works, as well as sheet music. It doesn't cover films. The Treaty does not allow for the contents of a Work to be changed (e.g. to "easy read") rather just for the Work's contents to be transcribed into a format that can be accessed by the visually impaired.The treaty also gives the term "accessible format copy" a broad definition that does not limit the format or the technique one may use to make a book accessible and allows whichever format capable of providing access to the work as feasibly and comfortably as a person without visual impairment or other print disability may access it.

With a concerted effort for widespread ratification and implementation, the Treaty will have a huge impact on accessibility for people with print disabilities. It should both promote the domestic production of accessible materials in each country, as well as provide access to books produced elsewhere. This will be important for books in languages that cross national boundaries, languages like English, Spanish, French, Portuguese, Russian, Chinese, Bangla/Bengali, Indonesian, and Swahili among many others. It will also be especially important for countries that haven't traditionally had robust services for people with disabilities, these less wealthy countries should benefit greatly from access to the extensive collections developed in wealthier and larger countries

CONCLUSION

In plain language, this is a Treaty that should start to remedy the book famine. It provides a crucial legal framework for adoption of national copyright exceptions in countries that lack them. It creates an international import/export regime for the exchange of accessible books across borders. It is necessary for ending the book famine, but it is not sufficient. Countries need to sign, ratify and implement its provisions. Non-profit organizations, libraries, educational institutions and government need to take advantage of these provisions to actually deliver the accessible books people with disabilities need for education, employment and full social inclusion. The World Blind Union will work with our colleagues and supporters all over the world to implement the Treaty and fully end the book famine for people with print disabilities.

Now that Kenya has already ratified the Marakesh Treaty, it is imperative for all State actors initiate and support the domestication of the treaty. The Kenya Law Reform Commission in particular is well placed in history to spearhead this process. Notwithstanding the import of Article 2(5) of the Constitution, which necessarily imputes certain international norms principles and standards, it is nonetheless desirable for the treaty to be domesticated as provided for under our laws. the alternative mechanism for achieving the same end involves the filing of a petition for the declaration that the trety is applicable municipally, although this process tends to be time consuming, acrimonious not guaranteed to to attain the desired effect. Eventually blind and visually impaired Kenyans can wait no more for the full implementation of the Treaty and must apply themselves with commitment to ensure that this happens sooner.

- Mr. Mathew M Kimanzi is a visually impaired Advocate of the High Court of Kenya. He is currently pursuing a Masters of Law degree at the University of Nairobi)

INTERNATIONAL LAW

BY JOSEPH LUTTA

Is NATO justified to initiate forceful regime change in the Arab world?

> In 2011, NATO warmongers rode on R2P as the perfect Trojan horse to depose Colonel Muammar Gaddafi who likeSaddam and now Assad was accused of exterminating his people.

"Show me the man and I will show you his crime"quipped the Head of the Soviet Secret Police, Laventiy Beria. This grotesque propaganda reverberates with NATO's warmongering machine that campaigns for the spreading democracy at gunpoint across the Arab world. This time round Syrian strongman Bashar-Al-Assad found himself on the chopping block after being accused of orchestrating the deadly'chemical attack' against innocent civilians. EvenUS President Donald Trump could not resist the temptation to join this orgy of slander by stripping down his pacifist pledges and calling for missile strikes against Russia, Iran and Syria.

By and large, this blanket condemnation flies in the face of Rule of Law and common sense considering the mystery surrounding this incident. First and foremost, is there any tangible and credible evidence incriminating him for this heinous crime? This gratuitous indictment is emblematic of an Orwellian dystopia where absence of evidence is evidence in itself hence the need for sweeping 'regime change.' Granted, Assad is a repugnant tyrant whose despotic reign reeks of corruption, cronyism and impunity. But does his misrule justify foreign military intervention least of all by NATO? Needless to say, the geostrategic shenanigans and hollow rhetoric bedeviling this impasse casts serious aspersions on the use force in international law. In Nicaragua v USA, the ICJ affirmed Articles 2 (4) and 51 of the UN Charter limits the use of force strictly for purposes of 'self defense.' After the gruesome genocides in Rwanda and former Yugoslavia, NATO attempted to pierce the veil of sovereignty under the doctrine of 'Unilateral Humanitarian Intervention' (UHI). This notion permitted the use of military force in response to gross violation of human rights in foreign domains.

MASS DESTRUCTION

Come 2003 the NATO war hawks used this doctrine to justify the felonious invasion of Iraq under the pretext of decimating nonexistent Weapons of Mass Destruction (WMD). When this façade was exposed they predicted the downfall of the late Iraqi leader Saddam Hussein would transform the country into the beacon of liberal democracy in the region. This prophecy of doom came to pass after Iraq was embroiled in sectarian violence and terrorist insurgences which paved way for the infamous Islamic State. After this foreign policy faux pas, UHI underwent a cosmetic face lift and in 2005 it was renamed the Right to Protect (R2P).

MUAMMAR GADDAFI

In 2011, NATO warmongers rode on R2P as the perfect Trojan horse to depose Colonel Muammar Gaddafi who likeSaddam and now Assad was accused of exterminating his people. Analogous to Iraq this quixotic quest to inculcate democracy in Libya failed leaving behind a grisly trail of carnage, displacement and plunder.

Flash forward to 2018 the same reprobates are rehashing the monstrosity of regime change in Syria. Oddly enough, these countries waffle on about democracy, human rights and Rule of Law only to flout these principles when pursuing their neo-conservative agenda in the Arab world. This trend of impunity is morally reprehensible in this day and age when NATO's hegemony poses an existential threat to global stability. In light of this geopolitical conundrum it is incumbent upon the international community to remap out the terrains of foreign intervention to avert needless military incursions in future.

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

LABOUR LAW

BY PETER KEYA

The place of Labour Laws in containing labour relations in Kenya

Since independence, strikes have continued to be part of the labour relations in Kenya especially for those who work in the public sector and are paid out of public funds. This trend is attributable to the vibrancy of trade unions. Trade unions continue to flex muscles and engage in popularity contests with the Government as the employer of the members of the unions. A union leader may as well be judged by how many strikes and how successful the strikes have been conducted. The success of strikes is largely determined by how long the strike lasts and the resultant bargain achieved. It is therefore not surprising that the right to strike was elevated to a constitutional right under the Constitution of Kenya in 2010 by virtue of the provisions of Article 41(2) (d) of the Constitution. Accordingly, every trade union, employers' organisation and employer has the right to engage in collective bargain. The government is no exception to these provisions.

COLLECTIVE BARGAINING AGREEMENTS

More recently, the country has continued to be treated with the melodramatic renewal process for the Collective Bargaining Agreements (CBAs). Be it teachers, University Academic Staff, University Non-Academic Staff, Doctors or Nurses, all of them seem to follow the same script. The trade union starts by grumbling through the media on their terms and conditions of service. No substantive steps are taken by the employer. This culminates into a potential trade dispute that leads to a strike notice being issued by the trade union. Haphazard attempts are made at resolving the dispute within the notice period by the representatives of the employer making rejoinders through the press. The notice period lapses and the strike takes effect with the usual braggadocio characterized by waving of twigs, demonstration, press statements culminating in the officials chanting to 'solidarity forever' while holding hands stressing the resolve to remain on strike until demands are met.

In the meantime, the matter gets to court seeking to have the strike declared illegal. Usually, the court

declares the strike illegal and either summons the trade union officials or attempts to mediate and /or preside over the dispute. The trade union sometimes acknowledges the court order but usually decline to adhere to the order using arguments such as it is the executive or governing body that has the mandate to call off the strike. Meanwhile, the employer buoyed by the court declaration strengthens its resolve not to engage with the trade union officials until the strike is called off. This episode is accompanied once more with name trading and counter accusations as to both the contents of the agitation resulting in the strike and insincerity by the people on either side of the dispute. In a further show of might, the employer resorts to issuing threats to the members directly warning them of dire consequences and sanctions if they continue with the strike. Some employers give in and slowly saunter back to work, albeit reluctantly. Disciplinary measures are then instituted for those who are adamant to resume work. These take the form of withholding of salaries and benefits, suspension and in some cases termination of employment. Officials are not spared either as they face intimidation amongst other methods to soften their resolute including blackmail through the use of the general public which ordinarily bears the brunt of such strikes. Lately, we have become accustomed to fresh job advertisements for those on strike, recall for those who retired or are on leave and even importation of foreign workers to fill up the deficit left by those on strike. In the end, most strikes are unsuccessful and Collective Bargaining Agreements are renewed on terms other than those bargained.

After all is said and done, it is only a matter of time before the cycle recurs with the same or different parties. Perhaps it is time the profession focused more on what is the appropriate legal mechanism to address this turn of events as lawyers inevitably play a role in the whole process at the different junctures.

Peter Joseph Keya is an Advocate of the High Court of Kenya and currently a law clerk at the Supreme Court

Conciliation of post-employment disputes

Since the enactment of the new labour laws in 2007, constitutionalization of labour rights and eventual creation of Employment and Labour Relations Court (ELR), there has been a dramatic increase in the number of individual employment disputes filed for adjudication by the specialized court. This has given rise to a host of challenges key, being case overloads leading to significant delays in determination of what appears to be simple and straight forward individual labour disputes. These challenges bring into fore the key question on whether the employment jurisprudence in Kenya has developed to effectively embrace or integrate the alternative dispute resolution mechanisms as permitted and promoted by the Constitution.

CONCILIATION

The related question would be whether conciliation as provided for in the current labour statutes and labour administration structures is effective and can conveniently offer a perfect substitute or a viable alternative to adjudication of individual employment disputes. The challenge is even greater when it concerns post-employment disputes since parties generally do not intend to 'repair' the employment relationship but seek to redress an apparent violation of labour rights.

In conciliation, a third party supports the direct bipartite negotiations by assisting the parties to identify the cause and extent of their differences, to establish alternative solutions and eventually agree on a mutually acceptable settlement. However, the responsibility for making decisions and reaching a solution remain a joint one between the parties. Hence, a conciliator only acts as medium for the continuation of dialogue. Even though the appropriateness of this mode of dispute resolution as it relates to alleged violation of statutory employment rights has been questioned or doubted, the hallmark of the conciliation process is to allow parties to freely negotiate with the aim of reaching an appropriate and acceptable compromise.

A careful reading of the existing enabling legislation and administrative structures exposes a significant gap as far as conciliation of individual post-employment disputes is concerned. Even though conciliation process is applicable to both individual and collective disputes, the situation is different when it comes to settlement of collective labour disputes as governed by the Labour Relations Act.

STATUTORY CONCILIATION

Cognizance of the public interest nature of employment and labour relations matters, Part VIII thereof provides for a statutory conciliation process. It effectively outlines the manner of appointment of conciliators, conciliation procedures, powers of the conciliators and stages where a trade dispute may be referred for adjudication. Individual employment disputes cannot be conciliated under the said provisions.

The provisions of Employment and Labour Relations Court (ELR) Act grants the Court an exclusive jurisdiction to hear and determine disputes under an employment contract. However, a Judge of the ELR court whilst seized of a dispute between an employer and employee, instead of hearing a dispute, has liberty to let another qualified person determine the dispute through conciliation, which determination the Judge may adopt or implement on his own motion or at the request of the parties. However, unlike the express provisions of the Labour Relations Act alluded to herein, there exists no guiding regulations on how the conciliation process ought to be initiated and proceeded with or how a conciliator in individual employment disputes ought to be appointed. It is for this reason that the court hardly invokes the aforesaid enabling provision to facilitate conciliation of matters pending before them.

Labour administration system ought to play an important role in ensuring effective application or utilization of conciliation mechanisms as promoted or encouraged by the Constitution and the relevant labour laws. Ordinarily, these systems ought to provide a free, expeditious and accessible conciliation system with the principal objective of limiting the number of individual claims that are subsequently filed or finally adjudicated by the Employment and Labour Relations Court.

However, under the present labour statutes, the pre-court administrative conciliation is not mandatory. The Employment Act merely permits an employee who is unfairly dismissed to present a complaint to the labour officer who, after affording the parties an opportunity to be heard, recommend what in his opinion would the best mode of settling the dispute. However, such referral by an employee is in addition to his rights to adjudicate over the same issues. It follows that the provision allows concurrent proceedings before the labour officer and at the Employment and Labour Relations Court by the same parties over the same issues or subject matter.

The provision obviously did not intend to provide for conciliation as an alternative pathway to litigation. The notable drawback is that a party may easily choose not to submit to the jurisdiction of the conciliator or present a complaint merely as a precursor to litigation with no intention to be bound by the outcome of the process even where it represents an agreement between the parties, constituting a valid contract.

From the foregoing, it is safe to conclude that the conciliation mechanisms established under the Employment Act must be revitalized to enable it to offer a viable alternative pathway to adjudication of individual employment disputes. The enabling statute ought to be amended to empower the parties, through a conciliator, to reach informed agreements and have the parties bound by the terms thereof after which a party would be precluded from re-opening the matter in courts.

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

Evaluation of the Court Annexed Mediation

Article 159(3) of the Constitution recognizes the application of Alternative Dispute Resolution (ADR) methods such as reconciliation, mediation, arbitration and traditional justice mechanisms by Judiciary. All methods of settling disputes outside court are known as Alternative Dispute Resolution methods. A commentator Joseph Grynbaum said, "An ounce of mediation is worth a pound of arbitration and a ton of litigation".

Mediation is basically assisted negotiation by a neutral third party. Mediation is a structured dispute settlement process facilitated by a neutral third party who engages in "shuttle diplomacy." Christopher Moore defines mediation as the intervention in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute."

COURT ANNEXED MEDIATION

Court Annexed Mediation is provided for under the Civil Procedure Act. There are other Statutes that have recognized mediation as an alternative method of resolving disputes such as the Community Land Act, The National Land Commission Act, the Land Registration Act and the Marriage Act. The Courts have recommended mediation in resolution of commercial, civil, succession and labour disputes under the court annexed mediation. The process is being rolled out into other types of disputes progressively. We have also witnessed mediation being used in criminal cases to reconcile parties especially in assault cases.

Mediation is a unique process with special characteristics which give it an edge over other forms of dispute resolution methods. Several authors have defined these characteristics which make mediation advantageous over other forms of dispute resolution. The characteristics are universal to all manner of disputes ranging from family, employment to even commercial disputes.

These special characteristics of mediation revolve around six C's being choices, calendar time, cost, confidentiality, control and closure. In mediation the parties involved have choices that don't exist in litigation such as the place of mediation, date, time and ground rules, as well as selection of the mediator. The confidentiality clause creates confidence in the process and facilitates honest dialogue. The parties may leave the mediation at any time if they are not satisfied with the process. Court cases can take years to be processed through the judicial system encumbered with budgetary limitations on courts and an overwhelming caseload. When parties agree to mediate, they can get their "day in court" much sooner. The Kenya Judiciary Report of the financial year 2016-2017 indicates that as at the end of that financial year there were 533350 cases pending in the entire Judiciary comprising of 185369 criminal cases and 347981 civil cases. The report indicates that there was a seven percent increase of pending cases from the previous financial year. In comparison, 463 cases were referred to mediation in the period with 150 being concluded. The total value of matters referred to mediation in the period in monetory terms was Kshs. 10,327,404,112 and the value of settled cases was Kshs. 566,734,116. The average period taken to conclude the mediations was 66 days. Under the court annexed mediation rules mediation process can only be extended after the 60 days by maximum of 10 days. Clearly mediation has high impact on justice because of faster settlement of disputes.

MEDIATION PROCESS

The Court Annexed Mediation in Kenya has various actors being: the court registrars, parties, Advocates representing the parties and the mediators. The court registrars screen the cases and decide the ones suitable for mediation. The advocates representing the parties are required to prepare case summaries in seven days on notification of the referral of the matter to mediation and also represent the parties in the mediation. The parties must attend the sessions in person as they are the decision makers. Company directors must attend to commit the entities. Mediation aims for a win-win situation and hence the role of the advocates differs from their adversarial role in litigation. In mediation the Advocates' role is to advise their clients on matters of law. The mediator is a neutral third party whose role is to facilitate negotiation between the parties towards settlement of the dispute. The Court Annexed Mediation is mandatory making it different from the normal known mediation which is voluntary.

In conclusion, the Court Annexed Mediation process has proven to be a success. However, there is need to address issues of training standards and professional ethics of mediators. The challenge of professional ethics is an emerging issue as the profession grows and as the Judiciary prepares to roll out the process country wide. Currently, Court Annexed Mediation is only in Nairobi based courts.

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Opportunities and challenges for lawyers in mediation

Mediation is one of the Alternative Dispute Resolution (ADR) systems gaining momentum in Kenya. The Judiciary has also embarked on referring matters filed in court to mediation. A party that chooses to resolve a dispute through mediation may or may not be represented by an Advocate.

The traditional role of Advocates in litigation has been to represent and protect the interests of his/her client and advising the client on matters of procedure and substantive law. While an Advocate can continue performing these traditional functions, the manners in which these functions are performed in mediation are different. Advocates must understand that mediation is a non-adversarial process through which disputants are encouraged by the mediator to take responsibility in resolving the dispute between them. The mediator controls the process but the parties to a dispute own the process. It is the parties who reach as settlement by consensus.

ADVANTAGES OF MEDIATION

Mediation is one of the ADR systems considered cheap, confidential and a faster way of resolving disputes. It is a process that maintains and enhances the relationship of the disputants. It works well in an employment set up, business and family relationships. In other parts of the world like USA, UK, Australia, Singapore, New Zealand, the role of an Advocate has become increasingly important as the society views mediation as one of the most effective ADR systems in resolving disputes compared to litigation.

A lawyer representing his client in mediation has the following responsibilities:

PREPARING THE CLIENT

Just as a lawyer prepares for litigation, he/she should also prepare the client for mediation. He/she should prepare the client to speak well and allow him/her to interact freely with a mediator and other parties to a dispute.

ADVISING CLIENT

A lawyer should advise the client when the case ready for mediation. However, there is no fundamental rule as to when the case is suitable for mediation. A lawyer should take into account various factors including the nature of the dispute and interests of the client in deciding whether the case should go for mediation or not.

SELECTING THE MEDIATOR.

It is the role of a lawyer to assist a client to pick an effective mediator. In choosing a mediator, the lawyer should look at skills of the mediator, experience, and expertise among other qualifications.

TYPE OF MEDIATION

There are different types of mediation which include facilitative, evaluative, transformative, narrative and concord mediation. It is the responsibility of a lawyer to advise a client the various types of mediation available and select the suitable type(s).

OPENING STATEMENT.

The lawyer should make his opening statement very clear and focus on the key issues involved in the dispute. When making the opening statement, a lawyer should recall that he/she is not in court and show that he/she understands the practice and dynamics of negotiation applicable in mediation.

LEGAL ADVICE

A mediator is not an advisor to any of the parties to a dispute. The main reason why a client engages a lawyer is to ensure that the lawyer protects the interests of his/her client. It is therefore, important for the lawyer to advise his/her client on legal issues involved in the dispute.

SWOT ANALYSIS.

The lawyer should make his/her client understand the Best Alternative to a Negotiated Agreement (BATNA), the Worst Alternative to a Negotiated Agreement (WATNA) and the Most Likely Alternative to a Negotiated Agreement (MLATNA). The client should be made to understand the strengths and weaknesses of his/her case.

CLIENT'S STRATEGY.

A lawyer should assist his/her client to plan a strategy on behalf of the client towards achieving preferred desires. The lawyer is expected to consider a number of options and theories that will be applicable in resolving the dispute.

USING CAUCUS SESSION.

A caucus is a private or separate session between the mediator and each party. A lawyer has to be present during the caucusing. During the private session, a mediator tries to explore privately with each party the barriers to a settlement and the consequences of various alternatives to a settlement.

BEING PART OF THE SOLUTION.

A lawyer should be part of the solution and not part of the problem. A lawyer is a problem-solver and in that regard he/she should have the skills of analyzing the dispute.

OFFERS AND SETTLEMENT

A lawyer can help his/her client in formulating and assessing the offers made by other parties to the dispute. He should appropriately guide his/her client in responding to counter-offers from other parties to the dispute.

DRAFTING A SETTLEMENT.

If a settlement is reached, the lawyer should assist in drafting the settlement terms and conditions. He/she should ensure that the language used is simple and understandable to the parties, settlement terms are clear and specific in particular who does what, what should be done and the time frame of doing what is to be done.

ENFORCEMENT

A lawyer should assist the parties in enforcing the terms of the settlement like he does in any written contract.

- Mr Charles Getanda is an Advocate of the High Court of Kenya and a Certified, Chartered and Accredited Mediator

Alternative Dispute Resolution as an emerging frontier

The Constitution of Kenya reinforces the right to access justice through Article 48 which urges states to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. In Kenya, access to justice is actualized with regard to judicial authority which is exercised by the courts and tribunals established by or under the Constitution of Kenya. Resultantly,litigation has been a dominant means of dispute resolution with an evident increase in cases that are filed and heard within the justice sector through Courts and Tribunals.

JUDICIAL AUTHORITY

Judicial authority in Kenya may be exercised through the following principles; justice shall not be delayed, it shall be done to all irrespective of status, it shall be administered without undue regard to technicalities, it shall protect and promote the purpose and principles of the Constitution and it shall promote the use of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. This therefore sets the framework for Alternative Dispute Resolution (ADR) as a means to realize the right to access to justice. The use of ADR is reinforced under Article 159(2) (c) which lists the forms of ADR as including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms subject to pre-conditions for traditional dispute resolution mechanisms as set out in article 159(3).

LEGAL REPRESENTATION

Access to justice has however been curtailed due to a number of factors: the speed of litigation, lack of autonomy in some instances, rigidity of the Court process, its technicality ,its publicity, cost of litigation (cost of filing fees), processing relevant documents as well as the cost of maintaining legal representation. This has further been amplified by the delay in handling matters before Courts and Tribunals as a result of the increase of filed cases vis a vis limited human resource available to hear and determine the said cases. As a result, several measures have been implemented to clear the backlog of cases that impede the wheels of justice. For instance, increasing the number of judicial officers, hiring legal researchers attached tojudicial officers to fast track research , promotion of ADR through enforcement of arbitral awards, referral of cases to mediation through the Court annexed mediation pilot project (CAMPP) initiated in 2016 for Commercial and Family Division matters and issuing orders towards allowing settlements through traditional justice mechanisms.

CASE STUDIES

The use of traditional dispute resolution mechanisms is evident in R vs. Mohamed Abdow Mohamed [2013] eKLR case, where the accused person charged with murder was discharged following an application by the prosecution for withdrawal of the charge. This was on account of a settlement reached between the families of the accused and

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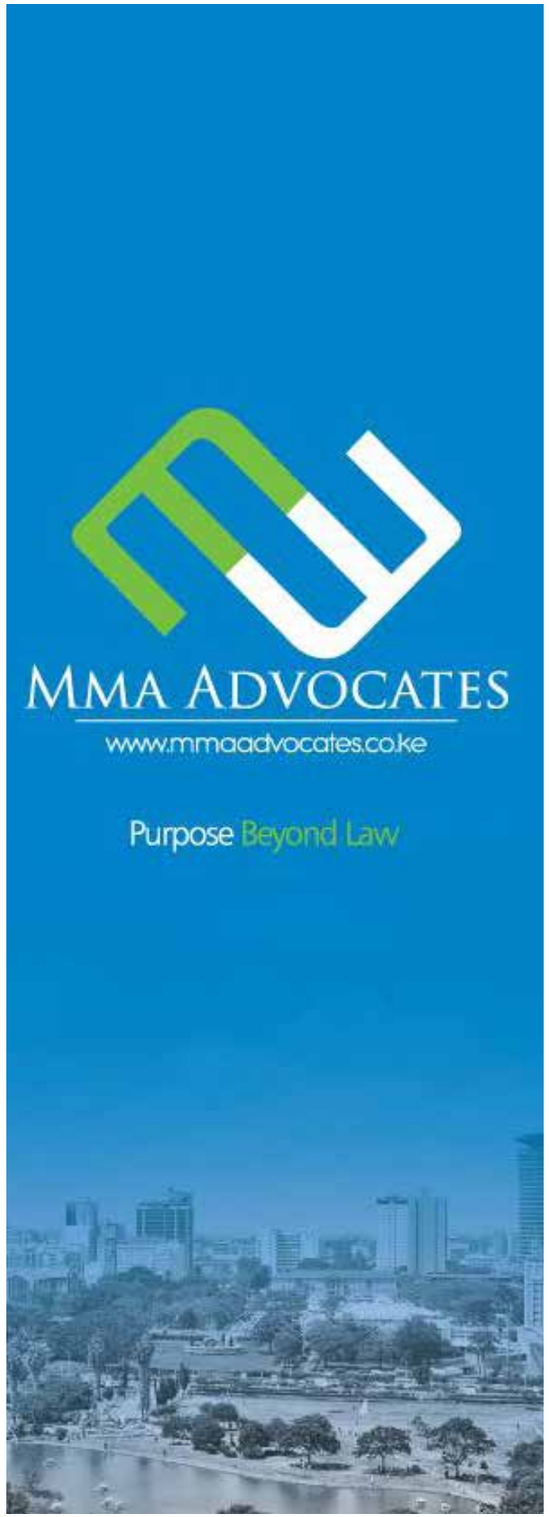

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deceased person. The families had agreed to compensation in form of camels, goats and other traditional ornaments which were paid to the deceased's family and rituals performed to pay for the blood of the deceased to his family. Most recently, there was a similar application in line with settling a murder case through traditional dispute resolution mechanisms in R vs. Abdulahi Nour Mohamed (alias Arab) [2016] eKLR. In the case, there was an application seeking time to reconcile and settle the matter out of court between the accused and the deceased's (victims) family in line with Somali culture, law and religion.

CODIFICATION

Our laws have also codified the use of Arbitration and Mediation and other alternative dispute resolution methods with increased uptake being on arbitration and mediation as alternative dispute resolution mechanisms. Further, a regional centre for international commercial arbitration and an arbitral court was established in 2013 through the Nairobi Centre for International Arbitration Act; known as the Nairobi Centre for International Arbitration (NCIA). NCIA is an independent institution charged with inter alia coordinating and facilitating in collaboration with other lead agencies and non-state actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitating their implementation, enforcement, continuous review, monitoring and evaluation.

LEGAL AID ACT

The use of ADR has also been promoted through the Legal Aid Act [2016] which advocates for the facilitation of access to justice for persons who cannot afford to pay for legal services. This is achieved through provision of legal aid i.e. legal advice, legal representation as well as assistance in resolving disputes by alternative dispute resolution. Additionally, disputes relating to community land pursuant to Section 39(1) of the Community Land Act are to be resolved through the use of ADR mechanisms including traditional dispute and conflict resolution mechanisms, the Act goes further to single out mediation and arbitration.

The Government has also entrenched the use of ADR in resolving disputes that may arise between the National Government and county government as well as between county governments. Article 189(4) of the Constitution mandates them to make every reasonable effort to settle disputes and advocates for the use of ADR mechanisms. The Inter-governmental Relations Act [Chapter 5G] Laws of Kenya vide Section 31 reaffirms this by stating that national and county governments shall take all reasonable measures to resolve disputes amicably as well as apply and exhaust ADR measures as contemplated in the Constitution.

The Judiciary - in line with its transformation framework, has established two Taskforces with the aim of investigating the feasibility of ADR mechanisms, traditional and other informal dispute resolution mechanisms as modes of enhancing access to justice in Kenya.

In 2016, the Chief Justice constituted the Taskforce on Traditional, Informal and other mechanisms used to access justice in Kenya (Alternative Justice Systems). It was tasked to formulate an appropriate judicial policy on alternative justice systems and to consider the methodology and viability of mainstreaming alternative justice systems as well as suggesting concrete ways of doing so. In line with its mandate, the Taskforce in conjunction with the Judiciary Training Institute (JTI) were to pilot and bench mark existing models of Court- Annexed Alternative Justice Systems, to capacitate them, observe them and document their functioning to glean best practices to be used to develop a potential national model. Additionally, the Taskforce would study best practices and formulate the policy on mainstreaming alternative techniques for reducing case backlog and produce a draft. Further, it would develop a national model for court annexed traditional justice resolution mechanism for possible adoption.

COURT ANNEXED MEDIATION

In line with the Judiciary's transformation framework and its service delivery agenda 2017-2021 and in view of the achievements by the CAMPP, the Chief Justice in 2017 subsequently constituted the Taskforce on Alternative Dispute Resolution Mechanisms used to Access Justice in Kenya-Court Annexed Mediation. The Taskforce aims to develop appropriate judicial policy on court annexed mediation and to consider the methodology of mainstreaming the court annexed mediation as well as suggest ways of doing so. As a result, the Taskforce shall focus on undertaking an analysis of the CAMPP to understand its conceptualization, successes, challenges and prospects. Additionally, in conjunction with the JTI itshall benchmark existing models of Court Annexed Mediation and compare them with the processes adopted for the Kenyan CAMPP with the view of gleaning best practices for development of a national model. Further to that, the Taskforce shall explore the possibility of formulating a comprehensive legislative framework for mediation and develop a strategic plan for implementation of Court Annexed Mediation.

PARTING SHOT

From the foregoing, it is evident that there is a paradigm shift in the mechanisms used to resolve disputes. There is an increased push and reliance on ADR as a mechanism as opposed to litigation.This is evident in legislation, as well as the strategic framework of the Judiciary which continues to examine the feasibility of implementing ADR mechanisms in curing the backlog that ails the court process. It is therefore, imperative for legal professionals to equip themselves with the necessary skills and knowledge to facilitate ADR mechanisms.

Ms. Elizabeth Mosa is an Advocate of the High Court of Kenya

Alternative Dispute Resolution: Which way forward for practitioners in Kenya?

With the promulgation of the Constitution of Kenya in 2010, Article 159 (2) of the Constitution formally recognized the use of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. This is further given effect by many Statutes including the Civil Procedure Act (Chapter 21 of the Laws of Kenya). In line with its transformation framework, the Judiciary has embraced Alternative Dispute Resolution (ADR) as an avenue for addressing case backlog in the court system while making justice more accessible.

The use of courts as the main forum for resolving disputes has been for some time seen as being eaten into. Alternative forms dispute resolution, including agreement-based ADR (such as mediation and conciliation) and adjudicative ADR (such as arbitration and adjudication), continue to flourish and are increasingly institutionalized, leading to their acceptance as forms of resolving disputes in Africa and Kenya by extension.

ADVERSARIAL SYSTEM

Many stakeholders have posited that ADR is the future of dispute resolution. In the same light, there have been theories that have claimed the ADR is really that, 'alternative' and should not be allowed to somewhat replace or appear to overtake litigation and other 'traditional' forms of dispute resolution. The latter view has been held mainly by proponents of the adversarial system of law where the outcome is a win-lose scenario. Kenya is an adversarial system of law and it would not therefore come as a surprise that a sizeable number, if not the majority are seen to resist or appear to be averse to ADR as a form of dispute resolution. While it is clear that ADR is not a form that can/may be used in all disputes, its increasing use cannot be ignored.

Lawyers in Kenya are in an adversarial Common Law system. As such, their concerns or apprehensions towards ADR are genuine and form a basis for a worthy discussion. Despite this, ADR is here to stay and therefore, a way forward must be charted.

IN-HOUSE COUNSEL

There are many ways in which lawyers can embrace ADR and infuse it in their practice be it private, as in-house counsel or in the public sector. During the contracting process, the in-house counsel tackles so many mixed business and legal questions that the dispute resolution clause sometimes gets very little attention. In-house counsel need to be more engrossed in arbitration law as more often than not they leave the actual handling of the dispute to external lawyers. Arbitration is, by its nature, a less formal and technical process than litigation in court, and that alone should encourage in-house attorneys of all backgrounds to take a more proactive role from infusing a proper (alternative) dispute resolution settlement to the actual hearing.

Advocates can also train as alternative dispute resolvers and act as neutral third parties. It is not surprising that in the recent SOAS Arbitration in Africa Survey that the overwhelming majority (90.6 percent) of respondents who consider arbitration as their primary profession are lawyers. In Africa, as in other parts of the world, lawyers are the primary professionals engaged in the business of dispute resolution. There are other opportunities in arbitration such as tribunal secretaries, registrars and expert witnesses that lawyers can tap into. Construction Adjudication is also another area lawyers can train in. Emerging areas in ADR such as maritime, sports and investment arbitration also offer a new area of practice for lawyers in Kenya.

CASE BACKLOG

In line with its transformation framework, the Judiciary has embraced ADR as an avenue for addressing case backlog in the court system while making justice more accessible. This led to the coming into force of the Court Annexed Mediation Programme (CAMP) which has been rolled out to court stations countrywide. The programme needs more people to train in mediation to ensure that justice is availed to all Kenyans.

With the establishment of international dispute resolution centres such as the Nairobi Centre for International Arbitration, Kigali International Arbitration Centres and the recent launch of the Africa Arbitration Association, more international disputes are expected to be resolved in the continent. This opens up international arbitration for many Kenyan lawyers as counsel and as mediators or arbitrators. The growth of international arbitration in Africa will be immense in the next few years and Advocates should tap into this area.

Over time there has been an increased call towards specialization in legal practice and while there are varying school of thoughts on this issue, it is important to remain open-minded and adaptable, which in a contracting job market such as law is the best way forward. ADR is here to stay and a wise lawyer is one who keeps abreast with developing areas of law to ensure longevity of practice and increase of knowledge and expertise as s/he offer services to clients and the general public.

- Mercy Okiro is an Advocate of the High Court of Kenya, a trained Construction Adjudicator, Arbitrator and Accredited Mediator of the Chartered Institute of Arbitrators, London and the Judiciary of Kenya.

Opportunities for lawyers in Africa's Continental Free Trade Area Agreement

LSK Secretary/CEO Ms. Mercy Wambua congratulates Mr. Job Mati after his recent admission to The Bar.

Africa has the longest and oldest economic trade history. Promoted by necessity, scarcity and abundance, our ancestors traded agricultural produce, iron tools and precious metals across the continent. Trade routes were established through the Sahara desert, over the Indian Ocean and the Atlantic which resulted in powerful trade towns and ports such as Mombasa.

Unfortunately, our economic history, camaraderie and brotherhood was shattered with the advent of colonialism. The Berlin conference regulated the colonisation of Africa and ensured that all forms of self-governance and African autonomy were eliminated. The colonialists re-arranged our economic activities to suit their European interests. Instead of African States trading with each other, they traded solely with Europe.

TRADE RIFT

The trade rift that was created between African States during the colonial period has persisted and manifested in suspicion and high trade tariffs post colonialism. We currently have imposed higher tariffs on intra-Africa trade than trade between African States and the European and American States. Intra Africa trade currently stand at 16 percent compared to Latin America's 19 percent and 60 percent in Asia.

The prohibitive nature of high trade tariffs and declining Intra-Africa trade prompted the Assembly of the African Union, during its eighteenth ordinary session that was held in Addis Ababa, Ethiopia, in January 2012, to adopt the decision to establish a Continental Free Trade Area (CFTA) by 2017. The decision aimed at ensuring Africa's market integration and ensuring that the resultant boost in trade would prompt socioeconomic development.

Years later after intense negotiations on the 20th and 21st of March 2018 at an African Union Head of States Summit in Kigali, the African Continental free trade area agreement was signed by 44 out of 55 countries. Amongst the signatories was Kenya - coincidentally the first country to also deposit the ratification protocols. The agreement targets to eliminate tariffs on intra-Africa trade of goods and services and create a single continental market with free movement of business people. This would increase trade between African States by half. Once the agreement is fully implemented tariffs would be eliminated on 90 percent of goods traded in African States.

Whilst the creation of the free trade area is a delight for investors and traders, it is important to ask ourselves as legal minds what is in for us. As a result of the AfCFTA agreement there shall be a demand for Lawyers knowledgeable in trade law.

LAWYERS' OPPORTUNITIES

Drafting International Trade Contracts

In as much as the sole purpose of the agreement is to boost trade, international trade shall be governed by contracts. Amongst the issues that lawyers have to grapple with while drafting the trade contracts are which countries law is applicable, intellectual property rights and dispute resolution.

Mergers and Acquisitions

An opportunity for lawyers under the agreement is to ensure that they can help their clients restructure their businesses to ensure that they will reap the benefits of the free trade area.

Dispute Resolution

Dispute settlement is the central pillar of any multilateral trading system. Most disputes where a multilateral trade agreement is in place such as the AfCFTA are complex and intricate and must be handled diplomatically. In the case of the AfCFTA agreement, so far a dispute resolution mechanism had not been negotiated by the date of signing of the agreement. Lawyers should however, be knowledgeable of dispute resolution mechanism such as mediation and arbitration. Further lawyers should be aware, that most multilateral agreements - as in our case, may contain a dispute resolution mechanism that either only allows States to resolve disputes on behalf of companies thus they should brush up on their negotiation skills or a mechanism that allows for an Investor-State Dispute Settlement (ISDS) clause, which allows private entities to initiate disputes against state parties directly.

Moreover, lawyers should ensure that they have the capacity to carry out international litigation.

AfCFTA Secretariat

The agreement provides for a secretariat the location of which has not yet been decided. The secretariat will be responsible for coordinating the implementation of the agreement and shall be an autonomous body within the AU system. As lawyers, various legal vacancies shall be established under the secretariat as advisors, consultants, litigators and negotiators

Committees

Kenyan lawyers should ensure that they are well represented as members of various committees established by the agreement. Several Committees will be established through protocols to assist with the implementation of specific matters. It is already agreed to establish committees for trade in goods, trade in services, on rules of origin, trade remedies, non-tariff barriers, technical barriers to trade and on sanitary and phyto-sanitary measures.

Separation From AfCFTA

The past year brought about the separation of Britain from the European Union aptly named Brexit. International trade is one of the practices most affected by Brexit. If at any point Kenya decides to withdraw from the agreement then Kenyan lawyers should be knowledgeable in (re)negotiating international trade deals that it previously enjoyed as part of the AfCFTA. Kenyan international trade negotiators and Lawyers will have to advice the both the Government and businesses what the options are.

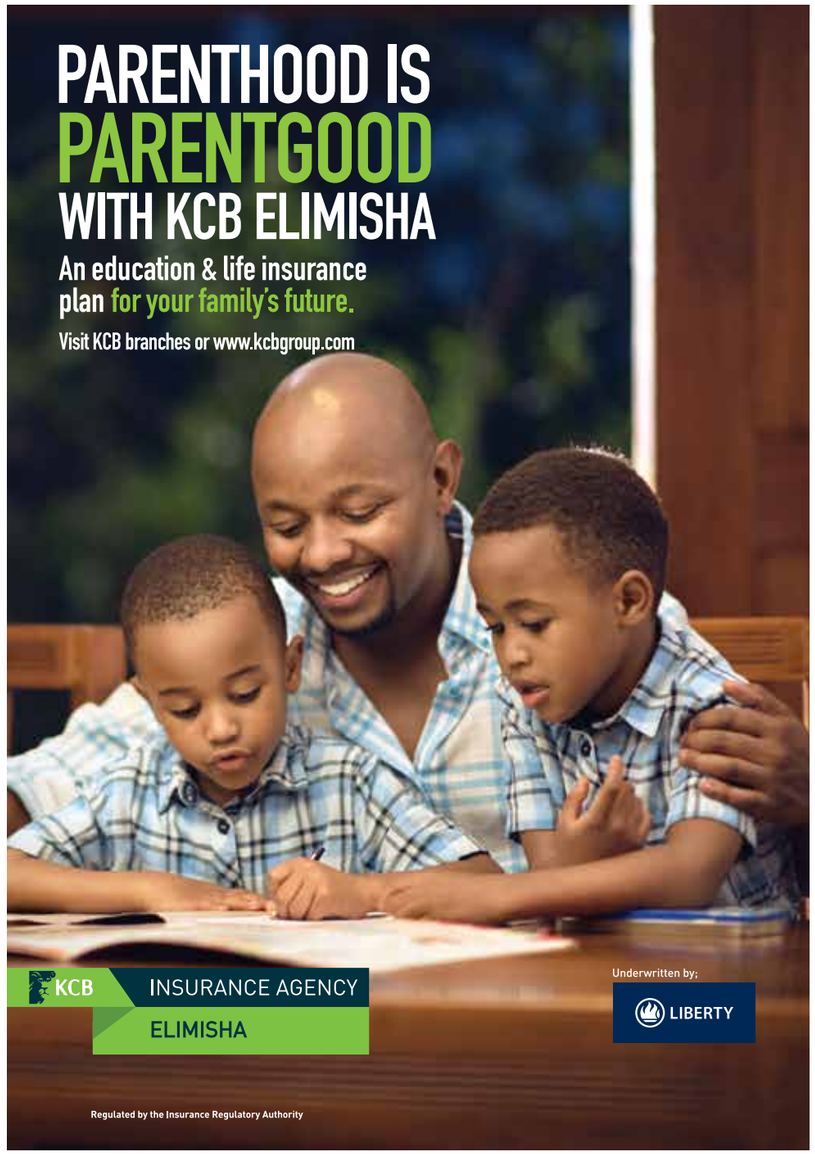
CONCLUSION

To be dominant as the foremost legal providers under the agreement we must fight for our space by ensuring that a proactive LSK establishes cross border protocols in liaison with the Government to ensure trade in legal services by its members under the agreement.

A dedicated committee be set up in relation to trade in legal service to look at all opportunities for lawyers that arise in treaties signed by Kenya. A reference point would be the committee of the International Bar Association bar issues trade in legal services committee.

Further the society must structure their CPD coverage to include knowledge on trade laws and their dispute resolution mechanism.

- Ms. Beth Michoma is an Advocate of the High Court of Kenya, She is currently the Deputy Director of Legal Services at Nyamira County Assembly & Managing Partner, Michoma & Company Advocates



BY SAMUEL KAIRU

Over-fragmentation of private legal practice in kenya: A boon or a curse?

Legal practice in Kenya, in the recent past, has experienced rapid expansion with many young advocates opening start-ups mostly immediately after admission to the Bar. Whether the dynamic is good or bad for the legal profession is not clear. However, the cause and effect of it are already with us.

Some of the key questions that emerge is why the sudden mushrooming of small law firms and by extent why the newly admitted Advocates are unwilling to first work for the already established firms before starting their own and the impact of such fragmentation on the quality of practice in the country.

This new development in the profession is symptomatic of a deep-rooted culture in the management of legal practice in Kenya where there are undeniable substantial challenges and inefficiencies. In fact, business management practitioners have been unable to decipher how smart, well versed and high income earners such as lawyers are unable to manage their key business institution effectively.

MANAGING PARTNER

There are several questions that arise from this discourse. How big should a law firm be to adopt proper management practices? Does the managing partner have to be the partner with the largest stake in the partnership, irrespective of their leadership capabilities? Should the managing partner have to be lawyer or should she or he have a combination of both legal and non-legal training? How should law firms handle human resource management?

The above questions seek to provoke the stakeholders to interrogate the current status of private legal practice in the country. There have been efforts by most legal practitioners to improve their management capabilities by enrolling for a Masters in Business Administration (MBA). This should be encouraged as it shows that many have recognised that there is a lacuna to be sealed. Nevertheless, the impact of such advanced training is yet to be felt.

Currently, law firms are still identified as the most poorly managed professional firms as compared to doctors and other professionals. One of the key areas is on human resource management. In fact, instead of enrolling for MBA alone practitioners should also endeavor to get specialized training in human resource management.

POOR PAY

Human resource should be a key component to consider in the management of law firms. It is not a surprise to find that employees in law firms are poorly paid, work long hours, mistreated by their bosses and have to persevere under the legendary partners' tempers and can be terminated at any time without proper notice irrespective of what Employment Act prescribes notwithstanding that the institution is a law firm which of course should know better. This happens to all calibers of employees whether it is an Advocate, a clerk or messenger.

This culture has therefore led to disaffection within law firms with employees who have options,such as Advocates, opting out of the law firms and establishing their own practice. The young lawyers have no sufficient experience either to practice effectively or manage a firm, it thus becomes a vicious cycle of poor management practices.

It has been proposed by various management advisors such as Olmstead & Associates that it would be better to have a Managing Partner who is not an Advocate. He or she would be in-charge of finance, accounting, human resource, office administration and operations. Some big law firms worldwide have adopted this practice with mixed results though we are yet to see such practice adopted entirely in Kenya. However, this is an issue to deeply interrogate for the legal practitioners.

PARTNER'S POCKET

Ordinarily, law firms in Kenya especially small and medium sized are run from the Managing Partners' 'pocket'. All the functions as stated above are crowded on one individual. Their main argument is they do not have sufficient resources to compartmentalize management; though a firm that has more than 15 employees should be better managed.

A law firm is a business. It should be managed as special type of a company. The legal practitioners should be separated from core management functions of operations, finance, human resource, office administration and operations. This compartmentalization is what occurred in the United States' motor industry in the 1920s and 1930s when Alfred Sloan was the head of General Motors; with tremendous success.

- Mr. Samuel Kairu is an Advocate of the High Court of Kenya

Currently, law firms are still identified as the most poorly managed professional firms as compared to doctors and other professionals. One of the key areas is on human resource management.

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LEGAL PRACTISE
BY GERTRUDE MATATA

Understanding technology and advocate/client confidentiality

This is what just happened, before I decided to write this. A client had communicated approval of settlement figures offered by the third party, through Short Text Message (SMS). I communicated the figures to the other side in the regular manner - a written confirmation that their proposed settlement terms had been accepted.

Before noting down details of the messages, which should include time, date and contents, my phone, an Infinix, which I am not yet familiar with, was probably attacked by a virus and all messages disappeared. In the meantime, the messaging client had discussed with a "knowledgeable" relative and changed her mind about the figures she had accepted.

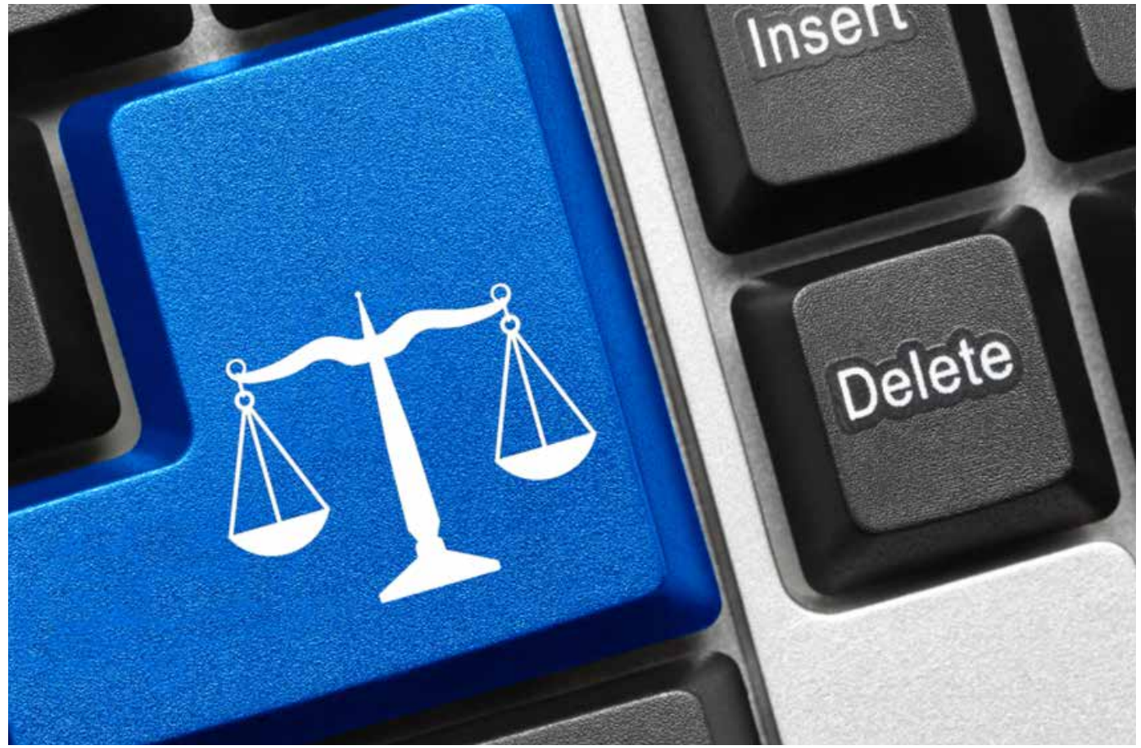
I called to ask her(client) to resend the messages and that is when I was advised she had not only changed her mind, but also deleted the message.

I was at the mercy of the other party and their views on the recanting of the already accepted offer. Applying for the messages from the mobile service provider is an option whose procedure is tricky and my previous experience on trying to get help on similar issues makes me dread the attempt.

SECOND EXPERIENCE

The second experience in the same week, is a string of emails exchanged between client and another interested party inadvertently ending up with the opposing party, who must then have read one email with highly confidential information. Even if the party who added the confidential information to the old thread is not the firm, it is highly detrimental to our case. Another older but more nasty experience was when inadvertently, a student on attachment, at the firm, used a flash disk that was infected with a very serious but not easy to detect virus on all computers - this action destroyed all information. The backups those days were on CDs and very little had been backed up.

I have also read twice John Grisham's book The Associate where one of the brightest legal students was blackmailed into attachment at a particular big law firm with the intention of getting him to steal sensitive information using flash disk technology. That law firm's information was highly guarded. The sensitive case information was in a room under constant CCTV surveillance. They worked under guard and yet the crooks were able to guide him on how to steal the information. What probably helped, was a high sense of ethics also derived from the



certainty that there would be serious consequences if caught.

SIGNING INSTRUCTIONS

In the past, clients used to appear at offices in person and would be properly briefed on a proposal and all pros and cons duly considered. Alternatively, advocate /client agreement would include use of written communication through good old, slow but reliable post office Box. Lately, many have decided that after the initial meeting where they sign instructions, they just call, email, WhatsApp or text so as to avoid the jam, and all other inconveniences incidental to commuting. Each client has found the appropriate technology to use, but we are yet to develop guidelines of suitability of each and inherent dangers.

WhatssApp LAWYERS

Lawyers rarely negotiate face to face anymore, we also find it convenient to call, WhatsApp or text. The phone used is in many cases the personal cell phones of the two lawyers. Phones as a negotiating platform whether with a colleague or a client undermines the process considerably, removing the body language aspect which is a significant indicator of the kind of reception the other side is giving to proposals.

In a summarised manner, I suggest that there is need for both LSK and Law Schools to address some of the challenges in the practice arena courtesy of the information technology revolution. Sample below:

- How safe and compliant with advocate/client confidentiality; proper instruction taking is the use of cell phones? Should personal cell phones be allowed for communicating written text to clients, if not, why not?
- Internet security -how secure are online exchanges between advocate/client in terms of confidentiality. Consider this by thinking about who accesses the emails when they are sent to the firm, and how materials are considered confidential protected after they are received in the increasingly paperless firms.
- With all honesty, who has the advanced knowledge in computer use in the law firms? The young support staff who have gone through computer school or the dinosaur lawyer who is the intended recipient of secured, zipped or coded sensitive documents?
- Can we honestly state that in practice we have reliable ICT support that understands confidentiality and can give affordable advice on securing documents and other information?
- Do some spouses browse through all the messages including lawyer/client content?
- Are laptops with legal documents shared with others not part of the privileged information pact?
- Threats to client information, like the viruses, are we well informed on best systems protection? If so, is it affordable or we need computer system protection levy?
- Sharing precedents like a divorce petition, succession forms, online or on flash disks, do we ensure only blanks are shared?
- What is the effect of email communication on advocate client confidentiality?
- There is need to examine the seriousness of this responsibility, it was aptly put in the case of King Woolen Mills Ltd & Another vs Kaplan & Stratton Advocates cited in Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others [2016] eKLR
- "... The fiduciary relationship created by the retainer between client and advocate demands that the knowledge acquired by the advocate while acting for the client be treated as confidential and should not be disclosed to anyone else without that client's consent. The fiduciary relationship exists even after conclusion of the matter for which the retainer was created."
- Do the non-legal support sign a code of conduct to ensure whatever they handle or is open to them in the firm computers and others system is treated with utmost confidentiality? What support does the Law Society give to support service providers and legal staff in terms of awareness?

Cases on this issue have relied on the provisions of the Evidence Act and the Constitution to underscore the seriousness.

To address the issue across the board, should the LSK not have a policy on some of these issues displayed conspicuously in every law firm, to guide both the clients and the players in the legal services sector services on risk control?

- Ms. Gertrude Matata is an Advocate of the High Court of Kenya and a Mediator.

Why lawyers should embrace technology

I recently went to discuss a brief at my client's house located in an affluent leafy suburb. My client requested for my car number plate and a colored passport sized photo. At first, I didn't understand why a simple meeting would entail such protocol details but upon my arrival, I appreciated the extent at which he had invested in technology and how it had also evolved. Upon my arrival, the automated gate fitted with number plate recognition sensors ushered me in with the aid of a beautiful voice that called out my name and welcomed me into the palatial home. The house was fully automated and all electronic appliances were controlled remotely from my client's palms. This struck me because eighteen years ago not in most of our wildest dream would we have imagined that a device could literally place the entire world in our palms; the wonder of technology today.

LEGAL TECHNOLOGY

Disruptive technologies are emerging fast and the legal profession is not being spared. In first world economies, legal technology is well advanced. Clients can outsource legal services through various legal technology platforms because most of the legal services are automated and most contracts are standardized making all these available at the click of a button. The technology revolution is sweeping steadily fast across every sphere of life and just like the Agrarian revolution, industrial revolution, the technology revolution will change the traditional way of doing things. It is said that no one has fought technology and won because it is so powerful no one can stop it.

ARTIFICIAL INTELLIGENCE

Bowman LLP, a law firm in Kenya is already in the lead in embracing legal technology when it recently announced that it has invested in Kira, an artificial intelligence (AI) solution, to improve efficiencies in certain key legal processes, primarily in the mergers and acquisitions, private equity and compliance areas. The software automatically identifies and extracts information from contracts, using machine-learning models. Innovations through technology is changing the market place and lawyers should embrace the latest trend in order to survive the revolution and thrive in the future market space. In recent years, we have witnessed a disruption in the provision of legal services and the traditional lawyer who had capitalized on the business of incorporation of business entities is now literally out of the market because at the moment any tech savvy person can incorporate a company from the comfort of their homes or office. The latest technology disruption affected the conventional conveyancers and there was uproar from a section of advocates who were scared of the technology because they viewed the tool as a threat to their practice rather than embrace it.

MILLENNIALS

The future consumers of legal services will be determined by the current millennials who are generally impatient and demand more for less. This generation can work from anywhere and consume services from any place as long as there is access to internet. A critical look at the technological advancement in other sectors should create a clear perspective and confirmation for the need of future lawyers to change approach in offering legal services. It is no wonder that the application of technology in legal services is among the many predictions by Prof. Richard Susskind as extensively discussed in his books the End of lawyers and Tomorrows lawyers. He foresees a future characterized by a world of internet-based global businesses, online document production, commoditized service, legal process outsourcing, and web based simulation practice.

PARADIGM SHIFT

It is critical for advocates to re-think the nature of offering legal services in this new technological era because these are seismic paradigm shift that will profoundly disrupt the economics of legal practice. The current leadership of LSK should discuss this topic extensively and consider amending the Advocates Act and maybe amend the Advocate's Remuneration Order due to the changing market trend because the future market will not appreciate fixed pricing but will rather value quality for less. The effect of this new notion of quality for less is starting to catch up within the legal profession. Currently, it is a silent acceptable norm for in house legal counsels to negotiate legal fees with an external counsel on matters clearly provided for by the Advocates Remuneration Order because both private and public companies are cutting costs to maximize profits.

The harsh reality is that the traditional conventional lawyers might not survive the new trend characterized by technological advancements because of the multiple options available to future consumers of legal services. Individuals may select to use legal applications for advice or download legal documents while companies might consider the option of investing in legal artificial intelligent software. Let's take time out and think about the future practice of law both in the private and public sector.

-Mr. Ashimosi is a Partner and Head of Conveyance and Company Law at Ashitiva Advocates

LEGAL PRACTICE

BY KEN ASHIMOSI

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The Legislative Framework For Climate Change In Kenya

The United Nations Framework on Climate Change (UNFCC) defines climate change as a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.

The mean global surface temperature has increased by about 0.9° to 1.0°C since the late 19th Century, and by about 0.7° to 0.8°C over the last 40 years. The warming occurred largely during two periods - between 1910 and 1940 and since the mid-1970s. Warming is evident in both sea surface and land-based surface air temperatures. Unless significant, steady reductions in the emissions of carbon dioxide from burning fossil fuels begin extremely soon, the Earth might be much closer to potentially catastrophic warming than is widely believed. So argues climatologist James Hansen of the Columbia University Earth Institute and an international team of colleagues.

RISING SEA LEVELS

The sea level rise is a threat to many island States in the Pacific Ocean like Republic of Kiribati and Indian Ocean has States like Republic of Maldives.As the flattest country on Earth, the Republic of Maldives is extremely vulnerable to rising sea level and faces the very real possibility that the majority of its land area will be underwater by the end of this Century.

Kenya ratified the United Nations Framework Convention on Climate Change on 30th August 1994 and on 23rd July 2015 submitted its climate Action Plan which is an Intended Nationally Determined Contributions to the Paris Agreement. The Paris Agreement (Article 4, paragraph 2) requires each Party to prepare, communicate and maintain successive Nationally Determined Contributions (NDCs) that it intends to achieve.The Paris Agreement defines how countries will implement their UNFCCC commitments after 2020.

Further, the Eleventh Parliament of Kenya enacted the Climate Change Act, 2016 which signals how imperative climate change is and the need for taking steps towards having laws in force to govern the same. Kenya is at a risk of extinction of wildlife, drought and its devastating results, high temperatures and shifting of seasons due to the effects of climate change.

Section 5 of the Climate Change Act, 2016 provides for the establishment of the National Climate Change Council while Section 6 provides for the functions of the Council which includes setting the targets for regulations of greenhouse gas emmissions.

Greenhouse gas concentrations have continued to increase in the atmosphere. This is due largely to human activities, mostly fossil fuel use, land-use change, and agriculture. About 47 percent of the warming effect of greenhouse gas increased over the last 100 years due to carbon dioxide. This exemplifies how greenhouse gas emissions need to be reduced globally and it is virtuous that this is included in the Act.

Section 13 of the Climate Change Act, 2016 provides for the formulation of the National Climate Change Action Plan by the Cabinet Secretary which is already in place. It entails measures and mechanisms of adaptation and mitigation. Section 15 of the Climate Change Act provides that the Council may impose duties on any public entity while Section 16 provides for imposition of climate change obligations on private entities, Section 24 provides for public participation. This is a holistic approach that gets all entities on board to be responsible and participate in climate change matters.

COUNTY GOVERNMENTS

The County governments have also been mandated in Section 19 to integrate and mainstream climate change actions, interventions and duties set in the Act and the National Climate Change Action Plan into various sectors. A County government shall in the development, updating and approval of the County Integrated Development Plan , and the County Sectoral Plans mainstream the implementation of the National Climate Change Action Plan, taking into account National and County priorities.

Goal number 13 of the Sustainable Development Goals (SDGs) provides for Climate Action therefore, the enactment of the Act was timely just after the SDGs were adopted. The Act provides for the National Climate Change Action Plan as stated above which entails the low carbon climate resilient development, adaptation and mitigation amongst others. At the same time it provides for offences relating to climate change which gives the Environment and Land Court the powers to sentence and fine those who commit climate change related offences.

Climate change is an international concern and therefore, all stakeholders must cooperate in order to reverse the current status of rising temperatures and global warming. The Climate Change Act is a step towards that direction.

- Christine Mududa is an Advocate of the High Court of Kenya and a Senior Legal Counsel at the County Assembly of Mombasa

The oil sector is a complex and technical industry dealing with a high value globally traded commodity with strategic energy and security implications.

Oil and Gas Contract Transparency

The recent resolution of the impasse regarding oil and gas revenue sharing among the National Government, County Governments and communities is a landmark achievement for the country. This will pave way for the enactment of the Petroleum Exploration, Development and Production Bill 2015 ('the Bill') which was first developed in 2012 to replace the 1984 Petroleum Exploration and Production Act ('the Act').

The oil sector is a complex and technical industry dealing with a high value globally traded commodity with strategic energy and security implications. Oil producing countries and companies have exploited these qualities to shroud the operations of the sector in secrecy. This opaque environment has fanned the resource curse epitomised by grand corruption, poverty and conflict. As Kenya exports its first oil, the country must urgently adopt a legislative framework that promotes a transparent approach to resource management.

Contract transparency or the public disclosure of agreements entered into between the Government and oil exploration companies (OEC) is at the heart of transparency and accountability in the extractives sector. Countries such as USA, Denmark, Liberia and East Timor amongst others routinely publish their petroleum agreements. The EITI and other initiatives promote contract transparency as a good governance practice.

PETROLEUM AGREEMENTS

Contract transparency is vital because petroleum agreements are often the only source of information regarding the revenue sharing arrangement agreed to by the parties. Although the Act provides a model agreement, the OEC and the government negotiate the fiscal terms of the applicable petroleum agreements. The agreements, which in Kenya are of the production sharing agreement genre, set the formula for calculating the cost of oil which is taken exclusively by the OEC; and the profit of oil which is shared between the OEC and Government. The petroleum agreements also set the cost recovery limits, surface area fees, training fees, bonus and royalty rates. The Governments take makes up the revenues which will be shared with the county government and communities. By disclosing the agreements, the public will be empowered to monitor the revenue utilisation.

PARLIAMENTARY OVERSIGHT

One of the effective means for ensuring contract transparency is Parliamentary oversight. Although Article 71 of the Kenyan Constitution requires Parliament to ratify all transactions relating to natural resources, Article 71 (b) qualifies this requirement by applying it only to agreements entered into after the enactment of the Constitution 2010. Section 3 of the Natural Resources (Classes of Transactions Subject to Ratification) Act 2016 excludes agreements entered into before the effective date. The production sharing agreements for most of the oil blocks in Kenya were entered into prior to the enactment of the Constitution 2010 and therefore, fall within the exception in Article 71 (b). In addition, by virtue of section 120 (2) (f) of the Bill the terms and conditions of existing agreements will be preserved and not be altered. The above provisions pose a challenge to Parliamentary scrutiny of existing natural resource agreements in Kenya.

The Constitution grants citizens the right to access information held by the State under Article 35. This right has been elucidated in various judicial decisions including in ELC 825 of 2012 Friends of Lake Turkana vs A-G and 2 others. In that case the court affirmed the citizens right to information and directed the Government to disclose to the community the agreements and arrangements it had entered into with the Government of Ethiopia relating to the purchase of power from the Gibe hydro project.

One of the reasons cited for failure to publicly disclose petroleum agreements is that it compromises the OEC's commercial interests. Section 6 of the Access to Information Act 2016 limits access to information where it substantially prejudices the commercial interests including intellectual property rights of an entity. In so far as natural resources are held by the government in trust and for the benefit of the citizens, and under the production sharing agreements, the oil and gas at all times vests in the government while the OEC's role is that of a contractor, the balance must tilt in favour of the public except in the clearest cases of prejudice.

Contract transparency is reaffirmed in section 111 of the Bill which empowers the Cabinet Secretary for Petroleum and Mining to establish a framework for transparency and accountability in the upstream sector. This includes the publication of all petroleum agreements as well as any other data and information that supports payments made by the oil exploration company and payments received by the National Government, county governments and local communities. Contract transparency is consistent with the values and principles of governance and revenue management espoused in the Constitution. Parliament should enact the Bill with due speed and operationalize section 111 thereof.

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Plea agreements in Kenya: A decade later

Gazettment of the Criminal Procedure Code (Plea Bargaining Rules), 2018 a decade after coming into force of Section 137A of the Criminal Procedure Code (Amendment) Act 2008 which provided for use of plea agreements in the criminal justice system is the last step in validating the use of Plea-Agreements as a tool to shorten prosecution process thereby saving judicial time.

Plea agreement or plea bargain is a written agreement entered into by the prosecutor and an accused person where the accused consents to plead guilty to a lesser charge in return for a lesser sentence or other concessions from the prosecutor. For a plea agreement to be valid it has to be recorded by the court.

CASE BACKLOG

Backlog of cases has been a major challenge and instituting unique, distinct and innovative ways of resolving the issue has been a priority for the Judiciary. The criminal justice system's innovative way a decade ago was to incorporate plea agreements into our laws to encourage accused persons charged in courts of law to plead guilty to a lesser offence for a lesser sentence or other concessions from the prosecutor. Although provided for in the law, uptake of plea agreement by the police, prosecutors, accused persons and court has been relatively slow. Some of the reasons for slow uptake include; lack of understanding of how plea agreement works, fear of pleading guilty and an uncertainty in outcome because courts are not bound by the recommended sentence in the plea agreement.

FAIR TRIAL

Article 50 (2) of the Constitution provides that an accused person has a right to a fair trial including the trial to begin and conclude without unreasonable delay. Plea agreement therefore as a tool provided for under Section 137A of the Criminal Procedure Code fits into the spirit of the Constitution. For instance, a person charged with murder under Section 203 of the Penal Code could plead guilty to the lesser offence of manslaughter thereby serve a lesser sentence of life imprisonment as opposed to mandatory death; and robbery with violence which attracts a mandatory death sentence could be reduced to Robbery and one sentenced to fourteen (14) years imprisonment.

Plea agreements are available to all accused persons charged in a court of law save for persons charged with Sexual Offences as provided under the Sexual Offences Act, 2006, Genocide and Crimes against Humanity and can be initiated by the accused person or his/her representative or the prosecutor.

PLEA AGREEMENT

For a plea agreement to be effective the accused person must be guilty of the offence charged, the accused person must negotiate voluntarily – a court will not record a plea agreement if it is established that there was coercion or material non-disclosure of facts by either party, the accused person must be informed of their rights under the Constitution and the Criminal Procedure Code and the prosecutor must have a factual basis to support the charge – meet the beyond reasonable doubt test.

The agreement will then be negotiated between the accused and the prosecutor in a written form, currently a form developed by prosecution and a team of pro bono advocates is used. The court has no role to play during the negotiations stage- I would however argue that where the court has been informed of ongoing negotiations it should allow reasonable adjournments to give reasonable time to the accused and prosecutor to negotiate.

FACTORS TO CONSIDER

Under section 137C of the Criminal Procedure Code, the accused person and the prosecutor must consider the following factors when negotiating the plea agreement; nature and circumstances relating to the offence, consultation with the investigating officers, personal circumstances of the accused (voluntariness), interests of the community and circumstances of the victims- there are instances where the court has ordered for a Victim Impact Assessment Report and or a pre-sentencing report as provided for under Section 216 of the Criminal Procedure Code from the Probation Department before sentencing.

A plea agreement form varies with the circumstances of the case, it may however, include provisions for compensation and restitution of the victim, consent to be a state witness, enter plea of guilty to a lesser offence in the charge sheet et cetera. The prosecutor and accused person must give the grounds for recommending a particular sentence although court is not bound by the recommendation as sentencing is discretion of the court. Plea agreements may be entered into any time before judgement is delivered and can be withdrawn before sentencing.

After the above has been complied with and the plea agreement placed before the court, the accused is placed on oath, rights of an accused person reiterated and the victims may be given a hearing to adopt their witness statements. The court may then accept or reject the plea agreement, if accepted it will form part of court records, becomes binding on all parties and the accused waives the right to appeal the sentence and or plead "not guilty". If rejected, the court will give reasons for rejecting it, the plea agreement becomes null and void and the accused will go through the trial process before a judicial officer other than the one who rejected the plea agreement.

CRITICISM OF PLEA AGREEMENTS

Firstly, it is feared that innocent persons charged in courts of law may consider entering into a plea agreements with the prosecution on the hope of getting a lesser sentence. This takes away the opportunity for the accused person to go through trial where the outcome may be an acquittal. Secondly, the victims who would have desired the highest possible sentence for the accused person may feel that justice has not been done because the accused person has gotten a lesser sentence. This fear has however been controlled by inviting victims into the process and adopting their statements, sanctioning for a Victim Impact Assessment Report and a pre-sentencing report to be filed before sentencing.

It is over a decade since plea agreements became part of the criminal justice system although it has only gained popularity in the recent past particularly after it was successfully implemented at the Milimani Children's Court Service Week in 2016 as a tool to reduce backlog of cases. The Office of the Director of Public Prosecutions and the Department of Justice, USA Embassy, Nairobi have been instrumental in sensitizing members of the public, police and remandees in prisons across the country on the use of plea agreements.

Gazettement of the Criminal Procedure (Plea Bargaining) Rules, 2018 although long overdue is now likely to further encourage more accused persons to use this tool to avoid protracted trial processes saving judicial and prosecutions time. The result is a win win situation for all parties involved.

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FAMILY LAW

BY CHERUIYOT HILLARY BIWOTT

Protection against domestic violence

The place of the law, family and community in social transformation and cohesion

One of the unique features of Kenya's Constitution is its focus on the family. Specifically, the Constitution espouses its commitment to nurture and protect the well-being of the individual, the family, communities and the Nation. Article 45 further demonstrates this commitment by recognising the family as the natural and fundamental unit of society and the necessary basis of social order, with State recognition and protection. Other constituent units of society that have been accorded special recognition and protection include children, youth, persons with disabilities, older members of society and women.

If there was an award for legislating on almost every facet of life, social, economic, political and cultural, I bet Kenya would win the award with minimal competition. The plethora of laws, regulations, guidelines, standards, policies and other legislative instruments is undoubtedly huge. A search on Kenya Law website shows that Kenya has 503 Acts of Parliament, covering almost every aspect of life and by extension death. The number of statutory instruments under each Act of Parliament often exceeds five, so you can tell how many statutory instruments we have.

Some of the specific laws relating to the family include the following-

- Births and Deaths Registration Act, Cap 149
- Children Act, No. 8 of 2001
- Marriage Act, No. 4 of 2014
- Matrimonial Property Act. No. 49 of 2013
- Prohibition of Female Genital Mutilation Act, No. 32 of 2011
- Protection Against Domestic Violence Act, No. 2 of 2015
- Widows and Orphans Pensions, Cap 192

As you can see, all the life processes from birth, to childhood, to marriage and ultimately death are provided for and granted protection by the law. Even with the increase in laws, there seems to be no equivalent tranquillity and cohesion in the family. Appreciating the place of the law in social order, it is worth noting that the law cannot be the sole instrument for cohesion and order.

PROTECTION ORDERS

The Protection Against Domestic Violence Act seeks to provide for the protection and relief to victims of domestic violence including the protection of a spouse and any children. The Act defines domestic violence as violence against a person or threat of violence or imminent danger by any other person with whom the person is in a domestic relationship. The Act goes further to provide for protection orders, the role of police officers and application procedures. Of importance is the mention of counselling under Section 14 of the Act. In my view, this should have been the core of the Act. Section 14(2) provides that-

The counselling provided shall be aimed at ensuring respect for the law prohibiting domestic violence, the promotion of a protective environment for all within the family and the promotion of harmonious domestic relations between and among the parties.

In this case, I propose that as a country, communities and families, we lay more focus on the core values that underpin the social unit and demonstrate leadership and concern through the existing units of society. The place of modelling, education, social norms and existing community strongholds should be coveted and institutionalised. This can be achieved through the following-

(a) Upbringing, indoctrination and modelling

Violence in any form begins from a thought, to a feeling, to subtle offensive and defensive attack then outright insults, bodily harm and even fatal injuries. To subdue such from resulting in violence, they should be nabbed at the onset. The family unit, workplace and school are breeding grounds for violence. To deter such violence, these institutions should be nurtured and empowered to identify traits that can result in violence at the onset and curtail them.

Premarital and marital counselling can play a big role in helping couples and families learn how to cope with each other and deal with any conflicts or misunderstandings.

(b) Respect and love

Where respect and love exist, patience, kindness and gentleness thrive. This cannot be taught or imposed by law. It needs to be demonstrated, observed and learnt from those whose lives exhibit such virtues. Such models can change society and the perception of the family. Families that nurture tolerance and love towards each other can bequeath such discipline to many generations to come and the ripple effect will be felt.

(c) Education

The education system is the greatest equalizer. Even where families and other institutions have failed to instil virtues of tolerance and gender values, the school becomes a tool for shifting mindsets and encouraging gender tolerance and respect.

(d) Religious institutions

Religious institutions are supposed to depict God's love for humanity and respect and love for everyone. They should instil respect and love and condemn any form of violence and be ready to help families undergoing strive or conflict through counselling, modelling and mentorship.

(e) Opening up

We have heard instances of victims of violence speaking up for the first time after over 25 years of abuse and violence. What causes such silence and resignation to fate? Remember the 'MeToo movement'? In my view, there have been no supporting structures and institutions that the victims can run to and report as they seek help.

In order to discourage suffering in silence and the perpetrators moving to their next victims, the communities must develop credible support structures and institutions including schools, churches, hospitals, police stations and reporting channels. In Kenya, we have seen victims suffer more violence, rejection and condemnation even in institutions which are meant to protect them and deal with the perpetrators.

(f) National and community dialogue

People are shy and at times embarrassed to talk about their experiences on domestic violence. I propose that there be national and community dialogue forums where the victims and perpetrators can open up.

If all these virtues and avenues for promoting cohesion and peace at home are utilized, the family will be a better place to grow and build the present and future and thereby minimal use of the protection procedures and orders under the Protection Against Domestic Violence Act.

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GENDER AGENDA

BY REBECCA OGEMBO

Understanding gender rights

On the 17th May 2018, the World celebrated the International Day against Homophobia,Transphobia and Biophobia (IDAHOTB) through discussions around the theme Alliances for Solidarity with National and county Government officials, civil society and community based partners on shedding light on the overlapping exclusion of the LGBTIQ, based on their sexual orientation, gender identity, tribe, religion and social status in access to social freedom and inclusivity in the diverse spaces meant to be enjoyed like every other Kenyan Today.

BILL OF RIGHTS

Chapter 4 of the Constitution distinctly - in Articles 27, 36 and 43 - provides for fundamental human rights, freedom of association and the right to the highest attainable standards of health, which emphasizes on the right to healthcare services and reproductive health care as stipulated in (Article 43(1) (a) (2) and (3)).

The Government has also developed a number of policies and established various institutions that seek to promote and protect the sexual and reproductive health rights of Kenyans. As such, Kenya is obligated to work towards the fulfillment of this right in line with international and domestic standards. In spite of these elaborate measures, violations of the right to sexual and reproductive health continue to be experienced throughout the country by sexual minorities (gay, lesbian, bisexual, transgender, intersex persons and sex workers) and marginalized and vulnerable groups (people with disabilities, people living with HIV and AIDS, Adolescents and youth, internally displaced persons and refugees). They are particularly noted as most vulnerable to stigma and discrimination associated to access to health and violations of human rights according to a Report of the Public Inquiry into Violations of Sexual and Reproductive Health Rights in Kenya by the KNHCR, April 2012

Multi-sectoral inclusion of human rights defenders and improvement of access to health should involve State and non-state actors and must not, whatsoever, be likened to a movement of recruitment, promotion and exploitation of the sexual minorities, marginalized and vulnerable groups into criminal acts that contravene the Kenyan Laws.

COURT OF APPEAL

Discrimination, acts of physical and sexual violence that may result to death, blackmail and hate based on sexual orientation and gender remains common in Kenya. The end of forced anal examination to prove homosexuality targeting gay men was recently made in a land mark Ruling by Court of Appeal Appellate Judges Hon. Alnasir Visram, Hon. Wanjiru Karanja and Hon. Martha Koome. The Appellate Court over-turned an earlier decision by the High Court and declared the tests illegal on examinations of two men on suspicion of having sex on the 23rd of March 2018. The landmark case was brought by the National Gay and Lesbian Human Rights Commission (NGLHRC) after two men were arrested in 2015 on suspicion of having gay sex, which is illegal in Kenya and punishable by 14 years in jail. In 2016, Petition 150 and 234 of 2016 was filed at the High Court seeking to challenge the constitutionality of Sections 162(a)(c) and 165 of the Penal Code.

CONCLUSION

The National and County Governments and policy-makers need to involve the LGBTIQ in the decision-making processes and in public participation forums to effect the aspect of equality and anti-discriminatory strategies in legislation, to fully protect the human rights for all Kenyan Citizens.

Constitutional institutions like the Kenya National Human Rights Commission, National Gender and Equality Commission and the Commission of Administartive Justice amongst other bodies, should be sensitized to factor in LGBTIQ led initiatives and provide technical support in access to justice and freedoms while ensuring equal opportunity and reduction of inequalities by promoting appropriate legislation, policies and action paramount to the fight against stigma and discrimination of sorts.

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WILDLIFE

BY SHAMINI JAYANATHAN

How Space for Giants protects Africa's jumbos

Space for Giants (SFG) is an international conservation organisation headquartered in Kenya, dedicated to protecting Africa's elephants by securing the landscapes they inhabit. Among the ways we hope to do this is to strengthen national judiciaries, wildlife law enforcement and prosecutorial agencies to ensure more appropriate and successful prosecutions of wildlife crimes. Central to our approach is the monitoring of trials in wildlife crime cases with a view to measuring impact of interventions. This paves the way for evidence-based proposals for change in legislation and policy.

North Central Kenya has the greatest abundance of wildlife outside protected areas nationally. This region provided an opportunity to study how wildlife cases are being handled, in order to make recommendations that could be extrapolated to a national level. Case data in relation to ivory, rhino and sandalwood cases was collected over a four year period. These species were selected because they are of high value to organised crime syndicates. The report on our findings is here: https://spaceforgiants.org/2018/07/09/report-analysis-of-wildlife-crime-trials-in-north-central-kenya/

PROTRACTED TRIALS

We found that seven out of 10 cases resulted in a conviction; all suspects were of Kenyan origin and not guilty pleas stood at 96 per cent. Trials were protracted, taking on average 20 months for simple possession cases, averaging at least five adjournments — the three common reasons being the court not sitting, witnesses not appearing or the absence or unpreparedness of defence counsel. While minimum penalties under the law were frequently imposed, magistrates tended to impose fines with imprisonment only in default of non-payment. The unintended consequence of this could be that the rich or well connected to organised criminal networks were able to 'buy' their way out of prison, while the poor faced incarceration.

When looking at the cases prosecuted, several concerns emerged — and with them, key recommendations that can improve the work Kenya has already accomplished in this arena. The Wildlife Conservation and Management Act 2013 (WCMA) was initially lauded for its heavy penalties. Subsequently a high court decision neutralised the life imprisonment penalty for offences involving critically endangered species. Other loopholes within the law remain, resulting in inconsistent charging decisions. High minimum terms all but eliminate the prospects of meaningful cooperation in return for lesser sentences in court systems already suffering significant backlogs, high rates of 'not guilty' pleas compound delays. There still remains a lack of prosecution -guided investigations, resulting in errors not being identified until the witness is in the box.

CHARGE SHEETS

On the positive side, we found charge sheets rarely required amendment, inventories were compiled in all cases, witness statements were detailed and KWS was creating duplicate files in order to mitigate the risks of lost files and unnecessary adjournments. In 2015 we created a "rapid reference guide" as a prosecution toolkit. Recently, Kenya's ex-DPP credited this guide for the rise in national conviction rates from 24 per cent to over 83 per cent over two years.

In 2015, the then Chief Justice Willy Mutunga launched a pilot in the three courts called 'active case management' (ACM), initiated by the author alongside Justice Joel Ngugi, then head of the Judicial Training Institute. Former LSK president Eric Mutua wasted no time in lending the LSK's support, by establishing a criminal committee and placing LSK members on the steering committee. Following the pilot's success, the ACM will now be rolled out to all courts. Our report recommends that Nanyuki and Nyahururu, as courts with particularly high caseloads, should be prioritised.

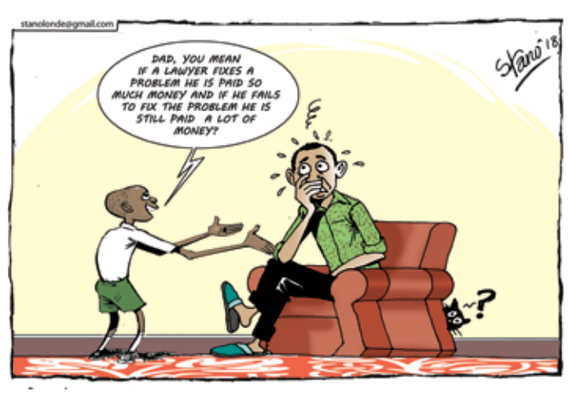
There remains an urgent need to amend the WCMA 2013 to increase the range of offences, to enable meaningful discussions on pleas. Also vital is supporting the ODPP to enhance its ability to conduct advance reviews of cases — alongside improved cooperation between investigators and prosecutors. Our report also recommends digital recording of court proceedings, increased use of 'trial absentia' as provided by the Constitution and development of offence-specific sentencing guidelines as can be seen in the UK and Uganda.

IVORY SEIZURES

Finally, we recommend a 'know your customer' suite of laws, regulations and policy at Kenya's ports and borders. Since 2009, Kenya has had the third highest number of ivory seizures globally. Of 14 cases, 10 were prosecuted, but nine remain unresolved. A major problem is tracking the owners of consignments, leaving us at the mercy of slow mutual legal assistance procedures. A KYC approach, similar to the banking industry, applied to agents and brokers would in general bring transparency to the transport sector, impacting all contraband crossing Kenya's borders.

Recently, Kenya has made huge progress in fighting wildlife crime. New leadership at the ODPP, the Office of the Chief Justice, CID and Ministry for Tourism, provides a grand opportunity to refine changes already initiated, in order to combat not just wildlife crime — but all crime.

Ms. Shamini Jayanathan is a Barrister-at-Law (UK) and Director of Wildlife Law and Justice, Space for Giants.



A young lawyer died and went to heaven (unbelievable we know!).
When he got to there the lawyer started protesting that it was way too early for him to die.
He was only 32 years old, and there must be some mistake.
The angel listened to his protests, and agreed that perhaps it was a mistake and went away to look into it.
After a few minutes the angel came back and said, "I'm sorry sir but I'm afraid there is no mistake. We calculated your age by how many hours you billed your clients, and you are at least 76!!!

***

An elderly patient needed a heart transplant and discussed his options with his doctor.
The doctor said, "We have three possible donors; tell me which one you want to use. One is a young, healthy athlete who died in an automobile accident. The second is a middle-aged businessman who never drank or smoked and who died in his private plane. The third is a lawyer who has just died after practising law for 30 years."
"I'll take the lawyer's heart," said the patient.
After a successful transplant, the doctor asked the patient why he had chosen the donor he did.
"It was easy," the patient replied. "I wanted a heart that hadn't been used."

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A little boy knows that his father is a lawyer. However, he does not really know what lawyers do. After his father explains it to him, the bright little boy immediately understood his father's line of work.
Son: "So what you're saying dad is that when a person has a problem, they call a lawyer like you to fix the problem. If you fix it, they pay you a lot of money. But if you don't fix it, they also pay you a lot of money."
Father: "That about sums it up."

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Kausi was caught red handed by a police officer breaking into a wholesale shop. He was quickly brought to trial before the Magistrate's Court in Kibera.
"How do you plead? asked the Magistrate. "Your honor," answered Kausi, "before I plead guilty or not guilty I ask that the court kindly appoint a lawyer to defend me." "Kausi, you were caught in the actual commission of a crime. What could any lawyer possibly say in your defense?" asked the Magistrate.
That's exactly my point, your honor," said Kausi. "I'm curious also to hear what he could possibly say!"

***

Lawyer: What was the first thing your husband said to you when he woke up that morning?
Witness: He said, "Where am I, Cathy?"
Lawyer: And why did that upset you?
Witness: My name is Susan.
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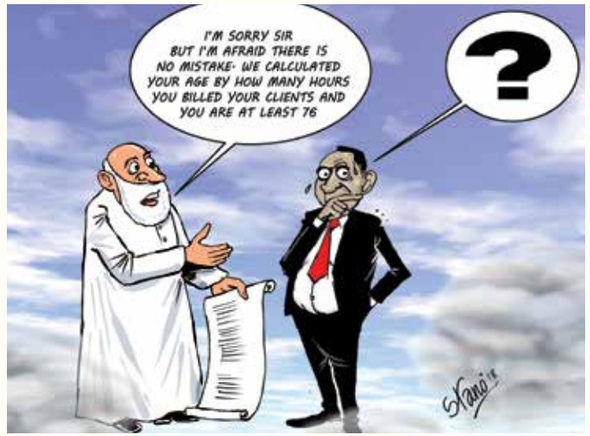

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INPATIENT SERVICES:

The following benefits are covered:

- Maternity services including both normal, elective or emergency CS delivery.
- Parent/Guardian accommodation when insured child is under age of 8 years (Lodger fee) for both local and international hospitals.
- Organ Transplant
- Accidental damage to natural teeth
- Accidental damage to eyes
- Ectopic pregnancy.
- Rehabilitation
- Chronic and Pre-existing conditions
- Overseas treatment - on referral
- Emergency Rescue & Evacuation (local &International)
- International emergency medical cover- up-to the first 45 consecutive days

OUTPATIENT SERVICES:

The following benefits are covered:

- Pathology
- Diagnostic tests and procedures
- Radiotherapy and Chemotherapy
- Cancer tests and consultation
- Dental treatment including simple extractions, difficult extractions, fillings, scaling and polishing,
- Gum surgery, Root canal Treatment,.
- Optical services- prescribed lenses and frames.
- Pre-natal and Post Natal Care
- Physiotherapy by a registered physiotherapist
- MRI &CT scans (pre-authorization Required)
- Child vaccination as per KEPI Guidelines Nutritional services & Advise

VALUE ADD SERVICES INCLUDE:

Because we value you, enjoy the additional benefits at no cost

- Cover includes a Professional indemnity with a limit of liability of Kshs. 1Million
- Cover includes a Personal Accident (Death) benefit of Kshs. 1Million
- AMREF bronze cover
- No waiting period for Declared Chronic and Pre-existing conditions (and related conditions)
- No waiting period Congenital conditions
- No waiting period Psychiatric conditions
- Nutritional Advice
- 24 hour call centre
- Health camps and health alerts
- Annual medical check up

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