

**THE LEGAL PROFESSION  
AND  
THE NEW CONSTITUTIONAL ORDER  
IN KENYA**

YASH PAL GHAI  
JILL COTTRELL GHAI  
Editors



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AND THE NEW CONSTITUTIONAL ORDER IN KENYA  
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We trust that you will find the book interesting and useful.



George Kegoro,  
Executive Director.



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Educated at Oxford and Harvard, and called to the English Bar by the Middle Temple, he has been a law teacher and adviser on the making of constitutions in a number of countries in Asia and Africa. He taught at the University of East Africa, Warwick University, and Hong Kong University. He was visiting professor at Yale, Harvard, Toronto University, the National University of Singapore, and University of Wisconsin, among others.

His research interests include constitutionalism and human rights, ethnic conflicts, sociology of law, and federalism and autonomy. He has written or edited about 20 books, including *Public Law and Political Change in Kenya*; *The Political Economy of Law: A Third World Reader Perspectives*; *Law, Politics and Government in Pacific Island States*; *The Law, Politics and Administration of Decentralisation in Papua New Guinea* (with Anthony Regan), *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law*; *Ethnicity and Autonomy: Negotiating Competing Claims in Multi-Ethnic States* His most recent publications include *The Constitution of Kenya: An Instrument for Change, Ethnicity, Nationhood and Pluralism: Kenyan Perspectives* (2013) (both with Jill Cottrell Ghai), *Autonomy: Practising Self-Government* and *Constitution and Rule of Law in China's Hong Kong: The Contribution of the Court of Final Appeal* (2014).

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Patricia is passionate about justice in society, gender equality, environmental sustainability, equitable land reform and legal scholarship and has dedicated a lot of time to these issues



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George Kegoro is the Executive Director of the Kenyan Section of the International Commission of Jurists. Kegoro is an advocate of the High Court of Kenya and served as Secretary to the Commission of Inquiry into the Post Election Violence in Kenya in 2008. In 2004, he served as Joint Secretary to the Commission of Inquiry into the Goldenberg scandal. Previously, Kegoro was the Secretary of the Law Society of Kenya and also worked as a State Counsel in the office of the Attorney General with responsibilities for legal research for purposes of law reform.

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He has written several books including: *Criminal Procedure in Kenya; An Outline of Judicial Review in Kenya; Kenya's Long Search for a Constitution: The Postponed Promise* and *Judicial Review and Administrative Law*. He has published numerous articles in refereed

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Pheroze Nowrojee, Senior Counsel, is an Advocate of the High Courts of Kenya (1967), Tanzania (1970) and Zanzibar (1989). He has also appeared in the High Courts of Uganda and the Seychelles. Born in Nairobi, he studied in India (B.A. Bombay, 1957), in the U.K. (Barrister, Lincoln's Inn, 1965) and in the U.S.A. (LL.M., Yale, 1974). He has taught at the University of Dar-es-Salaam (1974-1977), the University of Nairobi (1979-1985), and the Kenya School of Law (1968-1970, 1978-1985). His awards include International Commission of Jurists (Kenya) ICJ Jurist of the Year, 1995, International Bar Association (IBA) Bernard Simons Human Rights Prize, 2002-2004, Law Society of Kenya Roll of Honour, 2005, The Maasai People, Safeguarding Rights Award, 2007. His political offices include FORD-Kenya, Member of National Executive Council (NEC), 1992-1999, FORD-Kenya, Secretary for Legal & Constitutional Affairs, 1994-1999. He was Vice-Chair, Ufungamano People's Commission on Constitutional Reform 2000 – 2001. He has been on many boards including those of *Nairobi Law Monthly*, Kituo cha Sheria, Media Institute and Independent Medical and Legal Unit (IMLU). He is the author of numerous articles on law, public affairs and Kenyan legal history. He is a BBC Africa Poetry Competition Prizewinner (2001).

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Between 1999- 2001, he worked as a Legal Specialist with the United Nations Development Programme (UNDP). He was a State Counsel between 2001-2008 in the Department of

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He is also a member of the Institute of Certified Public Secretaries of Kenya, the International Commission of Jurists, the East African Law Society, and the Commonwealth Lawyers Association and Outreach Official of the International Bar Association (Africa Region). He is currently the Secretary/Chief Executive of the Law Society of Kenya and Commissioner of the Law Reform Commission and a Certified Professional Mediator.

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Ms. Milongo holds an LLB degree from the Catholic University of Eastern Africa. She is also a Masters of Laws candidate at the College of Law of the University of South Africa. Her research thesis compares the application of international law in Kenya and other African jurisdictions and makes recommendations for improvement. Her research interests include human rights particularly women and children's rights, international criminal justice, and the application of international law in Kenya.

She has worked at the Federation of Women Lawyers (FIDA Kenya) and the Tanzania Women Lawyers Association (TAWLA). She currently works as a legal researcher at ICJ Kenya. She has previously conducted research with the assistance of Fredskorpset Norway, TAWLA and Zanzibar Female Lawyers Association (ZAFELA), on the challenges and opportunities in realizing women's rights under Islamic law. The research formed the basis of a project she undertook at FIDA Kenya aimed at sensitizing Islamic women on the provisions of Islamic law and the Constitution of Kenya through capacity building fora. She has contributed to the research and the drafting of a manual by TAWLA discussing the rights of children in detention and those in child labour. She has also participated in research and other activities aimed at mainstreaming gender in the Tanzanian Constitutional review process.

She also has experience in conducting self-representation training for indigent women seeking access to justice. She has applied alternative dispute resolution mechanisms such as mediation and conciliation in resolving family disputes of the beneficiaries of her work. She is also keen to increase her capacity in the field of arbitration to facilitate expedient access to justice.

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## **Willy Mutunga**

The Hon. Chief Justice, Dr. Willy M. Mutunga, was appointed to the Supreme Court of Kenya on 16th June, 2011. He is a holder of a Doctorate Degree in Jurisprudence (1992) from Osgoode Hall Law School, York University in Toronto, Canada. Dr. Mutunga obtained his Bachelor of Laws (Honours) (1971) and Master of Laws (1974) degrees from the University of Dar-es-Salaam in Tanzania.

He joined the University of Nairobi as a lecturer in the Faculty of Law in 1974. He was detained for 16 months (1982-3) for his activism while at the University and for his work at the Legal Advice Centre (Kituo Cha Sheria).

Dr. Mutunga has established and served in many civil society organizations, including the Law Society of Kenya, where was chair from 1993 to 1995, the Citizens Coalition for Constitutional Change (4Cs), the Kenya Human Rights Commission; the East African Centre for Constitutional Development (Kituo Cha Katiba), Uganda; and the International Centre for Human Rights and Democratic Development (Rights and Democracy) in Montreal, Canada.

He has received several national and international honours and awards including: Elder of the Golden Heart for his distinguished service to the nation and for his role in leading reforms in the Judiciary under the new Constitution (2010); appointment as Senior Counsel (2003); Lifetime Achievement Award for the Protection and Promotion of Human Rights from the Kenya National Commission on Human Rights, (2003); the Jurist of the Year Award from the International Commission of Jurists, Kenya Section (2003); and the Law Society of Kenya Distinguished Services Award for Constitutionalism, Rule of Law and Human Rights, later named the Father Kaiser Award (1988).

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# LEGAL PROFESSION: THEMES AND ISSUES

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Yash Pal Ghai

**T**his book, part of the ICJ/KAS annual series on Judiciary Watch Report, is devoted to the study of Kenya's legal profession, out of the feeling that too much attention has been paid to studies of the judiciary and its mandate at the expense of other personnel who also play an important role in the legal and judicial system. Justice J B Ojwang of the Kenya Supreme Court noted this omission when he made the following important, insightful statement:

## **The Practising Bar, The Courts, and The Constitution**

*To the ordinary citizen, the truly vital elements of the constitutional order are the political agencies, members of which live by continual self-avowal, and by the conspicuous promulgation of structured initiatives in the forms of public programmes, policies and physical works. To the citizen, the dispute-resolution and the sanctification of binding law, which emanate from the Courts, take a secondary place – up to such time as one's rights or interests are the immediate subject. At that point, it is commonly accepted that the most critical constitutional process is that which proceeds in the Courts: and those involved see the Court as the sacred constitutional edifice that declares the binding norm for all, in the public as well as the private domain.*

*It is in such a context that the importance of Court process, and the vital role of the legal profession therein, is to be perceived.*

*If sometimes the ordinary citizen sees members of the legal profession as occupying relatively quiet niches in public affairs, a critical moment comes when the citizen seeks the finality of the law's voice, on a question of private or public rights – and this must come from the Courts of law.*

*Although the ultimate pronouncement issues forth from the Judge, its making squarely involves the members of the practising Bar. The Bar, alongside the Bench, are upon close analysis, the voice of the law; the voice of safeguard for fundamental rights and freedoms – and thus, the often unnoticed plank in the overall scheme of the Constitution, as the people’s charter of social, political and economic rights.*

*The integrity and legitimacy of definitive line-drawing on the claims of parties, by the Courts, is dependent on its faithful reflection of material fact, and of legal principle and jurisprudence – elements not always in stock in the Judges’ chambers. These elements are woven in a learned, objective and legitimate mode only after a pivotal conversation with the members of the practising Bar.*

*Therein lies the fundamental role of the legal profession, in the constitutional set-up, and in the day-to-day operation of the judicial system. The Bar and the Bench, hence, are in common cause, as the custodians of the pillar of the Constitution that sustains the fateful dispute-settlement component.*

In his contribution to this volume Chief Justice Willy Mutunga notes the role of the legal profession in the functioning of the judicial system and the common interests and links that bind judges and advocates in the working of the legal system and the maintenance of its mandate and ethos. As Kenya’s economy has, since independence, shifted towards the market (or administered market with a plethora of government regulations) and community and family relations have gradually moved away from the traditional to the “modern”, the role of the legal profession has greatly increased. The rule of law, including protection of rights and freedoms, are closely associated historically with an activist legal profession. Yet there are few studies of the legal profession in Kenya<sup>1</sup>.

The first issue I had to resolve as I planned this volume was the meaning and the scope of the legal profession. Most people think of advocates as *the* legal profession. But the scope of the legal profession is widely conceived for the purposes of his book, as those who profess law in some capacity: judges, advocates, government lawyers, prosecutors, academics, paralegals and law reformers. It is only by looking at these categories and their relationship to each other and to the public that we get a fair perspective on the legal system. However, the focus is still primar-

<sup>1</sup> The few include Y.P. Ghai and J.P.W. McAuslan, *Public Law and Political Change in Kenya* (Nairobi: Oxford University Press, 1970), chap. 6, Yash Ghai, “*Law and Lawyers in Kenya and Tanzania: Some Political Economy Considerations*” and Amos Odenyo, “*Professionalism and Change: The Emergent Kenya Lawyer*”, both in C.J. Dias, R Luckham, D.O. Lynch, and J.C.N. Paul (eds), *Lawyers in the Third World: Comparative and Developmental Perspectives* (Uppsala: Scandinavian Institute of African Studies, 1981); JB Ojwang and D.R. Slatter, “*The Legal Profession of Kenya*” (1990) 34 *Journal of African Law* 9-26; and Paul Mwangi, *The Black Bar: Corruption and political intrigue within Kenya’s legal fraternity* (Nairobi: Oakland Media Services 2001).



ily on the advocates, and even the role of the judges is seen in the context of their relationship to them.

A large part of the book is concerned with advocates in private practice, and their relationship to the judiciary, prosecutors, and the academy. The former are certainly the most numerous and prominent in the public eye. They are also very fond of writing newspaper articles—you cannot avoid them on Saturday and Sunday. And of all the professional associations, the Law Society of Kenya receives the greatest publicity. Perhaps advocates are less plentiful in parliament than in some other countries, but they are there—and vocal.<sup>2</sup> But other members of the legal profession also play an important role in the functioning of the legal system, particularly law teachers, researchers, and paralegals. There was also the question of the lawyer members of the state legal services, particularly the Attorney-General and the Director of Public Prosecutions. It seemed prudent to include them—to get a more comprehensive overview of legal system and the interconnections between different law related institutions—and their connection with the broader state system. The chief state law officers are included in this book because of their constant interaction with the private legal practitioners and the profound impact they have on legal ethics and the rule of law.

Public interest in the legal profession arises to a considerable degree from its closeness to the state and role in public affairs. The public sees them, more than any other professionals, in public forums and tribunals, some exhibiting considerable histrionics. There is also a wide perception that lawyers are critical to access state institutions, especially institutions of justice, and therefore to the protection of the rights and property of the people. Some think that they are crucial to the sustenance of the rule of law. Pheroze Nowrojee in his chapter demonstrates how much our freedoms and liberties depend on the integrity and activism of the legal profession, by reference to the struggle for freedom in the dark days of Moi. He also shows that the integrity of the rule of law and the impartial enforcement and protection of the law depend on the integrity, knowledge and skills of the lawyers. But their impact on the private sector and the economy more broadly is also very significant. The dispensation of justice as among different sectors of society (employers versus employees, merchants versus consumers, farmers versus agricultural corporations,

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<sup>2</sup> In *John Okelo Nagafwa v IEBC* [2013] eKLR, Election Petition 3 of 2013, High Court, Busia, <http://kenyalaw.org/caselaw/cases/view/89912/> a High Court held that an advocate (specifically James Orengo) could double up as a senator and a practicing advocate despite Article 77(1) of the Constitution that a full time State officer cannot participate in any other gainful employment. Good for the legal profession but somewhat less than fully convincing!

etc) depends greatly upon the advocates of these groups. PLO Lumumba put the matter thus in his chapter on ethics in this book, “A discussion on the role of a lawyer must be anchored on the functions of law in society. The legal profession is premised on the existence of law as a tool of social order and development; the alternative is anarchy”.

CJ Mutunga says in his chapter that the efforts of advocates are closely connected to the performance of the judiciary: on advocates’ erudition, research and arguments depends to a large extent the quality of the work of the judiciary. Equally, it must be acknowledged that corruption within the judiciary is largely the product of corruption within the advocates.

It was partly in the recognition of these, public, roles and their impact that we proposed in the draft constitution of the Constitution of Kenya Review Commission (CKRC) the following provision:

### **The profession of law**

The privilege of practicing law in Kenya is a public trust. It is a fundamental duty of every legal practitioner to -

- (a) uphold the Constitution;
- (b) observe, respect, protect and promote the rights and freedoms set out in the Bill of Rights;
- (c) conduct the practice of law with integrity, and to be scrupulously honest in all dealings with clients, other legal practitioners, the courts, and any public office or officer;
- (d) represent each and every client to the best of that legal practitioner’s ability;
- (e) advocate fearlessly before the court or any tribunal on behalf of, and in the best interests of, the client;
- (f) assist the court in the development of the law, by presenting well-reasoned, innovative and challenging arguments, such as will advance the objects and purpose of the Constitution and the rule of law;
- (g) scrupulously protect the confidentiality of a client’s business and communications, subject to paragraph (h); and

- (h) draw to the attention of the appropriate authority, any actual or apprehended violation of the Constitution or any law.”<sup>3</sup>

The legal profession provision met with hostility from the profession (including some commissioners) and was dropped at the National Constitutional Conference (popularly known as “Bomas”).

I had also proposed the independent office of the public defender, to provide legal advice and representation to the needy and as a counterpart to the director of public prosecutions (see below).

Even though these proposals were not adopted, there is little doubt that the 2010 Constitution has more to say on the lawyers and legal system than any previous constitution. In several senses, it places the lawyers and judges as its custodians. In his chapter Chief Justice Willy Mutunga describes the important responsibilities of advocates and judges to ensure the proper interpretation and development of the constitution. Several chapters point to the ways in which the values and institutions of law and justice are being reshaped by the new Constitution. Here I provide a brief account of its provisions relevant to the practitioners of law.

### **The role of lawyers in the Constitution**

Pheroze Nowrojee traces the struggle by lawyers (handful though they may be) for constitutional reform and protection of rights and democracy—and the personal sacrifices they made. The Law Society of Kenya (LSK) played the leading role in generating ideas for constitutional reform and in preparing the first draft constitution that outlined the essential elements of reform, based on the centrality of citizenship. Together with the Kenya Human Rights Commission and the ICJ-Kenya, the LSK guided the movement for reform. This movement generated and won support for ideas for reform as well as the highly participatory review process—of which many years later I became a beneficiary as chair of the CKRC. So the lineage of the new constitution can quite clearly be traced to these early initiatives of the Law Society.

And what now that the struggles of the Law Society have borne fruit? The role of the legal profession is critical to the success of the constitution. By success I mean not only that the technical provisions of the constitution are implemented.

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<sup>3</sup> This was not a popular proposal, resisted by several advocates in the CKRC itself, so it did not go beyond the Kenya Constitutional Conference (Bomas). Some opposed it because it was “unusual”, and some said it was discriminatory—what about engineers, accountants and auctioneers, they said?

The constitution is much more than merely new distribution of power, vertically and horizontally and the new institutions to exercise state power. This constitution is primarily about values, aspirations, and the vision of Kenya. That agenda requires the cultivation of a new culture of governance and responsibilities, of attitudes towards the purposes of state power, of the determination to transcend corruption and tribalism, both intertwined, the curse of our nation. Lawyers can play a critical role in the promotion of values as well as the sustaining of institutions. As we are beginning to focus on the implementation of the constitution, we become aware of the scale of new laws that must be enacted and the restructuring of state institutions, particularly the courts and the judiciary.

The CKRC was convinced that without major reforms in the judicial and legal systems, the new constitution, however good it might be, would have little chance of influencing the conduct of the state and society, much less achieving its objectives. The CKRC and Bomas were very conscious of the fact that a major cause of our problems, including particularly massive impunities that define our political and legal system, and the poverty and oppression that so many millions of Kenyans faced, was the failings of government lawyers and judges. Despite a constitution that provided for a relatively independent judiciary and prosecutorial functions, the legal system failed to safeguard the rights of the people or the integrity of legal processes. Not a single Chief Justice or Attorney General had shown the independence of mind and of their office that are essential to the discharge of their responsibilities. They allowed the executive, particularly the President, to dominate and subvert the principles and institutions of justice. They became the essential tools of the oppression under which so many Kenyans suffered. The powers of prosecution were placed at the service of the executive, to punish its opponents and to shield its friends. Our public life and morals decayed, and we lost trust in our state and private institutions.

Nor was the private legal profession without blame. Many of them did not honour the calling of their profession, failed their clients and stole their money. Nor did many of them uphold basic principles of justice and human rights. Some flourished under the patronage of the president, collecting huge fees from the Treasury for work of no effort or significance. Some of them became an integral part of the system of judicial corruption, colluding with particular judges.

Although supreme law, the constitution must be sustained by a strong system of the Rule of Law maintained by the judiciary and public and private legal profession. Consequently, the reshaping of the legal and judicial systems became a priority of constitutional reform.

Let me now turn to the essential principles (and provision) of that reform—an independent judicial service commission for appointments and dismissal of the judiciary and oversight of its competence; independent, competent and honest judiciary (but subject to disciplinary charges and removal for breach of their responsibilities); a strong and learned final appellate court; independent prosecutorial powers, balanced by an independent office of the public defender, to provide legal advice and representation to the needy; and a dedicated legal profession. The clauses on the responsibilities and obligations of the legal profession and the public defender did not survive, as mentioned above.

More specifically, the constitution constantly emphasises the importance of constitutionalism and the rule of law. Paragraph six of the preamble notes the “aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law”. Article 10 sets out national values and principles—beloved of lawyers’ rhetoric—as the foundation of the Republic, binding the state and people alike: the unity of the nation and the rule of law, human dignity and human rights, good governance, integrity, transparency and accountability—values which are reiterated throughout the constitution. Advocates’ roles as partners of the judiciary in the protection and development of the law are emphasised in the common law practice that advocates present arguments on the law which are the basis of the decisions of the judges. Nowhere is this relationship clearer than in the Bill of Rights in Articles 21, 22, and 23 which provide wide and easy access to courts for the interpretation and enforcement of rights and gives judges considerable discretion on remedies which can be effective only if both the advocates and judges fulfil their roles properly and efficiently. Judges are appointed essentially from among the ranks of the legal profession; two members of the LSK are members of the Judicial Service Commission and thus able to influence decisions on the appointment and removal of judges; and general management of the judiciary. Many provisions on the development and enforcement of the constitution depend on the initiatives of and research by advocates (as most broadly stated in Art. 258) as does the notion of and approach to justice (Art. 159).

Advocates have to play a major role in the proper interpretation of the constitution. The judiciary would have to make a major adjustment in its approach if it is to respond to the challenge of constitutional interpretation, a very different kind of exercise from statutory interpretation. It is the profession that has the principal responsibility for making this happen. There is the problem that the new constitution is not really like traditional constitutions. Traditional constitutions were written in

relatively precise language. They confined themselves to structures of government and many issues for adjudication concerned the division of powers (particularly in federal systems). Another major source of controversy concerned the application of civil and political rights. Both these issues, particularly the Bill of Rights, will present themselves to the Supreme Court in plentiful supply.

The new constitution is distinguished from the scope of previous constitutions in several respects. First, it is as much about nation building as state building (the pre-occupation of traditional constitutions). It is easier to be precise about systems of government than about the forging of national identity. The latter is more a matter of attitudes of those in and out of authority. Its prescriptions are nuanced, not easily captured in precise rules or even institutions. They cover not only relations between the state and citizens but also among citizens, and among communities. The recognition of cultural rights (also part of nation building) raises difficult issues of balancing the general with the particular, sometimes on a case by case basis. The new constitution is full of ethical and moral values, and aspirations of a particular kind of the Kenyan nation. Given the generous access to courts provided in the constitution, many controversies on these issues are likely to come to the courts. The Bill of Rights will raise issues not faced by Kenya courts before—particularly with the recognition of socio-economic rights, the difficult terrain of affirmative action and the balancing of individual and community interests implicit in the promotion of national identity. These and other issues must be handled with great sensitivity, often without the assistance of clear rules or any rules at all. The constitution is a negotiated compromise between various communities and interests, as a foundation for national unity, a pact to live together in harmony and co-operation, based on inclusion, human rights, improvement in living standards, etc. Unless this pact is honoured, the fragile unity that we have now will suffer, and so will the legitimacy of the constitution<sup>4</sup>.

The constitution is part of a wider national enterprise of national integration, social justice, inclusion, and sustainability. It is rich in content, inspiring in vision, empowering of people and of lawyers, showing the way to its own development, and calling for the cultivation of values of constitutionalism and the rule of law. It is waiting to be woven into the fabric of laws, interpretation and remedies. In this, lawyers must work with others. The legal system has been made central to the realisation of the objectives of the constitution. Faith in the institutions of the law

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<sup>4</sup> I have discussed this matter at length in chapters 4 and 6 of Yash Pal Ghai and Jill Cottrell Ghai (eds), *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives* (Nairobi: Global Centre for Pluralism and the Katiba Institute, 2013).

must be restored. Who better for this task than advocates? The jury is out (not very ominous since Kenya never had the jury!). Nor can this book answer the question definitively, for lack of time for adequate research. But it examines various aspects of Kenya's legal system where lawyers, in public and private sectors, play a key role which I hope will provide some pointers.<sup>5</sup>

### Political economy of the legal profession

The structure of professions is one thing. How lawyers operate and what drives them is another (Odenyo's study (see footnote 1) shows that few advocates he interviewed were much concerned about ethical issues or the state of the law or access to legal services of the poor). The explanation of what drives them is a bit more cynical and perhaps more realistic: driven by self-interest: seeking monopoly; strict procedures for admission; closely tied to the wealthy or otherwise powerful; protecting one's own kind; breaking the code of conduct when the prize is sufficiently high; and ignoring the poor and the marginalised.

In 1981 I published an essay, "Law and Lawyers in Kenya and Tanzania: Some Political Economy Considerations" (see footnote 1). Kenya and Tanzania had adopted strikingly different political ideologies: Kenya a sort of government dominated capitalism and Tanzania *ujamaa*, a sort of socialism where the state played a major and direct role in the economy, as entrepreneur, owner and manager of major enterprises. This provided an excellent opportunity to examine how law-

<sup>5</sup> There are two practical ways in which the constitution has already influenced the organisation of advocates. Until 2012, the rules in the Advocates Act prohibited advocates from advertising their services. On 29 March 2012, the High Court of Kenya ruled that advocates can advertise their services. Justice David Majanja heard a petition filed by *Okeyo Omwansa George and Marclus Ndegwa Njiru v Attorney General [2012]* eKLR, Petition No. 126 of 2011 <http://kenyalaw.org/caselaw/cases/view/78721/>, which among other things challenged Rule 2 of the Advocates (Practice) Rules made under the Advocates Act (Cap 16). Rule 2 states that no person may apply for or seek instructions, directly or indirectly or do anything which can be reasonably regarded as touting or advertising. He declared that Rule 2 of the Advocates (Practice) Rules banning advertising by advocates was unconstitutional and inconsistent with Article 46(1) and Article 48 of the Constitution. Rule 2 is now effectively inapplicable and advocates may advertise. Apollo Mboya deals in his chapter with the new regulations following this decision. (In this case the court also decided that a required period of two years limited practice (under another lawyer) before branching out on one's own was not unconstitutional as being "forced labour" under Art. 30). Mboya states that this rule has now been abolished.

The second case concerned an advocate who is a member of parliament (and thus a "State officer"). Art. 77 (1) says that a full time state officer "shall not participate in any other gainful employment": *John Okelo Nagafwa v Independent Electoral & Boundaries Commission & 2* above.

There is another aspect: the several new independent commissions have attracted a number of lawyers as commissioners (depleting the profession and scholarship).

yers organise and practise their profession (given many similarities in their colonial periods). I wrote that I “seek to sketch out the outlines of the framework within which the role of legal professions, especially in dependent and colonial economies as well as in post-colonial states, can be understood.” Since the colonial state has more than an objective interest in the organisation of the legal profession, a study of government control of the organisation and powers of the legal profession can also be explained within the broader political economy. I also examined the problem of the persistence of legal forms and traditions and the scope that new states have in altering the inheritance of the organisation of legal services.

I am taking the liberty of reproducing the first paragraph of the essay. “Lawyers in Kenya and Tanzania appeared with colonialism. The need for their services and a delineation of their role were defined by the form of colonialism that emerged in these countries. Since lawyers performed their services in relation to the official system of courts and administration, they were firmly tied to the machinery of the state that was required to complete the annexation and domination by the metropolitan interests of these countries. They were involved in the establishment of and perpetuation of the colonial modes of production. It is therefore obvious that the role of lawyers can only be understood in the context of the organisation of the economy brought about by colonialism. Yet when we look more precisely at the functions of lawyers, we find that they do not always fit fully with the forms of economy. The capitalist relations that were introduced through colonialism provided for a narrower role for lawyers than in other market economies [because of state controls and racial apartheid].

“To understand this inconsistency, we have to turn to the contradictions in the colonial economies of Kenya and Tanzania, between settler and peasant modes of production, and mediations effected by the state in attempting to hold the tensions that arose from these contradictions in some semblance of balance. With independence some of these contradictions disappear or appear in a different form, and new ones emerge; the role of lawyers is correspondingly affected”.

A very considerable part of the paper is about these contradictions and how the gradual development of the economy and the extension of the state law affected the role of lawyers. And then when Nyerere nationalised everything within sight and Kenya’s “man eat man” state-dominated capitalism became the paradigm, there emerged striking differences between the organisation, role and autonomy of the legal profession between the two countries. There is no space to develop these themes at length.



The colonial state is not usually enamoured of lawyers, particularly those outside government employment. This was reflected in Kenya in the exclusion of advocates from “African” courts, and the emphasis on traditional dispute resolution, or preferably by administrative officials. Under the highly controlled system of society and economy, the role of the legal profession is to a significant extent determined by government policies, quite apart from its formal organisation and regulation. Thus with a political system that emphasised the role of the state in Tanzania, there was a tendency towards the bureaucratisation of the profession and in Kenya with its orientation towards “free” market under the auspices of the state, a tendency towards “cowboyism” and the invocation of ethnicity (aided by corrupt state legal officers, as I try to show in my chapter on attorneys-general in this book). The roots of corruption in public life and the opportunism of lawyers and judges were evident then (as I illustrated in that chapter on political economy). The current tensions between the executive and the judiciary are the result of the independence of the judiciary, which had been effectively removed under Kenyatta and Moi.

Independence of the profession depends in part on the vibrancy and relative independence of the business community; the freer the latter the more likelihood of the independence of the former. A small scale, individualised economy is less likely to use lawyers other than for formalities of registration and thus lead to single or small firm of advocates (though lawyers can sometimes create a market for themselves, for example by going to rural areas). An economy dominated by corporations will inevitably lead to sizeable firms. As the sheltered practice of advocates is threatened by globalisation and the forces within the World Trade Organisation, we shall see further re-organisation within the legal profession. A society divided by race and ethnicity will reflect similar divisions in the legal profession. If the economy is run by cowboys and presidential cronies, so will the legal profession. And the most competent and marketable advocates will serve the wealthy and influential, and few will have time for the poor and the marginalised. Yet the formal ideology of the legal profession emphasises service to the community and the protection of the rights of the people. This may sometimes lead to superficial forms of legal aid, but hardly even that in Kenya. Neither the profession nor the government has shown much interest in legal aid or the plight of the poor (as Amondi so copiously illustrates in her chapter).

## History of the Legal Profession

There are two kinds of history: one which recounts the growth of lawyers or others qualified to practice (e.g., *vakeels*), training to be an advocate, the establishment of legal education facilities in Tanzania and Kenya, and the system of admission to practice (such as the Ojwang and Slatter article). The other is more political and sociological, examining the motives behind specific arrangements and explaining the changes in terms of politics (relating to the colonial polices or the resistance to it (such as Mwangi and Odenyo). There are some which combine the formal and the sociological (Ghai and McAuslan, and Ghai). Whichever the approach, the history of the growth of the legal profession (in terms of formal qualifications, procedures for admission, the racially based jurisdiction of courts, the exclusion of advocates from particular courts or tribunals, and the alliances and conflicts within the profession) mirrored the changing political policies and circumstances. In colonial time, the lawyers, mostly Europeans, kowtowed to government interests and those of white settlers. Asian lawyers served the small but growing commercial class among their community. The scene changed with the emergence of what Mwangi calls the Black Bar. It was not, as he shows, an easy process, meeting considerable resistance from the White Bar, opposing the provision of legal education in Kenya and increasing qualifications for joining the profession. He shows how the Attorney General Charles Njonjo joined forces with those resisting African lawyers, and in particular the hostility to the law faculty in Dar es Salaam, after 1961 the only institution in Eastern African providing legal education.

Mwangi also records what he calls the “The Fall of the Black Bar” by which he means the decline of the moral, ethical and professional standards of black Kenyan lawyers, from an earlier period when they fought for the training and promotion of African lawyers—and democracy and the rule of law. So much so that the chair of the LSK, Mr GBM Kariuki said, “Professional standards have fallen so low that unless the society urgently devices a way of arresting the situation, the public is going to lose confidence completely in the Society members” (pp. 96-97). The judiciary began to criticise the profession for its greed and exploitation of their clients—and other malpractices. Concern was also expressed in parliament over the level of professional misconduct; MPs urged the AG to arrest and prosecute crooked lawyers. The media accused advocates of ambulance chasing and swindling in personal injury cases (which is echoed for today in papers by Lumumba and Kameri-Mbote). The *Daily Nation* in an editorial (15 Sept. 1986) described advocates as “sharks” (pp. 96-97). There is no recent study of whether the professional standards have improved (but from chapters by Pheroze Nowrojee, Lumumba, and Kameri-Mbote,

and the large number of complaints against advocates and the leisurely way in which the LSK deals with them, it would appear not).

### Profile of Advocates<sup>6</sup>

Before we proceed to specific aspects of the legal profession, I set out a brief profile of the advocates in practice.

Town	Sole	2	3	4	5	6	7	8	9	10	11	12	14	15	16	17	20/+*	Firms	Lawyers
Nairobi	747	272	104	49	21	17	4	4	4	0	2	1	3	3	1	1	6	1239	2242
Mombasa	87	28	12	4	1	3		1		1								137	236
Kisumu																		57	??
Nyeri	9	3																12	15
Nakuru	55	12	4	5	3	2												81	138
Kisii	23	5		1														29	37
Eldoret	49	20	5	5	3													82	139
Meru	31	9	1	2														43	60
Bungoma	15	5	2															22	31
Embu	10	1	1															12	15
Kakamega	17	8																25	33
Total	1100	365	132	70	7	5	4	5	4	1	2	1	3	3	1	1	6	1739	2946

*\*1 with 20 lawyers, 2 with 22, and one each with 26, 37 and 41.*

The Table above gives an approximate indication of the distribution of private practising lawyers in terms of their geographical presence and the size of law firms. It is based upon a spreadsheet, by law firm or other unit, kindly supplied by the Law Society of Kenya. But the results calculated are only approximate because of some uncertainties about the spreadsheet that is an early stage of preparation. For example, some firms appear more than once; it is unclear whether these are repetitions. In each case the assumption made was that the firm should have appeared only once, but with the largest number of lawyers against its name. Those described as “advocates” were assumed to be private practitioners.

The pattern shown is of a profession mainly practising as sole practitioners (76% in fact). There is no firm with more than 10 lawyers outside Nairobi, and only

<sup>6</sup> I am grateful to Jill Cottrell Ghai for the analysis of the profile.

17 there. The spreadsheet gives the firms/units for Kisumu, but not the number of lawyers in each, so the total of lawyers is understated by at least 57.

Only 10 of the county headquarters other than Nairobi have any law firm: leaving 36 counties with no resident lawyers.

The Law Society has endeavoured to get lawyers to identify their main areas of practice. But this information is not very complete, and without a major exercise in analysis, which has not been possible, we cannot draw any useful conclusions from this data.

The figures are significantly less than those on the Law Society's website, which records:

### **Roll Summary**

Active: 6,229

Deceased: 533

Inactive: 3,258

Struck Off: 55

Suspended: 37

Unknown: 848

Total: 10,960

And it defines "active" as "The advocate is certified to practice for the indicated year".

It seems that the principal types of business that sustain lawyers in Kenya today are real estate (conveyances); intellectual property; commercial contracts (foreign and local firms); family; personal injury and criminal defence.

### **The golden period and decline: Pheroze Nowrojee**

The chapter by Nowrojee, an outstanding advocate, is an account of what may be called the glorious period of the dedication and skills of advocates in support of democracy and human rights. Describing the way in which Kenyatta and Moi destroyed democracy and the rule of law by grievously damaging and ultimately replacing the finely balanced independence constitution (and in the process inflicted great suffering on their former colleagues, even assassinations), Nowrojee traces a dimension of legal practice over a fifty year period, appropriate as Kenya

“celebrates” fifty years of independence. He recounts the efforts of a handful of lawyers (among them AR Kapila, G Imanyara, Muite, Mutunga, Khaminwa, and Gibson Kamau) who fought back in the cause of human freedoms and democracy at considerable risk to themselves (modestly leaving out his own outstanding contribution). These lawyers enjoyed considerable support from the members of the Law Society of Kenya—but by no means all. Many lawyers succumbed to great pressure and refused to defend those who were disliked by the government. Some even went to court to curb the activities of their colleagues who were more rights inclined (some of these lawyers were duly rewarded by the government and went on to hold high judicial office).

Many judges sold their integrity for cash and other benefits; the more honestly robust were essentially thrown out. Government lawyers (particularly those in the Attorney-General’s office) greatly and it seems enthusiastically supported the harassment and subversion of judges and advocates known for their integrity and competence. In a chapter both passionate and learned, Nowrojee provides an excellent account of how a legal and judicial system can be undermined and ultimately destroyed. But he also shows the potential of what an honest judge or advocate can do, showing how the regime can feel “threatened by one honest man with moral courage”. It is just as well to remind us, as he does, of this and the moral and legal obligations of judges and lawyers to fight for justice and the rule of law, as we seem to be entering another period of attack on rights and democracy. My view is that this time the fight will be even harder, as the legal fraternity has become so enmeshed in the business world and sordid deals with the government—and fragmented by ethnicity<sup>7</sup>.

### **Multiple relations between Bench and Bar: Willy Mutunga**

Willy Mutunga, a former chair of the LSK, writes on the relationship between the Bench and the Bar. He says, “We are allies at a distance, each fighting from different fronts as champions of justice, even if that means we must criticise each other”. They are, he says, the two most important wheels of the justice system as well as the keepers of the legal system. He examines the role of the judiciary and the legal profession in the context and imperative of the constitution, and concludes that “The bench and the bar have a joint responsibility to set the foundations for

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<sup>7</sup> It is not surprising that in the presidential election case, each major party was represented by a lawyer of his own tribe.

a jurisprudence of social justice and human rights.” He reminds advocates that “As our partners in the administration of justice the bar has a responsibility to use advocacy and integrity to help us keep the scales of justice in equilibrium”. He gives various examples of co-operation and interaction between the two branches of the legal system. Of judges, he says that they need to win back public confidence and must express themselves with such authority and integrity that the public will always respect their opinions and decisions. Of the advocates, while acknowledging the role of the LSK in the struggle for a new constitution, he laments the decline in the standards, especially ethical, of advocates (colluding with judges and clerks) continuing into the new post-2010 constitution period, followed by a subtle analysis of advocates’ obligations. He has useful advice to the legal profession as to advocacy, moving away from formalism and what he calls Latinism to social and economic contexts with the broad framework of the constitution. And at the same time he challenges the legal profession to hold judges to accountability: “The bar must hold the Judiciary accountable for the clarity and quality of its decision-making. Because lawyers are the primary readers of judicial opinions and the most skilful evaluators of these opinions they are therefore the most regular and most skilful critics of judge’s work”.

### **Law as a profession: Lumumba’s perspectives**

“Legal profession” is sometimes understood to mean all those who are in some capacity engaged in the working of the legal system. This broad approach would include judges, advocates, government lawyers, prosecutors, academics, paralegals and law reformers. It is only by looking at these categories and their relationship to each other and to the public that we get a fair perspective on the legal and judicial system. Here, however, the focus is primarily but not exclusively on the advocates; even the role of the judges is seen in the context of their relationship to the advocates. For the purposes of this book, two key government officers are also included, the attorney-general and the director of public prosecutions, because of their impact on the working of the law and criminal justice. For an understanding of the mission and work of lawyers, it is useful to start with the concept of “profession” since the practice of law is related to the traditions of a profession, influencing the organisation of legal practitioners, the entitlement to practice as a lawyer, the code of conduct and ethics, and several other aspects of their work. In the common law system, which Kenya is, judges and state officers start their career as advocates and somewhat rarely as academics. In most cases they have picked their notions of what is proper in legal practice during their years as advocates.

To a considerable extent, the organisation of the advocates is based on the notion that they constitute a profession: formal training, an association which admits people to practise law and sets the rules governing it, has a code of conduct and disciplines its members. The most detailed discussion of this aspect in this book is PLO Lumumba's essay on legal ethics. He offers several definitions of "profession", starting with Roscoe Pound's, "*A group pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art is in the spirit of public service the primary purpose*". He also quotes a more elaborate definition from the British Royal Commission on Legal Services Report (in 1980) as follows:

...a body of men and women (a) identifiable by reference with some registered record (b) recognized as having some special skill and learning in the same field of activity in which the public needs protection against incompetence, the standards of skill and learning being prescribed by the profession itself (c) holding themselves out as willing to serve the public (d) voluntarily submitting themselves to standards of ethical conduct beyond those required of the ordinary citizen by law (e) undertaking to accept responsibility...

Professions come armed with a monopoly over the services they offer. In return for this they undertake to be suitably qualified and to observe certain rules which protect the interests of their clients as well as promotes the public good. They can be expelled from the profession in case of the violation of a code of conduct by the profession's association (membership of which is compulsory). They thus enjoy considerable autonomy in the organisation of the profession: training, qualifications, examinations, accreditation, discipline of members, prescription of fees, and complaints against members. In some cases their organisations have a special status or role (e.g., in the state regulation of the relevant industry or sector). The Law Society of Kenya, for example, is represented in various organisations or its officials are ex-officio members of outside committees. These rules are particularly appropriate when the profession plays an important public role as lawyers.

Advocates are a profession under the Advocates Act and they have an organisation under the Law Society of Kenya Act—Lumumba provides a detailed and interesting account of how advocates are constituted and organised as a profession. Closely connected to this notion of professionalism, apart from technical competence, is the notion of ethics and responsibilities. As Lumumba and Patricia Kameri-Mbote (in her chapter) show, the government, particularly through the office of the attorney-general, plays a more important role in key rules about some aspects of the profession than this model suggests (the explanation of this may lie

in the way the profession developed in Kenya, a subject dealt with by Ghai and McAuslan, Ghai, Odenyo, Ojwang and Slatter, and Mwangi<sup>8</sup>).

Nor was the profession particularly united in its view of proper regulation (including admission), perhaps because of its fragmentation by race during the late colonial period (well documented by Mwangi) and now to some extent by tribal differences. This factor may also have diminished the influence of the Law Society on law and its administration.

In a learned chapter, Lumumba explains the roles of an advocate, in an increasingly complex society requiring regulation through increasingly complex law. He discusses the role of an advocate in society, with obligations in various capacities: as an officer of the court having to be accountable to the court; safeguarding the interests of the client (which requires confidentiality, accountability to the client, avoiding conflict of interest, and exercising due care and diligence; and preserving the independence of the profession). Lumumba discusses the codes of conduct and the mechanisms for their enforcement, through a number of institutions. He focuses on the Disciplinary Tribunal consisting entirely of advocates. He prefers what he calls co-regulation where non-advocates also sit, to inspire public confidence in its impartiality, and combat the tendency to protect one's kind. He also prefers a broad philosophy or approach to the responsibility of the advocate which must transcend the interests of the client, drawing on African notions of obligations to society. He is not persuaded that the bodies charged with investigation and sanctions have been fair and conscientious and deplores the squabbles and standards of morality within the profession. Chief Justice Mutunga notes in his chapter the decline of ethical standards, into the post-2010 Constitution.

### **Professional integrity and disciplining of advocates: Kegoro, Milongo and Nyanjong**

Following upon the observations of Lumumba and Mutunga, Kegoro, Milongo and Nyanjong trace the history from early days of the disciplining of advocates for breach of advocates' conduct and efficacy of the current system of complaints and redress. A study of the system of discipline of advocates provides interesting insights into the history of the legal profession. At first disciplinary matters were dealt with by the judiciary and later the basic responsibility for redress moved to the LSK (in conformity with the English practice)—but with a much greater role

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<sup>8</sup> See footnote 1 for references.



of the AG than most other common law jurisdictions (in this context, as Nowrojee reminds us, the obsession of control of the legal profession in Moi's regime was so intense, that appointments to the disciplinary body were made by no less than the president!).

Like other authors in this book, the authors of this chapter are critical of the conduct and morals of advocates, and the difficulties faced by their clients in securing justice from the LSK or other institutions charged with the enforcement of the code of conduct. The most common types of complaint relate to overcharging of clients by advocates, especially in relation to personal injury and death claims. There are also complaints about delay in carrying out the instructions of the client, acting in situations of conflict of interests, and failure to keep the client informed of progress made in carrying out instructions.

The authors say that despite some reforms in the system, it remains fragmented, with lack of adequate and independent mechanisms to investigate complaints or provide justice. Without a secretariat of its own, the tribunal relies on, and is effectively part of, the LSK, whose members dominate the tribunal, and whose secretary is also the secretary to the tribunal. The LSK maintains custody of the records of the tribunal. The authors say that the principal clients' complaints against the Tribunal are that the discipline administered is slow in responding to complaints, overly lenient and notoriously unresponsive to clients' concerns. It is clear that the application of the norms of a profession regarding discipline have not worked here. At the request of the LSK, the International Bar Association recommended major reforms to the system of the accountability of the advocates in 2002. Except for one, none of the recommendations has been adopted. The authors note that at the institutional level, disciplinary mechanisms and processes should be restructured to recognize the multiple aims of a professional disciplinary system.

A later study, discussed briefly by Kegoro et al., reinforced the 2002 recommendations and added some of its own.<sup>9</sup> A rapid survey of its 83 recommendations, especially of those requiring changes in the law, indicates that very few have been adopted. Notably this leaves the rather remarkable position that the President appoints the members of the first tier complaints body (the Cox and Ojienda study proposed that this should be on the recommendation of the Law Society (para. 368)). And the main body, the Tribunal, includes the Attorney General and Solicitor

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<sup>9</sup> Noel Cox and Tom Odhiambo Ojienda, *The Enforcement of Professional Ethics and Standards in the Kenyan Legal Profession* (Report for the World Bank and LSK, 2007, revised for publication by Noel Cox 2013; published by Cox and Ojienda).

General (or a nominee of the AG) and now also the Director of Public Prosecutions; the study proposed that the chair and deputy should be appointed by the AG on the recommendation of the Judicial Service Commission, and that the AG and SG should no longer be there, although a representative of each should be (para. 397).

### **Legal education and the training of the profession: Kameri-Mbote**

Legal education is relatively new in Kenya (compared to other fields—medicine, architecture, agriculture, engineering, and science and social studies). There was a reason for this: the British (political) distrust of lawyers who in several other colonial possessions had led the struggle for independence. So access to legal training was effectively restricted to the more wealthy communities—Europeans and Asians—who could afford to send their children to Britain. In any case, the established lawyers at the time preferred that the entry to the profession should be through apprenticeship (“articles”) which would be done locally. It was the independence of Tanganyika which prompted the establishment of the first law teaching institution in Eastern Africa, at the urging of Julius Nyerere who emphasised the need for local lawyers (to promote the “rule of law”). The Dar-es-Salaam law school (part of the University of East Africa) began enrolling students in 1961 and many distinguished Kenya lawyers and judges were trained there. Kenya started a faculty at the University of Nairobi in 1970 with the breakup of the University of East Africa.

Patricia Kameri-Mbote describes the current system of entry to the profession, which consists of a basic degree from an accredited university, and “practical” training at the Kenya School of Law. The syllabus and other regulations on legal education are the responsibility of the Council of Legal Education (including accreditation of university law schools) which is composed of government lawyers and private practitioners (both unfamiliar with educational developments and methodology). Kameri-Mbote identifies various problems with this system: a narrow professional outlook, a large number of compulsory courses (leaving little scope for research, specialisation or pursuing interests of students). Regulations are hard to follow because of conflicting objectives of practical training with academic accomplishments. She thinks that at both the university and Kenya School of Law, there is too much emphasis on practical subjects. There may be a price to pay for this. The healthy development of a legal system depends to a significant degree on teachers and practitioners with a broad vision and reflections on the changing pur-

pose and role of law in society. From her account, it seems unlikely that the system of legal education would achieve this objective.

The deficiencies of the regulatory system are compounded by the attitude of teachers, who according to her give teaching a low priority (perhaps 10% of their time). There is, for the most part, little room for tutorials or small group teaching. Teachers give even less time to research. Few textbooks are written by them, and thus there is a heavy dependence on foreign books and journals. Teachers seem to spend most of their time earning money through consultancies, or teaching at various institutions simultaneously. Universities themselves are to blame for the poor state of legal education; they see establishment of teaching parallel courses and graduate degrees as a way to make big income without much expenditure. For some reasons, extra-mural training of this kind draws a large number of students—again for the “wrong” reasons—which include promotion in their jobs—even if their theses are written by hired hands. Altogether Kameri-Mbote paints a dismal picture of the state of legal education and training—which I fear is reflected only too obviously in the professional work of lawyers.

### **Paralegals, Unrecognised?: Waruhiu and Odhiambo**

There is no one definition of paralegals. Normally a paralegal would have had some legal education and training which falls short of what is required of an advocate or comparable professional. Paralegals often have their own organizations and codes of conduct. No account of the legal profession would be complete without a discussion of paralegals. They play an important role in several countries. The range of services that lawyers provide would diminish if there were no paralegals to assist in various tasks—of courts, advocates, and community services. In US, UK and Canada, paralegals tend to provide legal services similar to that of certified lawyers, but their rights of audience are seriously limited. Their principal roles relate principally to case management, legal research, and legal aid. They work with law firms and business houses. Without them, the cost of legal services would escalate, in some cases making legal services unaffordable.

The role of paralegals can also vary from country to country. It would seem that the roles in Britain and the US vary significantly from that in Kenya. Paralegals are understudied in Kenya, although they perform a variety of important and interesting functions, and are at least 3000 in number—a deficiency made up by Waruhiu and Odhiambo (both with considerable direct experience of working with them) in this book. They discuss the role of paralegals in Kenya, and point to the way the con-

stitution recognises their role (though indirectly): Articles 50(7) (on Fair Hearing) and 49(1) (c)). Paralegals work in banks, law firms, companies, and NGOs, but their most important work is with communities, providing legal information, arranging legal representation, bringing complaints to appropriate authorities.

Waruhiu and Odhiambo show how a peculiarly Kenyan (or African) role for paralegals has developed. Due to the lack of legal aid and the difficulties of access to the system of justice (“such extreme injustices, community vulnerabilities and huge gap between the administrators of justice”), a number of civil society organizations have trained paralegals who are based in the community to work closely with the county administrators, especially the chiefs, police, probation, children and prison officers to assist in legal education, legal aid, accompaniment to court and drafting of legal court documents.

The authors draw attention to another development: the involvement of paralegals with the judiciary, by the establishment of the judicial-paralegal customers care desk. Paralegals are able to advise court users (witnesses, litigants, accused persons and general public) on the court operations and procedure and follow up cases with the court registrar or advocate as appropriate. This has enhanced judicial-public relations as well as reduced congestion and bureaucracy in the court system. Paralegals now work in police stations, prisons, courts and communities, to assist the accused and are active in the defence of human rights and democracy.

### **Legal Aid, the Missing Factor: Amondi**

The absence of any meaningful scheme of legal aid is also the theme of the chapter by Caroline Amondi. She clarifies that although access to justice is often confused with legal aid, legal aid is a more limited concept. It refers to the system of providing free or inexpensive advice about law and if necessary legal representation, to those who cannot afford them. She explains the necessity for legal aid and the structural features of its provisions. The poor, because of the many disadvantages they suffer due to poverty, find it unusually hard to understand or cope with the law. They do not know what their rights are and even if they do, how to protect them. Amondi observes, “The integration of access to justice into the development agenda of the nation through legal aid is a necessary condition for improving and safeguarding citizens’ socio-economic rights”. On the structural features, she explains that the dominant features rest on the following interdependent pillars of the rule of law: the legal framework geared towards efficiency and social justice, competent, impartial and effective institutions of justice, and an array of efficient

and equitable services, including proximity to courts and lawyers, and financial resources to pay for legal services.

Under international instruments, and now the Kenya constitution, the state is obliged to provide legal aid for those unable to afford legal costs, but little has been done by the government to set up a scheme (there are statutory provisions for particular categories of people such as children). Civil society organisations, with the help of western governments, have provided legal assistance, but the reach and scale are, understandably, limited. A large number of expensive studies have been made over the years on the institution of legal aid (discussed by the author), but with little practical results so far. A Bill for Small Claims Court was prepared in 2007 and more encompassing Bills on legal aid 2013 and 2014 (discussed by the author), but none has been introduced in Parliament. Amondi expresses serious doubts about the commitment of the government to legal aid; it is clear that it is a very low government priority. Nor have the courts shown much enthusiasm for legal aid in the few cases where this has been an issue.

Anticipating precisely this lack of enthusiasm, I proposed a constitutional provision for the office of a public defender. It was accepted by the CKRC and Bomas, but met its demise at the hands of the CoE. Under the proposal there would be a state funded but independent office of the Public Defender (PD), with one off term of 10 years. The PD, with qualifications similar to that of judge, would provide legal advice and representation to persons who are unable to afford legal services. The details of the PD Office were to be determined by Parliament, in the same way as that of the DPP. Presumably it would have required the state to provide sufficient funds and other facilities for PD's functions and responsibilities, with offices in major population centres.

### **Justice and the rule of law: In the custody of State Law Officers?**

If the state has made such feeble efforts to provide legal aid to promote the rule of law and equal access to the law and its institutions, the State Law Officers must take major responsibility. When we study next the record of the two major Law Officers, we are not surprised that such low priority has been given to legal aid. It is their responsibility to protect and promote the constitutional nature of the state: democratic, protector of rights, with clear responsibilities to ensure fairness, social justice, an inclusive state, and other Article 10 values. As far as the Attorney General, the key state law officer, is concerned, a major responsibility is to protect the rule of law and promote constitutionalism. As the chief legal adviser to the

President the AG is obliged to tell the President his or her duties and responsibilities as set out in Chapter Six and other parts of the constitution, including Articles 131 and 132, and the oath of office. The other major state law officer has the principal responsibility to maintain the essential principles of criminal justice. It is these two law officers who are discussed in this book.

### **Attorney General: Yash Ghai**

Ghai starts his discussion of the history, status and role of the AG, by discussing first the recent debates in England on the reform of the offices of the AG and DPP. These debates (and recent reforms) are extremely instructive for Kenyans since these offices are a legacy of the British. The status and roles have changed in Kenya since the first introduction of the offices, reflecting changes in status and policies. The British debates focussed on two principal issues: the relationship of the AG to the government as legal adviser (the degree of independence of government) and the combination of the tasks of adviser and prosecutor. There was broad consensus that as adviser the AG should retain independence and should not be a member of the cabinet, keeping a suitable distance from policy makers (nor sit in cabinet meetings except for special reasons). The AG's role as the defender of the public interest, particularly the rule of law, was emphasised, with a measure of accountability. The role of the AG in prosecution was to be reduced; already in practice the decisions are made by a prosecution commission (though the AG retains the power to direct in rare cases, involving the national interest).

Of particular interest to Kenya are two rules (and one recommendation) affecting the AG. The AG must be consulted in good time before the government is committed to critical decisions involving legal considerations (like gargantuan procurements). Second, as part of drafting functions, the AG has the responsibility to ensure compatibility with human rights as well as constitutional propriety of all Bills—and declare so to Parliament. And there was strong demand that the AG's legal advice should be made public.

Kenya has not had such a wide ranging debate—though it needs it greatly. Perhaps the group most responsible for the demise of the rule of law and the emergence of what is now gigantic phenomenon of impunity are the State Law Officers, particularly the AGs. The independence of the AG and the DPP under the 1963 constitution was removed within a year. The first AG (Charles Njonjo) was responsible for much of this damage—and set the trend for his successors, the most ardent and faithful being Amos Wako, who together occupied the post for upwards of 40

years and truly buried the rule of law. They conferred more than impunity; they ensured to the corrupt the fruits of corruption (ask any Kenyan about Goldenberg or Anglo-Leasing).

The CKRC correctly diagnosed the problem, and aimed for a fundamental reform, separating the offices of the AG and the DPP, the former becoming just a lawyer to the government and the latter an independent state officer (Art. 260). Both posts now appear in the chapter on the national executive (the decision to include the DPP was a decision of the CoE, contrary to that of the CKRC where it appeared in the chapter on the legal system) but both are required on their own to “promote, protect and uphold the rule of law and defend the public interest (Art. 156(6) for the AG) and for the DPP, to “have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process” (Art. 157(11)). As for the new English approach to the effective separating of the AG from the politics of the government, the AG is closer to the government (a member of the cabinet and essentially there to protect its interests)—a view which comes across very sharply in the Office of the AG Act which Githu Muigai shepherded through the National Assembly—manifesting a view of the grandeur of the office and wide in its control of many state organs, well in excess of what is conceived of in the Constitution. Completely and patently contrary to the constitution, he has given the AG security of tenure. There is a sort of arrogance and disregard of the constitution—already Muigai has come under judicial and professional criticism for exceeding his authority on several occasions.

### **Director of Public Prosecutions: Waikwa Wanyoike**

Waikwa Wanyoike examines the role of the Director of Public Prosecutions (DPP), noting that the DPP occupies the most critical position in the administration of criminal justice. He locates the current status and functions of the DPP by comparing the post-independence role of the chief prosecuting officer under the authority of the Attorney General. This meant that decisions about prosecutions were made effectively by the Attorney General, a politically driven office in practice if not in law. The AG grossly abused prosecutorial powers, and undermined the role of the DPP. In most cases the DPP was a willing accomplice, and was well rewarded. Now the DPP is a separate and independent office. The functions of the DPP are also elaborately set out in Article 157. One critical power of the DPP is the authority “to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct”. This provision, more

than any other, gives the DPP the most potent tool of ensuring action where there is suspicion of criminal activity.

The Constitution gives the DPP state powers of prosecution, including instituting and undertaking criminal proceedings, taking over and continuing any criminal proceedings initiated by another person or authority but with permission of that person or authority; discontinuance of any criminal proceedings instituted by his office, with the leave of the court. However, prosecutorial powers must be exercised in accordance with Article 157 (11): the DPP must “have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

The CKRC was concerned that the AG was performing too many roles – including that of member of both Parliament and Cabinet – and this compromised his ability to act as an independent prosecutor. People expressed concern over the power of the AG to take over private prosecutions since over the years AGs had taken over private prosecutions to frustrate the power of individuals to prosecute cases that the political establishment was unwilling to undertake. Wanyoike and Ghai show that the impunity closely connected with the practice of AG and DPP was the greatest threat to constitutionalism and integrity. Wanyoike, quoting the Waki report on electoral violence, says that impunity was thriving in the country and was fuelled by “elements of systemic and institutional deficiencies, corruption, and entrenched negative socio – political culture.” He concludes that the “issue of impunity is directly related to the ability of the state to prosecute persons for criminal offences.”

Wanyoike shows how the appointment of the first DPP, Tobiko (a carryover from before), was deeply flawed. The parliamentary panel set up to vet Tobiko received many allegations of corruption, some irrefutable, and adverse comments on his conduct by a parliamentary committee. Both the panel and the parliamentary oversight committee refused to consider allegations against Tobiko (there were allegations by a member of the panel that a great deal of money had been given to certain members of the panel and the committee). When the appointment was challenged in court, the three judge bench of the High Court upheld the appointment in a deeply flawed decision. It is hard to conceive of a worst start to a post designed to introduce the highest standards of integrity in public and private life. Continued political use of functions of AG and DPP shows the force of bad habits, with the same old people in charge of political and administrative powers; a striking example of the resistance of the established groups to the constitution.



Wanyoike shows that courts have variously held that, while they will safeguard the independence of the DPP to decide on what cases to prosecute, they will not hesitate to interfere where it is shown that the prosecution is an abuse of process or is inspired by factors that are inimical to public interest or where the nature of prosecution would bring the administration of justice into disrepute. The discriminatory aspect of decisions to prosecute is shown by a two-tier prosecutorial system whereby in most cases relating to prosecution of persons high in authority or those who are well-known personalities in or generally privileged persons within the society, the findings of criminal investigations are most often seen and evaluated by the Office of the DPP before formal charges are laid.

On the positive side, Wanyoike considers that ODPP has undertaken genuine efforts to institutionalize and professionalize in order to meet the specific demands of Article 157 of the Constitution. However, there are still numerous internal and external factors that undermine and slow its progress: influence of past practices, and the failure of the national government, including parliament, to fully appreciate the critical role of the ODPP, denying it sufficient resources. Nevertheless, while it has been vocal in pushing for its prosecutorial independence; the office has done very little in using its powers to prosecute cases that foster systemic impunity, especially against persons in authority or the elites in society. Nor has the ODPP protected the vulnerable in the society or those who were not favoured by the political elites (for example human right defenders) from being victimized through the use of criminal justice system or being dragged unnecessarily through phony criminal processes, contrary to the constitution.

### **Order and justice without lawyers: Steve Ouma**

Steve Ouma writes from a different perspective from other authors, who are explaining various aspects of the profession, from within the legal system. Ouma looks at the profession from outside that framework—and in this way helps to place the profession and the legal framework within which it operates. He draws his insight from the study of the community living in the Nairobi “slum” of Korogocho, where few lawyers venture—he says because there is no money to be made. Ouma, a well-known Kenyan anthropologist and sociologist, draws insights about both the legal system and those who serve in it, by examining the ways in which, in the absence of lawyers, people cope with entitlements (particularly in relation to property, relationships, and disputes). He starts with an exploration of the rise of slums, in the colonial period, as a way to marginalise and subordinate communities to serve impe-

rial interests. Described as “native locations”, they manifested the segregation and exploitation of Africans as the city of Nairobi grew. Unfortunately colonial policy of segregation and marginalisation continued despite independence, but the distinction between the oppressed and the oppressor changed from race to class—blacks exploiting blacks, supported by the same coercive forces as during colonialism.

He explores Korogocho as a “community” and its life where there has been little access to legal services or lawyers and engages questions like: How does the community deal with internal and external matters where some legal intervention would normally be expected? Is there an informal system which performs the functions usually associated with a formal legal system? What are the overall effects of the lack of access to lawyers and other institutions of formal justice? He asks and answers question such as: How do we enforce the law in the unplanned urban poor settlements in Nairobi? How does the community deal with internal and external matters where some sort of legal intervention is expected? Is there an informal system which performs the functions that are usually associated with a formal legal system? What are the overall effects of lack of access to lawyers and other institutions of formal justice?

For the most part, Ouma argues, the law has not infiltrated the slums. He examines two consequences of this: the role and importance of administrative officers in managing the slums, and the growth of an informal system for managing relations within the community. He explores how people have established their own legal order that is more responsive to their reality than the formal system would be, based on a different conceptions of property and entitlements (which are protected by administrative officers when it suits them). But there is real danger that this “homemade” system can be punctured if someone invokes the state law; it is too frail to withstand that challenge, backed by the might of the official apparatus.

Ouma demonstrates this by examining litigation pursued against residents of Korogocho by outsiders, many of them or their spouses holding senior government positions. Under the people’s-cum-administrators’ law, this privileged group has built, on public land, what are called “structures” –simple, modest and narrow wooden cabins. These are then leased to residents of Korogocho—generating a considerable sum of money to the “landlords” (which, from information other than from Ouma, include very senior politicians). The landlords got worried at one point with rumours of giving some security to the “tenants”, and filed a petition in the High Court demanding the eviction of the tenants and the formal recognition of their “title”. At this point the decision of the High Court calls into question Ouma’s assertion that the poor cannot expect justice from state courts: the court rejected

the landlords' petition. Ouma does have a subtle analysis of the obligations of advocates, but it also hints at how few lawyers are concerned about the plight of the poor, when the law could come to their rescue.

A local system works so long as all obey the understandings of the community, but if one side invokes state rules and system (normally those who have the capacity and means to do so), the informal system collapses, creating fresh problems for the community. In any case it is hard to imagine that people in any of Nairobi's settlements can lead a 'traditional' way of life with its notions of property and dispute resolution intact. This is the case not only because most settlements have a multiplicity of communities, but there is constant intersection between the traditional and current forms of livelihood and state officials.

For legal scholars and practitioners, the starting point must, therefore, be holding to account, not the people of Korogocho for residing in Korogocho and indeed other slums without title deeds, but those who through complicity, greed or abdication of duty have "produced" Korogocho. The lawyers should therefore not be dealing with an "illegal people" but rather an "illegal situation". A study conducted by the UN Habitat Report on Rapid Economic Appraisal of Rents in Slums and Informal Settlements (2001) reported that 57 per cent of all structure owners in the slums were ministers, civil servants, and government officials or politically connected business people and they are the biggest beneficiaries of the continued existence of slums. A question that needs to be engaged is whether developing informal systems for law enforcement as envisaged in Article 159 (c) of the Constitution, of the use of alternative forms of dispute, is a way of bridging the gap between the unconventional and conventional systems, or rather a reinforcement of the distances observed in his analysis of the 'geography of power'.

### **And now to the future: Apollo Mboya**

Apollo Mboya, secretary of the Law Society of Kenya, reflects on the future of the legal profession. Noting the successful agitation of LSK for a new constitution, he points to the important decision made by it in the wake of the constitution—vote by secret ballot to its Council being conducted by the Interim Electoral and Boundaries Commission. A Bill for new legislation was prepared in 2014 to replace the 1949 legislation governing the organisation of the legal profession. The order of Senior Counsel has been instituted to recognise outstanding performance in practice, research or teaching of law. The number of advocates on its Roll has reached 10,459 and the proportion between the genders improved: 4041 women

to 6418 men. The status of the LSK has been recognised by its membership of the Judicial Service Commission and several other organisations.

Mboya then notes the challenges facing Kenyan advocates, in a world of rapidly changing technology and markets, globalisation, and the blurring between professions, leading to greatly increased competition. He gives us a fascinating picture into the organisation and politics of law firms in Kenya—and how they are responding, or more accurately, should respond to contemporary challenges. Advocates' clients are becoming more demanding, requiring a range of sophisticated services, at lower costs. Big international and regional firms are invading a formerly protected market, causing considerable apprehension among Kenya advocates (likely to negate the rule enacted some years ago restricting legal practice to Kenyan (or East African) citizens). Mboya places special importance on the improvement of legal education to equip lawyers to operate in this brave new world. Whether most Kenyan law schools are capable of meeting the challenge is highly unlikely; Patricia Kameri-Mbote has little confidence in the law schools as currently organised. What is of interest to a long term legal educator like me is the contrasting perception of the nature and purposes of legal education. There has for long been differences between those who see legal education as preparation for a trade and craft (as Mboya), and those who see it as liberal education with less emphasis on techniques and skills than on the nature and purposes of law in society and economy—and the fundamental values of a law oriented society (as Kameri-Mbote). The Kenya legal profession has always preferred the first approach. These differences are (or were) also reflected in the mode of training: the first approach emphasised apprenticeship and learning on the job, largely by observing their mentors (this was the preferred approach of European advocates in Kenya, who were opposed to the first university education programme in East Africa—for an interesting discussion of this, see Mwangi's book). The second approach emphasised university education with a reasonable dose of social sciences; and a post-graduate year where practical skills could be acquired. The first model gave control to the practitioners, the second to academics. Mboya advocates that universities should adopt the practitioners approach, especially given increasingly competition and dependence on new technologies. It is worth pondering, as the 2010 constitution becomes the framework of government and society, which approach best serves the national interest.

It is interesting that Mboya does not address many other issues discussed in this book: such as legal aid, public interest litigation, paralegals, ethical standards, access to justice, the rule of law, and human rights. One gets the impression of a self-absorbed profession, concerned only about its own income. We know that this

is not the case; there are many advocates who care about the welfare of others, believe in the constitution, and are committed to social justice. The LSK has never been more active on social and political issue except for the period when Willy Mutunga was its chair, pushing for respect for the rule of law, even taking public interest cases to courts. The trends are difficult to predict since these aspirations and efforts seem to represent a minority of advocates, while many are content with the conduct of the government.

### **In conclusion**

Most authors of this book are pessimistic about the commitment of both the legal profession and the government to the rule of law and social justice. The quantity and quality of research, especially probing the contours of the constitution, is poor (though not universally so—there are some committed and able scholars). The ethical standards of the profession are low. One hears of numerous instances when advocates pocket damages given for their clients (it is notorious that the profession, uniquely, refused to accept two cheques from insurance companies, one for the clients and the other as costs for the advocate). In recent years there has been much dissatisfaction with the extraordinarily high fees advocates charge. To return to the political economy framework, the driving considerations for advocates is still the administrated economy, with numerous state contracts (government and parastatal) and external corporations of which the Chinese public and private companies are now very prominent—not particularly bothered by standards of integrity and transparency, the central values of the constitution. Mboya, noting fundamental changes in the environment for legal services, sets out in detail his recipe for the re-organisation and training of lawyers.

Meanwhile, the LSK seems to protect its members against claims of clients, a sort of trade union. The complaints mechanism has often been criticised for its delays and inefficiencies. As far as State Law Officers, the custodians of the rule of law, are concerned, they seem to be chosen for the lack of their commitment to this value. There was a collective sigh of relief among ministers and civil servants when the DPP was appointed under the new procedures; the sigh was well justified. The government cares little for justice for the poor; despite numerous studies of the problem and considerable foreign assistance, no effective steps have been taken to provide access to justice for them. All these groups seem to be united in their concern for the powerful and the wealthy. This is not how the new constitution envisages justice.



# **THE LEGAL PROFESSION 1963-2013: ALL THIS CAN HAPPEN AGAIN – SOON**

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**Pheroze Nowrojee**

“The history of the human race has been a struggle for the removal of oppression, and we would have failed had we not made our contribution. We are glad we made it.”

— Robert Sobukwe, Statement from the Dock

## **At 1963**

**L**awyers entered the period 1963-2013 with an old Act, The Law Society Act, Cap.18, enacted in 1948, with an older body, the Law Society of Kenya established in 1921, and the Common Law.

The Law Society Act, Cap.18 set out our duties and still guides us in the manner we will conduct our professional acts in relation to the nation. Its objects were set out in S.4, and among these is one that came to the fore in the fifty years under review:

1. 4. The objects for which the Society is established are –
  - (a), (b), (c), (d) -
  - (e) to protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law;

## **The years that followed**

The fifty years that followed were an assault on constitutional frameworks, administrative fairness and the Rule of Law in favour of authoritarian one-man,

one-party rule. The common law conventions and voluntary restraints were eroded by the assault on the profession and the judiciary by the Kenyatta executive followed by the Moi Executive.

Centres of resistance emerged throughout those fifty years. Among these, and one of the earliest and longest sustained, together with the NCEC (National Convention Executive Council), were lawyers and the Law Society of Kenya. They became the targets of the Kenyatta and Moi regimes.

### **The Attack on the Bar: The 1970s**

The Kenyatta regime began the assault mainly by two procedures impacting immediately on the constitution and the legal profession – detention without trial and criminal charges. These were used for political purposes, to establish political dominance and to eliminate political opponents and opposition. They were used to move the country to one-party, one-man rule. The Kenyatta regime sought to camouflage this by portraying that it was acting within the principles of due process in each. The Moi regime continued using these processes, for the same purposes, using the same hand-me-down camouflage patterns.

The detention laws were patterned on the Emergency Regulations of British colonies. They were of course arbitrary detentions without any challenge possible in the courts to check whether the facts alleged against the detainee were true, or whether there were reasonable grounds for a belief in their truth or whether the minister concerned had exercised his discretion in accordance with law. The fig leaf used by the legislation was the provision for a Detainees' Review Tribunal. This was a body that was presided over by a High Court judge, appointed by the President, (whose regime had detained the person appearing before the Tribunal). The Tribunal was to meet periodically to review the cases of the detainees. In practice the Tribunal did not review the propriety of the detention nor the need or otherwise for continued detention. It did not discuss this with each detainee and merely went through the motions of meeting them and, sometimes, inquiring about their health. This charade was best captured by Ngugi wa Thiong'o, (who appeared before the Tribunal twice), in his book *Detained*:<sup>1</sup>

[At the first tribunal], after polite introductions, they simply stared at me. I asked them: Why was I detained? They didn't know. What were the accusations against me? They

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<sup>1</sup> *Detained: An African Writer's Diary* (Nairobi: Heinemann African Writers Series/ East African Educational Publishers, 1981)



didn't know. And now the chairman talked: Had I anything I wanted to tell the government ? (p.150)

[At the second tribunal, the chairman], Justice Hancox was impatient, yawned several times and kept on looking at his watch. This time the interview lasted less than three minutes. (pp. 150-151)

The Tribunal instead of being an impartial, independent body, a keeper of the residuary interests of the detainee was run as the political watchdog of the interests of the Executive itself. Only persons with proven loyalty to the executive were thus appointed to chair this Tribunal. It is not surprising therefore that three of its chairpersons were later appointed to the post of Chief Justice.

The use of criminal charges to get rid of political opponents was a constant feature of the Kenyatta and Moi years. This too was to be camouflaged by following the forms of a fair trial, such as open courts, defence counsel, and statutory court procedure. But, the 'fair' process was always subverted by the State having first ensured a pre-determined conclusion and conviction by managing that such cases were only placed before compliant magistrates and judges. The system to ensure this was documented in the Africa Watch report on Kenya, *Taking Liberties*.<sup>2</sup>

One safeguard that Kenyatta and Moi could not always manage to do away with, or control, was the accused person's right to counsel of his choice. Both Kenyatta and Moi were dependent on foreign aid to run their governments, and those international donors were watching closely. The appearance of a fair trial had to be maintained. Both regimes decided then to control the lawyers. Many were frightened away. Many were persuaded, with state work, to decline taking political cases. Despite all this, a significant number of advocates remained committed to practise in accordance with professional standards.

When these lawyers of detainees and of persons charged in criminal courts began to resist the malpractices they found there by prosecutors and magistrates/judges, and to expose the unprocedural operations of the detentions and the political use of the criminal prosecutions, the Kenyatta and Moi governments turned to attack the lawyers in addition to their clients, and turned their unlawful measures, detentions and criminal charges, against the lawyers and rights defenders themselves.

Among the first attacks on the Bar were the charges that the Kenyatta government brought against the most prominent criminal defence lawyer in Kenya and

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<sup>2</sup> London: Africa Watch, 1991.

East Africa, AR Kapila. His knowledge, experience, professional commitment and brilliance in defence of his clients frustrated too many of the Kenyatta regime's false cases against political opponents and personal enemies. His defences made the public also see that falsity all too clearly. The regime charged him with criminal offences, but the true purpose was to get rid of this lawyer who was an impediment to the regime's illegal and unbridled control of the judiciary. The chosen magistrate duly complied with a conviction. It was an unappreciated irony that Kenyatta, himself a victim of a false case as a political opponent of the lately departed colonial regime, now had his regime using the same process against the very lawyer who had defended him at Kapenguria.

Another leader, Byron Georgiadis, again at the criminal bar, also saw and rejected this executive control over the judges and magistrates. In rejection of it, Georgiadis made the matter public by writing three major op-ed articles. These appeared in the *East African Standard*. In these he set out the principles of the rule of law and of the duties and necessity of the legal profession. He set out his concerns about the situation in Kenya where all these were steadily being disregarded or overridden. His seniority and standing forced the government into a response in Parliament itself.

Georgiadis too paid the price of defending the profession's principles and their constitutional underpinnings. He was forced to close his criminal practice. He intended to leave, but friends persuaded him to stay and instead join a major law firm to do only civil cases. It was many years before Georgiadis returned to criminal work.

### **The Effect on the Legal Practitioners – Fear and Refusal to Represent**

A part of the advocates, like the judges, also acceded to subservience and silence. One effect was the unwillingness and fear of too many advocates to defend persons unpopular with the Kenyatta and Moi regimes. This was breaking their professional oath. This too was not a new situation. This had happened thirty years ago during the Emergency from 1952 -1960. A specific part of the members of our Bar had refused to defend Mau Mau accused persons. The refusals within the profession had reached levels serious enough for the matter to be mentioned in the House of Commons and for the past UK Attorney-General, Sir Hartley Shawcross to speak in London on it:

I have heard it said that certain members of the Bar in one of the colonies [read Kenya] refused to accept a brief to defend an African accused of offences of a quasi-political

nature against public order. The suggestion is that those barristers made excuses and declined to act, their true reason being they thought that their popularity or reputation might be detrimentally affected [read racism] by appearing for the defence in such a case. If it were true it would disclose a wholly deplorable departure from the great traditions of our law and one, which if substantiated, both the Attorney-General and the Bar Council of which I am a Chairman, would have to deal with in the severest way possible.<sup>3</sup>

This situation now began being repeated in the years from 1969, when the de facto one party state was created after the 1969 banning of Kenya People's Union (KPU) and the 1969 single party general election. The Law Society did not speak up against this unprofessional refusal to take up cases. The decade of the 1970s thus saw the diminishing of the Law Society's voice for the rule of law. These years also saw increasing timidity in the advocates to make proper and spirited defences.

### **The Corrupt Cartels**

The two decades of the 1970s and the 1980s also suffered the presence of cartels consisting of corrupt prosecutors, corrupt defence lawyers, corrupt police investigators and corrupt magistrates and judges fixing cases and operating deals for their private gain, all the while still performing their sycophantic and equally corrupt public services to the executive in return for impunity and a blind eye for their profitable private manipulations of the judicial process. Many members of the Law Society who accepted elevation to the bench did not stay away from such a working environment and joined these groups.

### **The Bar Responds**

Through this subservience, shame, and the abdication of the profession's duties, there were still many advocates who practised as the profession required. Kenyatta and Moi, emboldened by their temporary success and the convenience of misusing the criminal courts to remove political opposition, used such cases more and more. When the political misuse of the criminal courts kept increasing Kenyans began in times of difficulty to turn to these steady lawyers. It was then that these lawyers of detainees and of persons charged in criminal courts began themselves to be detained and or charged with criminal matters.

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<sup>3</sup> *Hindustan Times*, 25 February 1953, New Delhi.

## **The Lawyers were Detained**

Among the first lawyers detained was John Khaminwa. He was to be detained twice. Each time it was due to and in the course of his professional duties, in defence of a client and by reason of his insistence on upholding the Rule of Law. For these and his unhesitant struggle against injustice, Haverford University conferred upon him the Honorary Degree of Doctor of Laws.

Among other lawyers detained were Willy Mutunga, Lenny Gacheche, Gitobu Imanyara, Mohamed Ibrahim, Rumba Kinuthia, Gibson Kamau Kuria, Wanyiri Kihoro, Jean Marie Seroney, Gupta Ng'ang'a Thiong'o, Mirugi Kariuki, with Kiraitu Murungi just escaping detention and going into exile. Gibson Kamau Kuria too was conferred with an Honorary LLD, by the Lewis and Clarke Law School.

## **The Lawyers were charged with criminal conduct**

Defence lawyers who were charged with conduct liable to imprisonment, included James Orengo (regularly and numerous times), Gitobu Imanyara (regularly and numerous times), Japheth Shamalla, Paul Muite, Beatrice Nduta, Martha [Njoka] Karua, GBM Kariuki (for contempt), Pheroze Nowrojee (for contempt), Mbuthi Gathenji, Wanyiri Kihoro, Willy Mutunga, Rumba Kinuthia, Mirugi Kariuki.

But this persecution by the Kenyatta and Moi regimes was counter-productive. Each prosecution only recruited more colleagues to defend and act against the regime. And soon, the many became many more, as is recorded by Aryeh Neier, below. Neier, the famous human rights defender and long-time head of the ACLU (the American Civil Liberties Union, 1963-1978) and then of Human Rights Watch (1978-2012), visited Kenya during this period, and noted that Kenya had its share of lawyers who were upholding or participating in repression more than in challenging it, but still found that in Kenya “enough lawyers are defenders of human rights that the Government cannot silence them all by singling out a few for specially severe reprisals. A significant escalation of repression would be required, and that would cause difficulty for a country economically dependent on tourism, on its reputation as a regional centre for international commerce and on foreign aid.”<sup>4</sup>

<sup>4</sup> *The Nation*, 1 April 1991.

## The Attack on the Law Society of Kenya

In the event, finally Moi had no choice but to attack not a lawyer, or a few lawyers, or several, but the whole profession, by attacking the Law Society of Kenya itself.

When the Moi regime found that it was not gaining control over the profession and could not (in the same way that it had with the other professions), it attacked the Law Society itself. It made funds and government assistance available to candidates in the Society's elections to take over and control the Law Society for him. This was a direct attack on the independence of the Bar. It urged individual LSK members to bring legal suits against the LSK, and obtain injunctions to gag LSK statements and prevent challenges to the misrule and bad governance of the Moi regime. It supported them with funds and compliant judges. Among these suits were:

- (a) *Aaron Ringera & Others v Law Society of Kenya*:<sup>5</sup> In this case the plaintiffs moved to stop the statements of the Law Society which spoke of government violations of the rule of law. An injunction was granted against the Law Society, its officers and council members stopping them from issuing public statements on political events. The chair and officers of the LSK refused to be gagged. Contempt proceedings were initiated. Eventually, these faded away.
- (b) *Kenneth Kiplagat v Law Society of Kenya*: In this case a Moi sympathizer, sought to declare the statements of the Law Society against certain Government steps, as not representative of his views as a member, and *ultra vires* the Law Society of Kenya Act. This application was commenced by chamber summons, a form long held not to be able lawfully to constitute an originating process. Upon a preliminary objection, it was struck out.
- (c) *Kenneth Kiplagat v Law Society of Kenya (No.2)*:<sup>6</sup> The same applicant then brought a fresh action through a proper originating process. The issue was whether s.4 (e) of the Law Society of Kenya Act, was valid law or whether statements made under it were *ultra vires*. This was argued at great length. This second attempt was also dismissed. Joyce Aluoch J. and Ransley J. held that the section was valid and that the statements were lawfully made.

All three courtroom attempts to muzzle the Law Society and lawyers failed.

The Moi regime then introduced a new complaints mechanism against advo-

<sup>5</sup> *Ringera & 3 Others v Paul Muite & 10 Others*, Nairobi High Court Civil Suit No. 1330 of 1991

<sup>6</sup> High Court, Nairobi. Civil Case no 542 of 1996 (decided 2000).

cates, the Complaints Commission. Its members would be appointed by the State, thus enabling the Moi government to control outcomes. It was to evade the difficulty that Moi could not easily control outcomes in the statutory Disciplinary Committee (the disciplinary body already in existence), because its members were elected by the LSK members under statute.

Moi sought to punish the lawyers by making the legal profession subject to the heaviest control. The result was that the legal profession was now subject to five disciplinary regimes, more than those for any other profession:

- (a) The Disciplinary Committee under the Advocates Act, Cap.16;
- (b) Contempt of court sanctions under the Judicature Act, Cap.8;
- (c) The s.54, Advocates Act, Cap.16 powers of a court over advocates;
- (d) The common law power of judges over counsel in court; and finally,
- (e) The new Complaints Commission.

Moi then imposed Value Added Tax (VAT) on legal services, while exempting other professions, supposedly so that the profession would lose business by becoming more expensive to the public.

Moi's regime next threatened to deregister the LSK. An ultra-loyal Minister publicly threatened that if the Law Society did not change its ways and stop criticizing the President, it would be de-registered, like other troublesome bodies. The regime was so used to such arbitrary and unilateral ways with political opponents and those bodies with whom they had fallen out, it came as shock to the Minister and the Moi regime when they were reluctantly advised that LSK was a statutorily established body and could not be 'de-registered'. They had become used to having, along with the judges and magistrates, all the registrars – of companies, books and newspapers, societies, trade unions, co-operatives and all else – also totally compliant and ready to register or deregister as ordered, regardless of statutes, rights or the Constitution.

### **The Abolition of the Tenure of the Attorney-General 1986**

In 1986, Moi amended the Constitution to abolish the security of tenure of the Attorney-General. The Attorney-General is the titular head of the profession. The subservience to the executive had reached these irrational and unattractive lows.

## The Attack on the Judiciary: The 1980s – 1990s

The control completed by the Kenyatta regime over the judiciary was continued, by the same means and with the same objects – unchecked power, immunity from accountability, and personal gain – by the Moi regime, often by the same individuals carried over in office from the Kenyatta period.

Some of the magistrates and judges understood the nature of the new statutes and the many amendments to the Constitution. They believed they themselves were not part of the making of these deviant laws. They believed that they were therefore not part of that system. They would administer the laws fairly and justly. They did not, could not, accept what had long before been pointed out elsewhere - “Without wishing to impugn the personal honour and integrity of the magistrate, an unjust law cannot be applied justly.”<sup>7</sup>

Their seeming neutrality was also subservient. They failed to speak up even for those within their own ranks, magistrates and judges who would not toe the State House line, and who quietly went about their job according to the law and the evidence before them. When such magistrates and judges were victimized, the other judges remained silent. This allowed injustice to be visited upon their colleagues. They also kept silent when the security of tenure of the judges was abolished.

The executive’s demands for control of the judiciary and the latter’s succumbing to those demands are not new phenomena in the common law. A prominent example is England during the Commonwealth under Oliver Cromwell. When the High Court allowed the lawyers of one Maynard to question Cromwell’s authority to detain him, Cromwell pre-empted the court by committing Maynard to the Tower, for presuming to question or make doubt of his authority, and –

... the Judges were sent for, and severely reprehended for suffering that Licence. When they with all humility, mentioned the Law and Magna Charta, Cromwell told them, with terms of contempt, and derision, ‘their Magna F----- should not controle his Actions; which he knew were for the safety of the Common-wealth.’ He asked them, ‘Who made them Judges? Whether they had any Authority to sit there, but what He gave them? And if his Authority were at an end, they knew well enough, what would become of themselves; and therefore advised them to be more tender of that which could only preserve them;’ and so dismissed them with caution, ‘that they should not suffer the Lawyers to prate what it would not become Them to hear.

<sup>7</sup> A statement of Robert Mangaliso Sobukwe in mitigation after conviction before the Johannesburg Regional Court, May 4 1960, quoted on ANC website at <http://www.anc.org.za/show.php?id=3396>.

“Thus,” continues Clarendon,<sup>8</sup> “he subdued a spirit that had often been troublesome to the most Sovereign power, and made Westminster-Hall as obedient, and subservient to his commands, as any of the rest of his Quarters.” Kenyatta and Moi’s judges suffered the like submission of spirit.

Thus the attacks on magistrates and judges who upheld the rule of law and refused to be sycophants of the Presidency, the Provincial Administration or the sole political party KANU (Kenya African National Union), were also a major feature throughout the Kenyatta and Moi years. In retaliation against their independence, they were, among other punishments, transferred to hardship stations, denied privileges given to their fellows, edged out of the judiciary, denied promotion. Compliant magistrates and judges on the other hand, were prominently promoted, feted, given social approval, and, significantly, a blind eye was turned to their self-enrichment through corrupt practices in the cases before them. The attack on the judiciary had started early.

*Mr. Justice Farrell Ag.CJ 1968*

One of these arose out of the attempted interference by President Kenyatta in 1968 in the outcome of the appeal by Bildad Kaggia from his conviction for holding an illegal meeting at the opening of the KPU offices at Homa Bay. The magistrate had convicted Kaggia, and sentenced him to one year’s imprisonment. The effect of that, if sustained in appeal, would be to disqualify Kaggia from retaining his seat in Parliament, where he was a constant thorn to Kenyatta. The appeal to the High Court was to come before Farrell J as Acting Chief Justice. The Kenyatta regime angrily sent messages through a British cabinet member that the white judges were not to interfere in his matters. Farrell Ag.CJ remained silent. At the appeal, Byron Georgiades appeared for Kaggia and argued against both conviction and sentence. Farrell Ag.CJ upheld the conviction, but reduced the sentence to six months imprisonment. The political effect was that Kaggia did not have to vacate his parliamentary seat. Farrell Ag.CJ had not succumbed to the pressure. Kenyatta did not confirm him to the substantive appointment as Chief Justice, and did not renew his contract. The regime’s reaction presaged the coming years. Numerous instances of retaliation against judicial officers who did not comply with unlawful demands of the executive followed. A few of the more prominent ones are set out.

<sup>8</sup> Edward Hyde (1st earl of Clarendon), *The history of the rebellion and civil wars in England, Volume 3*, Book XV p. 296 (in the edition by Oxford University Press, 1826, available on Google Books)



### *Mr. Justice Schofield 1987*

In 1987, a *habeas corpus* application came before Mr. Justice Derek Schofield. The wife of Stephen Mbaraka Karanja applied for the production of her husband who had been arrested earlier. An order was made against the CID. When the matter returned before Mr Justice Schofield, the CID represented by the Attorney-General, failed to produce the husband, and stated that he had been shot dead trying to escape and had been buried in a public cemetery in Eldoret. Schofield J ordered that the body should be exhumed, and ordered further that an independent post mortem be carried out. The police exhumed 23 bodies but stated that they could not find Karanja's body. The judge, considering the explanation given by the police for failing to find and produce the body unsatisfactory, ordered contempt proceedings.

Before these could commence, "the then Chief Justice, [Miller CJ], told Schofield that the President had taken an interest in the case and that his insistence on the head of the CID complying with his order was jeopardizing the renewal of his contract. The Chief Justice told him, further, that he had done his research on the matter and found that there was no contempt. Schofield's response was that he had not yet heard the parties and had therefore not reached a decision on the matter."<sup>9</sup>

The Chief Justice ordered that the file be transferred to another judge. In response to this flagrant breach of the principle of judicial independence and the rule of law, Mr Justice Schofield refused to renew his contract, a response of honour welcomed by those without honour.

### *Mr Justice Shields 1990*

In 1990, the *Nairobi Law Monthly* was banned under the Penal Code. A judicial review application was made by the publisher and the editor, Gitobu Manyara, for leave to apply for an order of *certiorari*, to quash the banning order.

The application came before Mr Justice Frank Shields. Leave was granted by Shields J and as permitted by Order 53 Rule 1(4), of the then Civil Procedure Rules, he ordered that the grant of leave would operate as a stay of the impugned banning order. The effect was that the *Nairobi Law Monthly* was not yet a banned publication and was free to operate and be sold on the streets. It thus was again accessible to all Kenyans. The Government functionaries, in particular, the then Chief Justice Hancox and the Attorney-General, had failed to contain the *Nairobi Law Monthly*

<sup>9</sup> Mumbi Ngugi, "A Matter of Moral Courage: A Chat with Chief Justice Schofield" (2004) 68 *The Lawyer* p.11.

and Gitobu Imanyara. This had been the first time that a challenge to a banned publication had been allowed by the courts.

Moi was furious. Hancox the Chief Justice had failed his master, the executive, and could not give any satisfactory explanation why he had not prevented such an outcome by directing and controlling his judges. In retaliation, Hancox suggested that the lawyers must have bribed the Registry staff to have the matter listed before that judge, and the judge bribed to give those orders. Hancox called in the CID. The CID came to the Registry and took statements. The staff stated that no attempt had been made by any lawyer to place the matter before any judge nor any bribes paid or offered to them. The CID then proceeded to the Chambers of Shields J. There they sought to question him on the matter. Shields J. listened to them in silence, finished smoking his Turkish cigarette, and walked out. The investigations died a natural death.

#### *Mr Justice John Khamoni 1999*

Mr Justice Khamoni, a graduate of Dar-es-Salaam Law School, enrolled as an advocate in 1970. He was appointed a magistrate in 1978 and a High Court Judge in 1990. In the following years Mr. Justice Khamoni delivered several leading judgments. In 1996 he gave the landmark judgment on the issuance of orders of prohibition against oppressive criminal proceedings in *R v Jared Benson Kangwana*.<sup>10</sup> It was immediately followed and applied in a number of cases and became an important shield against the misuse by the Moi regime of prosecutions against political and personal opponents. In *John Kamau Icharia v Paul Njiru and another*, Khamoni J. was dealing with an application to set aside an *ex parte* judgment on the ground of non-service of the plaint and in the interests of justice. He found that the applicants had in fact been served and were presenting a false ground. Dismissing their application, Khamoni J. observed, "In fact, I see no justice based on falsehood. It is a matter of principle."<sup>11</sup>

In 1999, the Law Society of Kenya nominated Mr. Justice Khamoni for its award of distinguished service in the administration of justice. When the then Chief Justice was informed of the award, he called a meeting of all the judges. The judiciary then wrote back to the Law Society as follows :

<sup>10</sup> H.C. Misc. Application No.446 of 1995.

<sup>11</sup> H.C.C.C.No.1774 of 1994.

Your said letter is returned herewith. The Law Society is not qualified to assess or evaluate the judges' performance of their judicial duties. You are requested to note that in future the Judiciary will not entertain any approach to issues which ignore protocol.

Under the Chief Justice's direction all the other judges boycotted the Law Society's function where the award was to be given to Mr. Justice Khamoni. The judiciary then withdrew from a training programme on alternative dispute resolution to be hosted jointly by the Law Society and the Canadian Bar Association. The judiciary prevented Mr Justice Khamoni from receiving the honour awarded him. They felt threatened by one honest man with moral courage. Correctly, so. For the following fifteen years the presentation salver, engraved with Mr Justice Khamoni's name, has remained on display in the reception hall of the Law Society of Kenya.

### **Chief Justice CB Madan**

The judges mentioned above were models of what the profession stood for. Of them, the judge most looked up to in the last fifty years was Chief Justice CB Madan. Born in Nairobi, CB Madan was admitted to the Bar in Kenya in 1933. When he became CJ in 1984 he was uniquely qualified: he came to the highest post with long, respected and successful experience of all three branches of state. He was certainly the most qualified CJ in the Commonwealth, and most likely in the world.

He spent 25 years as a practicing lawyer at the Bar, from 1936-1961, leaving it as a Queen's Counsel (QC). He was Secretary-General of the Kenya Indian Congress and elected first to the City Council of Nairobi in 1938. In 1948 he entered national politics and served in the Legislative Council till 1961. From 1955-1957 he served as an Assistant Minister, and in 1957 he was appointed to the Cabinet as Minister Without Portfolio. He was in active politics for 23 years, thirteen of them in Parliament. In 1961 he was appointed a puisne judge. He served in the Judiciary for the next 23 years, till his tenure as the Chief Justice of Kenya, 1985-1986.

Thus, by the time he was appointed Chief Justice he had served in all three branches of state, the legislature, the executive and the judiciary. And he had served them with distinction and honour. It is a remarkable record.

All this vast and comprehensive experience showed in his decisions, in his administration of the judiciary, in his treatment of the bar and his treatment of litigants and members of the public at large. He brought to bear on each case and file, this unique multi-faceted vision. And it was a vision for Kenya. He was a fiercely

Kenyan public figure: in politics, in law, in his writing. He wrote poetry celebrating our country. One of those poems was set to music by Them Mushrooms and is on their tapes. He wrote well, and his judgments reflect this blend between tough politics and literary expression. For with his political experience he had no illusions about our public affairs. No politicians in election petitions or other cases could bamboozle or browbeat him. No lawyer could bluff him. He had seen it all, and he saw through them all. But with courtesy and fairness. The overwhelming impression all carried away from his court – lawyers and parties, winners and losers – was of a fair decision and a fair Judge. His judgments in *Githunguri v Republic*<sup>12</sup> and in *Butt v Rent Restriction Tribunal*<sup>13</sup> are part of the literature of our law. He is our most cited judge.

Against this remarkable record, Moi hesitated in appointing him Chief Justice and kept him as the Acting Chief Justice for more than a year, never sure he could trust such an independent minded person.

### **The Abolition of the Tenure of the Judges 1988**

The constitutional nadir in Moi's attitude to the judiciary was reached in 1988. Moi amended the Constitution to abolish the security of tenure of the Judges of the High Court and the Court of Appeal (The Constitution of Kenya (Amendment) Act No. 4 of 1988). No judge protested publicly, and no judge resigned at this defining departure from the rule of law.

### **The Abolition of the Bill of Rights through unenforceability**

The dangerous absurdity of the jurisprudence of the Moi regime and its legal advisers reached another ocean floor in 1990. The High Court held in two decisions (*Kamau Kuria v. Attorney General*<sup>14</sup> and *Joseph Maina Mbacha v. Attorney General*<sup>15</sup>) that the Bill of Rights and Fundamental Freedoms could not be enforced through the High Court in Kenya, because no rules had been promulgated setting out the procedure to apply for such orders. In the absence of these rules, no applications were valid. The decisions were given by Chief Justice Miller and by Mr. Justice Dugdale respectively (in different proceedings).

<sup>12</sup> [1986] KLR 1.

<sup>13</sup> [1982] KLR 417.

<sup>14</sup> High Court Misc. Application No. 279 of 1985.

<sup>15</sup> High Court Misc. Application No. 356 of 1989.

Its own two decisions now exposed the bankruptcy of Moi's compliant judiciary to the public and to a watching profession throughout the Commonwealth. The little legitimacy that had remained collapsed. Moi's judiciary had thus also shown that it could not cope with the sustained constitutional challenge mounted by the lawyers. Against the learning and legal expertise of the independent Bar, as exemplified in the pleadings of Gibson Kamau Kuria and others, the servile judiciary of Moi's regime failed.

### **The Attack on international Human Rights Organizations**

And finally when international human rights bodies and law societies and professional bodies took note of the egregious and impunity-filled attacks on law, lawyers and the Law Society of Kenya, they began investigations and reporting on Kenya. Moi then began to launch attacks on Amnesty International, Lawyers Committee for Human Rights, Human Rights Watch and other major human rights bodies. It was a self-defeating campaign that with every retort only steadily reduced his legitimacy internationally. He and his government soon became the subject of adverse international and national human rights reports year after year, approaching in number those against South Africa.

### **The Lawyers Emerge among Leaders against the Oppression of the Moi Regime**

It is against these failures of Moi's judiciary forced by the strong challenge of the lawyers, that a major tectonic shift began to take place. The lawyers professional challenge in the courts was now turning into a popular challenge to Moi among the people.

The content of the legal challenges, the content of the government failures, the normative rights even of an emasculated Constitution were reaching through to the people. The lawyers were seen to be right, they were perceived as striving against power hitherto seen as impregnable and socially not to be disrespected. They were thus seen as persons speaking on behalf, not of individual clients but now increasingly of a larger part of the whole people. They were not seen as persons silently watching the suffering of the people. They were seen as sharing that suffering as persons, and as a profession, enduring detention, criminal charges, remand cells, prison terms, interference with their daily work, just as other citizens were forced to.

These perceptions arose through, and were disseminated slowly over a period of time, by the small or big reports in the daily newspapers, and then in weeklies like *Society* and *Finance*, by brave press persons like Pius and Lois Nyamora, and Njehu Gatabaki. The continuous small challenges were reaching a wider audience and their sustained presence was countering the Government monopoly of radio and television. They were thereby changing perceptions about its legitimacy. Those changes were generating a popular disaffection with the Moi regime. And now the *Nairobi Law Monthly* was making it legitimate and normal to voice that disagreement.

### **The Nairobi Law Monthly 1987**

The first and pre-eminent carrier of this change was the *Nairobi Law Monthly*. The voice that now single-handedly recalled Kenya to the rule of law and its own independence struggle aspirations was that of this publication and its editor, Gitobu Imanyara. He stood alone at first. But soon he and the magazine became the catalyst for a stellar company of counsel that broke the impregnability of Moi and his system, led to the return of multi-partyism, to a slow dismantling of that oppression and its machinery, and finally to the departure of Moi from power.

Nothing the government did halted the conviction, drive, eloquence or energy of Imanyara. National and international recognition heaped pressure on Moi. Amnesty International adopted Imanyara as a Prisoner of Conscience. International prizes followed, even while Moi sought to harm and malign him at home. But Moi was dealing with a phenomenon with which he was not at home and for which he had no real answer. He again failed in his response.

The *Nairobi Law Monthly* hit the public like an ice cream van in the Chalbi. Successive issues converted the believers of Moi into doubters, those doubting into non-believers, the non-believers into quiet witnesses, the witnesses into stuttering objectors, the stuttering objectors into voluble campaigners, and the hardened campaigners into invincible leaders.

It did this by stating the law, stating where Moi's regime was on it, and letting the public see the gap. Then their daily experience confirmed that the *Nairobi Law Monthly* was speaking the truth. *Nairobi Law Monthly* did all this with legal articles fully documented, with law reports, with an implemented Right of Reply policy that baffled a Moi suspicious of written politics, with poems, photographs, jokes and sedate, well-reasoned editorials. The general public became the main, and eagerly awaiting, readers of each issue. There were at that time barely 1000

lawyers in the country, but the print order soon became 15,000, and the multiple readership 140,000.

Issue followed issue, written by Gitobu together with, or – if he were in detention, remand cell, prison, hospital, or gagged, or abroad receiving prizes – by a constellation of legal talent that seemed endless. Moi, like Macbeth at another State House banquet, must have wailed, “What, will the line stretch out to th’ crack of doom?” Looking at those by-lines now, it is a roster of subsequent fame and achievement. Copy flowed in from members of the public and from lawyers all over the world. The *Nairobi Law Monthly* was referred to in the *New York Times*, the *World Press Review*, *Time* magazine, and numerous peer publications.

The *Nairobi Law Monthly* offices were raided, copies regularly confiscated, newsvendors constantly intimidated. Finally Moi’s regime instructed his Attorney-General to ban the *Nairobi Law Monthly*. The Attorney-General, Matthew Guy Muli, issued a Special Issue of the Kenya Gazette and published Legal Notice No.420 of 1990 of 28<sup>th</sup> September 1990:

All past, present and future issues of the periodical publication entitled THE NAIROBI LAW MONTHLY printed and published by Kaibi Limited, Tumaini House, 4<sup>th</sup> Floor, Nkrumah Avenue, P.O. Box 53234, Nairobi are declared to be prohibited publications.

Earlier, in July 1990, Imanyara had been detained because, among other grounds:

You are the Editor or Proprietor or Publisher of a Nairobi magazine known as THE NAIROBI LAW MONTHLY in which you have repeatedly written or published articles which denounce, ridicule and discredit the Government of Kenya, its activities and its established constitutional leadership.

All this failed to stop the *Nairobi Law Monthly*. (See under *Mr. Justice Shields* above). As importantly, it failed to diminish the example of the independent minded press that it set to the rest of the media and to all Kenyans.

The Moi administration detained Imanyara, charged him serially, remanded him constantly, denied him bail, assaulted him with stones, refused him *habeas corpus*, tortured him, blocked proper medical treatment, impoverished him, injured his family. All this failed to stop Gitobu Imanyara or Florence Imanyara, or to diminish the example of the independent minded advocate and citizen that they set to the rest of the lawyers and to all Kenyans.

## The Effects of the Mlolongo Election 1988

Secondly, the lawyers' challenges in court were now spreading out into the public political arena into broader issues and challenges. New partnerships were emerging. Civil society, the faith organizations and the lawyers began working together. The historian, Daniel Branch, later observed:<sup>16</sup>

The coalescence of opinion over the conduct of the 1988 elections between the churches and the lawyers was mutually beneficial. The churches provided the lawyers with a wider audience and a medium for communication; the lawyers, for their part, brought two vital elements to this relationship. First, the elite backgrounds of the lawyers and their defence of political prisoners supplied a link between civil society activism and political opposition of various shades.

“Secondly, lawyers like Paul Muite, Kiraitu Murungi, Gibson Kamau Kuria, Gitobu Imanyara and Pheroze Nowrojee developed the criticisms of the queue-voting system into a broader debate about constitutional reform.

The new partnerships resulted in huge popular surges for change of leadership, governmental reform and a new Constitution. At the head of that charge was a large component from the legal profession.

Thirdly, the unity during this period within the profession itself propelled it to a leadership position, as well as afforded a protection against extremes of retaliation by the Moi regime. Aryeh Neier wrote:

What inspires admiration, even awe, in an outsider is the unhesitating readiness of Kenya's human rights lawyers to spring to one another's defence at great risk to themselves. By the time the police had spent thirty minutes at Imanyara's office searching the premises [and arresting him on fresh charges of sedition again], several other lawyers appeared on the scene. Although the police took the prisoner out the back way, one of the lawyers, Martha [Karua] Njoka, jumped in a car and followed them. When she reached the police station to which he'd been taken, several police officers surrounded her car and wrested the ignition key from her. Undeterred, she entered the station to lodge a complaint against the police, which they refused to accept.

Njoka [Karua] and another young lawyer, Beatrice Nduta, are defence counsel for Mirugi Kariuki in the treason trial. On February 6, Nduta herself was arrested on a complaint by the prosecutor in that case, the son-in-law of Kenya's Attorney-General. Twenty-nine Nairobi lawyers, led by Paul Muite, subsequently elected Chairman of Kenya's Law Society, showed up in court to defend her. As she told me the following week in Nairobi, when she returned to her office from court, she found messages from several other lawyers complaining that they had not found out in time to appear in her behalf. The lawyer

<sup>16</sup> Kenya: *Between Hope and Despair 1963-2011* (New Haven: Yale UP, 2011) at 182.



representing Imanyara on the sedition charge, Pheroze Nowrojee, was cited for contempt in another political case. More than seventy lawyers offered to appear in his behalf. When he declined such mass representation, more than 120 lawyers turned up in court and sat through the proceedings to observe and be observed.

Continuing, Neier asked, What accounts for the dedication of so many Kenyan lawyers to the human rights cause. He thought it was also out of “a sense of their own responsibility to champion these causes, a burden they seem willing to bear.”

## **2002 – 2010**

### *The False Dawn of the NARC Victory and the 2005 Referendum*

With the departure of Moi in December 2002, after the constitutional depredations of 24 years, it was expected that change would be forthcoming. The Kibaki government, though full of former reformers including many lawyers, now sought to use the momentum of constitutional reform for the fashioning of a new constitution. Sadly, their conception of the new constitution was of the old wine of unchecked power in new bottles.

The betrayal of the Kibaki regime, in becoming a repeat of the Moi regime, started by stalling the review of the Constitution, a specialty of Moi since New Year’s Day 1994. The Kibaki regime followed suit with a stonewalling filibuster of eight years from December 2002 till the Promulgation in August 2010. The formerly united lawyers became divided. This too contributed, as it was intended to do, to major delay in constitutional reform and the achievement of any new Constitution.

The division arose from some putting ethnic loyalties before loyalties to the ideas and ideals of our profession. The dangers of this sad retrogression manifested themselves in the continuous rejection of reforming provisions still pressed for by reforming practitioners. The Kibaki denial of constitutional reform in those years was one of the causes of the Post-Election Violence of the intervening 2007 General Election and its illegalities.

Having blocked the Boma’s constitutional review process in 2004, the Kibaki regime then sought to push through a version suitable to his own politics and succession, by a referendum in 2005. This government draft was defeated.

### *The Constitution of Kenya 2010*

The new Constitution of Kenya was finally promulgated on 27<sup>th</sup> August 2010. It has opened an era of new jurisprudence with new values, enabling the Law Society of Kenya and its members to serve Kenya better.

### **2010 -2013**

Even in the years following, we have seen challenges made to the Constitution itself and to the reforms and gains made, even though the people of Kenya approved its contents and its philosophy of equality, social justice and democracy. We have seen those who bitterly opposed it earlier now eagerly using it for protecting themselves, even though they had never wanted others to have those protections. It should not surprise us, nor move us to deny them that right. We won it for all, even for those who opposed it.

This is the admirable result of what so many members of the Law Society of Kenya fought for over many decades.

### **Conclusion : All This Can Happen Again - Soon**

There is no conclusion. Save, that All This Can Happen Again – Soon. Because the defence of justice is an on-going task, which the next fifty years will also face. While justice remains the professed and real purpose of the legal profession, each ambitious executive is a threat and a continuous threat to that purpose. We must always have in mind what Montesquieu said,

Political liberty is to be found only ...when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go.<sup>17</sup>

And of course 1887 Acton's reminder:<sup>18</sup>

*"Power corrupts, and absolute power corrupts absolutely."*

To prevent this, the Constitution has legal aims but also broader aims. The legal profession works the Constitution. Therefore the legal profession also shares

<sup>17</sup> *L'Esprit de Lois* (The Spirit of the Laws) Book XI (1748)

<sup>18</sup> In Letter to Bishop Mandell Creighton, April 5, 1887 published in J. N. Figgis and R. V. Laurence, eds., *The history of freedom and other essays by John Emerich Edward Dalberg-Acton, first Baron Acton* (London: Macmillan, 1907).

the Constitution's broader aims. This is why our principal legal document sets out these broader aims expressly.

### **Social Justice – A Just State**

So what should be the aims and methods of the legal profession for the next fifty years as it applies, defends, and extends the Constitution of the nation and the ideas and ideals of the profession?

It was best stated by another lawyer, freedom fighter and the first Prime Minister of India, Jawaharlal Nehru. When asked by Andre Malraux, the French writer, "What has been your greatest difficulty since independence?" Nehru replied, "Creating a just state by just means".<sup>19</sup>

It is no accident then to find that the Constitution of Kenya 2010 is a law that aims at a just state by just means. It is also not an accident that it gives that task largely to the legal profession.

This aim is why social justice is a major part of the Constitution. The Preamble of the Constitution of Kenya 2010 acknowledges the debts to the past and the hopes for the future and in doing so recognises :

the aspirations of all Kenyans for a Government based on the essential values of human rights, equality, freedom, democracy, *social justice* and the rule of law.

Article 10 then expressly sets out social justice as one of the enumerated national aims:

10.(2) The national values and principles of governance include –

...

(b) human dignity, equity, *social justice*, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; . .

In the Bill of Rights (Chapter Four), Article 19 sets out why this Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. Art.19(2) states:

19.(2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote *social justice* and the realisation of the potential of all human beings. [emphasis added]

<sup>19</sup> Andre Malraux, *Anti-Memoirs* (New York: Henry Holt, 1990) p. 145.

### *Other Rights – The Right Against Injustice*

The objective of social justice is also why the categories of the Bill of Rights are not closed. Art.19 (3) of the Constitution expressly provides that the Bill of Rights does not exclude other rights and freedoms which are not in the Bill of Rights. Art.19 (3) states :

- (3) The rights and fundamental freedoms in the Bill of Rights –
  - (a) belong to each individual and are not granted by the State;
  - (b) *do not exclude other rights and freedoms not in the Bill of Rights, but recognised or conferred by law*; except to the extent they are inconsistent with this Chapter [emphasis added] ; and
  - (c) are subject only to the limitations contemplated in this Constitution.

Freedom from injustice, and the right against injustice are such fundamental rights and freedoms. These are not in the Bill of Rights in those words, nor are they ‘created’ by Chapter Four of the Constitution, nor granted by the state or by recognition by a court. They are nonetheless rights and fundamental freedoms that belong to each Kenyan. They are actualized by a just state. For injustice comes by the violation of many norms, constitutional and social.

They are also recognised and conferred by law. The rights to life, to a fair trial, to impartial courts, to human dignity to promote social justice, to promote the realization of the potential of each human being, the rights to equality, equal treatment and freedom from discrimination, to freedom and the security of the person, freedom from slavery, servitude and forced labour, political rights, rights to property to fair administrative action, economic and social rights, the rights of children, persons with disabilities, of youth, minorities, marginalised groups and elder persons, are all proof that the prohibition against their dark mirror images of injustice and unfairness, stated as the right against injustice and freedom from injustice, are recognised by law and conferred by it. The right against injustice and freedom from injustice are not inconsistent with any part of Chapter Four of the Constitution of Kenya.

An immediate example is Art.25 (c). It ensures that the right against injustice caused by an unfair trial is an absolute right. It cannot be derogated from. Injustice therefore cannot be negotiated through interpretation into a right excluded from the protection of Arts.19, 20, 21, 22, 23, 24 and 25 and the rest of the Bill of Rights and Chapter Four or made a right without a remedy. Numerous articles of the Constitution set out the basic rights and other provisions which when fulfilled lead to a just society.

### *By Just Means*

Various articles, such as Articles 50 (fair trial), 35 (right to information), 47 (fair administrative action), 48 (access to courts), 258, 159, and 259, all set out the just means by which that just society is to be secured.

Just means is a fundamental ingredient of the just state. We have experienced between 1963 and 2010, a lengthy departure from the use of just means and know its consequences all too well. The departure from just political means by politicians has also been reflected in departure from just legal means by members of the legal profession. In politics, there is a belief that any means, constitutional or not, can be used to obtain power and the wrong means is validated by ‘success’. It was mirrored within the legal profession. In our profession too, a belief was accepted that any means, professional or not, can be used to obtain preferred legal outcomes, and the wrong means is validated by ‘success’. This has brought disrepute to the profession and loss of trust in the profession.

Articles 19-24 set out the just procedures, the modes by which social justice may be progressively achieved. Art.20 (5) deals with the issue of resources to achieve a just state. These provisions are set out within the Bill of Rights, emphasising both their importance and the priority and the extensive protection afforded them by the Constitution. This is why the constitutional tasks of lawyers go beyond legal justice to the upholding, defence and enhancement of social justice.

This profession is one of the principal keepers of those just means. To this end the Law Society of Kenya and all lawyers are professionally committed to just means. To act on this commitment is our chief responsibility.

### **The Rule of Law**

The second perpetual aim in the profession’s next 50 years is the defence of the rule of law, another national aim: see the Preamble and Art.10(2). This national aim also depends for achievement and protection heavily on the legal profession. For the profession it is a constitutional duty, a statutory duty and a professional duty. It is why S.4 (e) the Law Society Act, Cap.16 is present in its governing statute. S.4 (e) provides, as noted earlier, that:

2. The objects for which the Society is established are –

...

(e) to protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law;

So we end these past 50 years, as we began them, with s.4 (e). ‘Protection’ is an intriguing concept in this provision. Protection from what and whom? Not against fraudulent tricksters, or murderers or thieves. It is against those who violate the law in a more fundamental way: by denying law itself, whether as the executive or the legislature or as the judiciary. They are those who take office by law and then deny the supremacy of that law. Their principal challengers come from the legal profession. It is the task of the Law Society of Kenya, and thus of its individual advocate members to take steps in the protection of Kenya and Kenyans against violations of the Constitution and statutes, that injure Kenya and Kenyans, whether by criminals, politicians, other advocates or judges. Therefore, the constant defence of the rule of law is the principal protection that members of a Law Society offer the public. The statute’s empowerment of the Law Society was prescient. Its implementation by its members is, and in the next 50 years will be, critical.

## Democracy

How do we respond to dictators, or those inclining towards dictatorships? Do we support them, appease them, or oppose them? We cannot support them, and we cannot engage in appeasement to dictators. They are *against* the rule of law. We are lawyers. That fact alone defines our response. For lawyers are *for* the rule of law. Our politics may be personal choices; but our professional responses are not. They are not only public matters, they are public responsibilities. We have no choice. We cannot support such regimes, we cannot appease such individuals. We can only oppose such regimes.

And we must make known our opposition. Silent diplomacy and photographs of us smiling with African dictators and those Heads of State inclining to dictatorship, have not helped our continent. Nor the oppressed anywhere else.

All this emphasises the priority and the extensive protection that the legal profession must extend to the laws, rights and protections relating to the rule of law, democracy and social justice. Each of these emphasised protections is in the Constitution to rebut the history and failures of Kenya and of its legal profession over these past 50 years, and to prevent repetition. Because there were many members of the Law Society who became a part of those oppressive governments, many who campaigned in vain to do so, and many who silently aspired to do so, hoping by their silence to be picked for office or favours. But, throughout, in small numbers or large, there were more members of the bar, of the magistracy and of the higher bench resisting them, than either Kenyatta or Moi would have preferred. We as law-

yers particularly failed at different stages in 2003 and 2008. A number of lawyers then did come into government with power and influence to move the country into better directions. Their efforts to that end were feeble or few or non-existent. Some joined the forces they had battled, and actively excluded change. All this allowed the forces we had defeated to regroup and return.

These national aims in the new Constitution are those we thought best to set down after the experience of the preceding 47 years from 1963 – 2010. They address the failures of those past 47 years when we had departed from each of these balances. Instead of social equity and safety, we achieved the world's third largest gap between the rich and the poor, when medicine, good health and nutrition, basic shelter and education had gone beyond the reach of the poor. 50 years ago we had started with democratic norms. But within a few years we went progressively to unchecked executive power, one party politics, one-man rule, judges without tenure, elections without secret ballot and so on, down the slope.

All these are dangers that can recur and recur quickly. Lawyers guard against that. We do so by the use of these new constitutional markers. So that departures from them may be the more quickly recognised and, hopefully, checked. More importantly the constitution gives us the tools to check those departures and corruptions of these rights and protections. The profession that is most trained to use those tools and apply those remedies is the legal profession. This is the task for the next fifty years.

If we do not make all this work for the next fifty and more years, a gap will arise between the Constitution and the people. That gap will cause the words to atrophy into disuse. It will cause the people to view the Constitution first with disdain, then with despair, and finally with contempt and disregard. We have lived through this process during the past fifty years. A large gap between what the 2010 words say and how people live in the next fifty years will inevitably take us back to dark days again. Now that some of this is in place the critical task is its defence, and protection. The best defence of the new Constitution is its frequent use. Indifference to it is a danger to its existence. To prevent that or to live in dark days again is the choice of our profession. It prevented that once before. It must prevent that continuously.

Paraphrasing the words of Jack Greenburg (with Thurgood Marshall, one of the NAACP and LDF<sup>20</sup> counsel in *Brown v Board of Education of Topeka, Kansas*,<sup>21</sup>

<sup>20</sup> LDF is the NAACP's Legal Defense and Education Fund, which Thurgood Marshall founded.

<sup>21</sup> 347 US 483 (1954).

and then successor to Thurgood Marshall of the LDF), we must therefore possess, and show that we possess “the staying power to reshape Kenyan society” in the manner we resolved in the constitutional referendum of 2010.

Elie Wiesel, on the obligations of the Judaic faith, has also reflected on its ethical duty to shape history.<sup>22</sup> It is one of the high duties of the legal profession itself, facing the dangers of predetermined outcomes from compliant judges or matters fixed by lawyers. Elie Wiesel examined other duties too: the will to testify and the work of “defending the survivors”. Through the last forty years in Kenya there were adverse courts, fixed outcomes and millions were injured by these injustices. So the work also turned to these other tasks. And so staying power, with clarity of purpose and the energy of belief in the profession were key, both to private survival and to the success of the public work.

It is one of the brightest achievements of the last 50 years that practising lawyers demonstrated the staying power of the profession in the defence of these aims, and led the country to the new Constitution. It remains one of the profession’s tasks of the next 50 years. The profession is well equipped to perform this task. It is a profession that fought a long fight and paid a heavy price to ensure that in Kenya no right will go unpursued for lack of a lawyer; no accused person will be refused legal representation; nor be lacking an advocate to sue any person no matter how powerful, for any remedy. This is the true legacy of the past 50 years of the legal profession in Kenya.

And this legacy will endure, because we as lawyers will continue to act against injustice, oppression and assaults on the rule of law, as our profession expects of us. So this survey ends as it began, with the words of a fellow lawyer from South Africa:

... when my sentence has been completed, I will still be moved, as men are always moved, by their consciences . . .

- Nelson Mandela<sup>23</sup>

<sup>22</sup> *All Rivers Run to the Sea, Memoirs Volume One 1928 – 1969* (London: Harper Collins, 1997).

<sup>23</sup> (At his trial) Nelson Mandela, *No Easy Walk to Freedom* (Oxford: Heinemann, 1973) p. 160.



## **A NEW BENCH-BAR RELATIONSHIP: THE VISION OF THE 2010 CONSTITUTION OF KENYA**

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Willy Mutunga

**T**he making of Kenya's new Constitution is a story of ordinary citizens working to overthrow the existing social order and defining for themselves a new democratic social, economic and political order. Kenyans did not win the liberties and social vision now enshrined in the new Constitution through a singular mighty show of civilian force. The theatre for the struggle for the new Constitution also took place on the bench and in the bar and the implementation of this Constitution will continue to be contested, advanced or undermined in these two theatres.

The Constitution heralded a new judiciary and a new form of rule of law. It signalled a new relationship between the bench and the bar, two institutions that are critical to the implementation of the Constitution. Both the bench and the bar play an important role in the administration of justice: they are the two most important wheels of the justice system as well as the keepers of the legal system. Thus, both institutions must remain alert and keep their permanent sights on the negotiation of the social contract that the people of Kenya have decreed through the Constitution. Both the bar and the bench occupy a position of privilege and power in re-writing the rules that govern the operationalization of our *grundnorm*. It is therefore imperative that both institutions work together. This has not always been the case. In the last two-and-a-half years I have given speeches that are inspired by the Constitution's transformative framework and that touch on the relationship between the bench and the bar. The following are a few of the themes I have focused on.

## The past

Through the Constitution, the Kenyan people decreed that the status quo of the past was unacceptable and unsustainable. The new Constitution created a new judiciary whose judicial authority is derived from the people.<sup>1</sup> It mandates a transformation of the judiciary to ensure equitable access to, and efficient and effective delivery of, justice to the people. It is no longer acceptable for Kenyans, to borrow from the words of Martin Luther King Jr, “to quietly endure, silently suffer and patiently wait.”<sup>2</sup> The transformation of the Judiciary will only succeed on a sustainable basis if both the bar and the bench work closely together and share the vision of a transformed legal system. The current bench-bar relationship is good, but there is a need to strengthen it further.

When I was sworn in as Chief Justice, we found a judiciary that was designed to fail. It was characterized by deprivation of the freedom of speech, assembly and association; lack of independence, which made it appear to be part of the civil service and therefore subjugated to the executive; and a crippling inability to stand up to external pressure. Both the bench and the bar faced a crisis of confidence and an emerging crisis of competence. Stories about inappropriate interactions, such as bribery and improper financial ties, between judges and lawyers were the order of the day. Corruption was at home among judicial officers just as it was among advocates – indeed it was very hard for judges to practise corruption without the co-operation of advocates.

Moreover, the bar-bench relationship was abysmal. To begin with, the Office of the Chief Justice operated as a judicial monarchy supported by the Registrar of the High Court. This trickled down the judicial structure and resulted in many courts being run as fiefdoms. This hierarchy led to a strained bar-bench relationship. Other factors including excessive bureaucracy and a silo mentality within the court system, backlog of cases, endemic corruption, ineffective case flow management also contributed to the decline of this relationship. The bench was not the only contributor to this state of affairs. Members of the bar bullied, browbeat and intimidated magistrates and judges. Others ran practices that relied on political networks and patronage.

<sup>1</sup> I acknowledge the contributions of Duncan Okello, Chief of Staff – Office of the Chief Justice, LLB (Nairobi), MA (University of Kent at Canterbury) and my Law Clerk, Atieno Odhiambo, B.A. History (Rice University, Houston), Juris Doctorate (Tulane University, New Orleans).

Article 159(1) “Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.”

<sup>2</sup> See Martin Luther King, Jr., *Why We Can't Wait* (New York: Harper & Row, 1964) p. 2.

## The Law Society of Kenya, the Constitution and transformation

The Law Society of Kenya (LSK) has long been an advocate for the rule of law. Over the years, the LSK has played a leading role in upholding constitutionalism and challenging oppression and lawlessness. The LSK and its members have repeatedly been a key component of the forces of liberation in our country. In the 1970's it fought to open the judiciary and the bar to all Kenyans. In the 1980's and 1990's the LSK successfully fought for the registration of other political parties besides KANU. Countless of times, the LSK and its members drew the line that first halted and then reversed the tides of repression under various regimes.<sup>3</sup> Decades later, the call to service in the new Constitution is still clear. The Constitution is the new frontier and new responsibilities are upon us to assume new burdens. The LSK's exemplary past is not enough. After liberation, vigilance is necessary, if not more so.

Our current Constitution has its ancestry in the work of members of the bar. The political reforms of 1991 ushered in a multi-party system in Kenya. This led to the 1992 elections which resulted in a broader constitutional debate and culminated with the publication of a Model Constitution in 1994 by Citizens Coalition for Constitutional Change (4Cs) in partnership with the LSK and the Kenya Human Rights Commission (KHRC), organizations that were lawyer-led.<sup>4</sup> Additionally, a lot of the provisions of our current Constitution that pertain to the judiciary are products of various reports which were a result of collaboration between the bar and the bench. An example is the 2009 Task Force on Judicial Reforms<sup>5</sup> which offered concrete recommendations on strengthening and enhancing the performance of the Judiciary. This report contains some of the most comprehensive recommendations on judicial reforms which were incorporated into the new Constitution.

Lawyers also played a larger-than-life role in the final Constitution. For example, the Constitution of Kenya Review Commission (CKRC) and the Committee of Experts (CoE) processes were lawyer-led. It is apparent that this new radical Constitution is a product of the bar and for that reason the bar has a bigger responsibility to live up to the true letter of the Constitution. It should not be viewed as an inconvenience. Members of the Law Society of Kenya must therefore take bold steps to

<sup>3</sup> For a detailed study of the efforts of the LSK to fight for the rule of law, see the chapter by Pheroze Nowrojee in this volume (note by Editor).

<sup>4</sup> See Willy Mutunga, *Constitution Making From The Middle: Civil Society and Transition Politics in Kenya, 1992-1997* ((Nairobi and Harare: Sareat/Mwengo, 1999) at pp. 323-405.

<sup>5</sup> Government of Kenya, *Final Report of the Task Force on Judicial Reforms* (Ouko Report) (Nairobi: Government, 2010).

bring their practice into conformity with the high standards of conduct implicit in the Constitution. For example, the Constitution clearly sets out several principles to guide the courts on how to administer justice, and specifically demands expeditious delivery of justice without undue regard to procedural technicalities. However, it is lamentable that the LSK has not been keen to embrace a transformative culture within its ranks. Lawyers who were amongst the most vocal champions of a new constitutional order now appear to take only timid steps to bring their practice into conformity with the high standards of conduct required by the Constitution.

The bench and the bar as guardians of the Constitution must work together to pave the way for our country out of its past of tyranny towards the realization of the liberties and freedoms that the Constitution has bequeathed for the citizens. This is ever so important, especially when vestiges of the old republic are actively resisting the new Constitution. By protecting political freedoms and limiting state power, the bar and the bench facilitate and encourage an engaged civil society, which holds all branches of government accountable.

### **Bar-bench influence**

Some of the ways in which the bench experiences the influence of the bar is through the LSK's role in the Judicial Service Commission (JSC) and in the vetting of judges and magistrates. The Constitution has strengthened the role of the JSC and its composition has been widened to include members of the LSK as well members of the public.<sup>6</sup> Membership in the JSC allows the LSK to participate in key reforms within the judiciary and key appointments such as the hiring of new judges and magistrates as well as of the next Chief Justice and Deputy Chief Justice when their terms end.<sup>7</sup> It also allows LSK involvement in the investigation and removal or discipline of judges and magistrates.<sup>8</sup>

The vetting of judges and magistrates is a constitutional and statutory response to the public's demand for a 'clean' judiciary i.e. a judiciary that has integ-

<sup>6</sup> Article 171(2)(f) "The Commission shall consist of ... two advocates, one a woman and one a man, each of whom has at least fifteen years' experience, elected by members of the statutory body responsible for the professional regulation of advocates."

<sup>7</sup> Article 172(1)(a) The Judicial Service Commission shall "...recommend to the President persons for the appointment as judges."

<sup>8</sup> Article 172(1)(c) The Judicial Service Commission shall "...appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers ..."  
See also Article 168(2) "The removal of a judge may be initiated only by the Judicial Service Commission acting on its own motion, or on the petition of any person to the Judicial Service Commission; see also Judicial Service Act (No.1 of 2001) First Schedule, Section 4 and Second Schedule.

ity, transparency, independence and competence.<sup>9</sup> The LSK was one of the key organizations that championed and campaigned for the reform of the judiciary and played a pivotal role in delivering the vetting process. The LSK is an important starting point for gathering basic information on all candidates seeking judicial office. The leadership and members of the LSK ultimately gave voice to the public frustration with the competence gaps, integrity deficits, spinelessness and breaches in efficiency that characterized the judiciary for so long. The LSK's participation in this exercise is one manifestation of the close ties that bind our judiciary and the legal profession.

The judiciary directly influences the bar through Section 44 of the Advocates Act (Cap 16)<sup>10</sup> which governs the remuneration of advocates. It gives the Chief Justice power to make orders regarding the remuneration of advocates for both contentious and non-contentious matters and accordingly directly influences the livelihood of members of the bar. This section of the law prescribes the minimum charges that an advocate must charge for services rendered to create a uniform fee structure, prevent predatory pricing by those advocates with greater resources and ensure higher quality representation.

A comprehensive review of the Advocates Remuneration Order was last done in 2006. A review was therefore necessary given the fact that the cost of living and of doing business had risen significantly in the last seven years. There was a need to ensure that advocates were compensated fairly and to make sure that Kenyans were

<sup>9</sup> Section 18 of the Vetting of Judges and Magistrates Act (No. 2 of 2011) states:  
“(1) The Board shall, in determining the suitability of a judge or magistrate, consider—  
(a) whether the judge or magistrate meets the constitutional criteria for appointment as a judge of the superior courts or as a magistrate;  
(b) the past work record of the judge or magistrate, including prior judicial pronouncements, competence and diligence;  
(c) any pending or concluded criminal cases before a court of law against the judge or magistrate;  
(d) any recommendations for prosecution of the judge or magistrate by the Attorney-General or the Kenya Anti-Corruption Commission; and  
(e) pending complaints or other relevant information received from any person or body, including ...”

<sup>10</sup> 44. Chief Justice may make orders prescribing remuneration  
“(1) The Council of the Society may make recommendation to the Chief Justice on all matters relating to the remuneration of advocates, and the Chief Justice, having considered the same, may by order, prescribe and regulate in such manner as he thinks fit the remuneration of advocates in respect of all professional business, whether contentious or non-contentious.  
(2) An order made under this section in respect of non-contentious business may, as regards the mode of remuneration, prescribe that it shall be according to a scale of rates of commission or percentage, varying or not in different classes of business or by a gross sum, or by a fixed sum for each document prepared or perused, without regard to length, or in any other mode, or partly in one mode or partly in another, and may regulate the amount of remuneration with reference to all or any of the following, among other, considerations, that is to say...”

still able to access justice. Several forums involving peer institutions were held after which the Council of the Law Society of Kenya forwarded the proposed Remuneration Order amendments to the Office of the Chief Justice. Rather than rubber stamp the amendments as had been done in the past, the Chief Justice sought the public's input and encouraged open debate on the amendments. This was not only fair, but solidly based on the constitutional principle of public participation. Views were solicited from the Competition Authority of Kenya (CAK) and the Commission for the Implementation of the Constitution (CIC) both of whom gave detailed reviews of the proposed Remuneration Order. The Chief Justice then appointed a Committee to undertake a line-by-line analysis of the proposed Order and make its recommendations. The review process was a delicate balancing act of ensuring that advocates' costs are competitive enough to attract the best minds into the profession while not being prohibitive and thereby curtailing access to justice.

Although the Chief Justice has always participated in this process, several questions have emerged: is this legal regime in consonance with the laws of competition; what is the place of public participation in this process, given that the Constitution requires public participation; should the Office of the Chief Justice have the power to determine remuneration for advocates? It is necessary and proper to vet these issues and a healthy discussion on the same is welcome.

### **Implementation of the Constitution**

The constitution-making process that took place in Kenya is reputed to have been one of the longest and most consultative. The end product was the current Constitution, which is one of the most progressive in the world. It is a great example of a peaceful revolution where an unacceptable and unsustainable status quo is being mitigated. This mitigation is evidenced in the Preamble of the Constitution, the Bill of Rights, the Leadership and Integrity chapter, and the creation of autonomous institutions, devolution, equitable distribution of resources, and the decentralization and democratization of executive power.

The making of the Constitution did not end with its promulgation. It continues with its interpretation and implementation. The bench and the bar now have the challenging and difficult task of implementation because Kenya's destiny as a successful nation-state, committed to the enhancement of its citizens' welfare is hinged on the full-scale implementation of the Constitution. Although the judiciary is the midwife for the safeguards of Kenya's new Constitution, the bar plays an important and pivotal role in this process.

The bench and the bar are constitutional twins joined at the hip of its implementation. There is therefore an urgent priority for members of the LSK to achieve full implementation of the Constitution. This document is the product, in no small part, of the great exertions of, and sacrifices by, the LSK membership. Members cannot therefore feign indifference when it comes to the implementation of the Constitution. Its membership cannot be party to ill-disguised manoeuvres designed to subvert the new constitutional order and defeat the genuine aspirations of the Kenyan people. More than any other section of our society, the bench and the bar are the officers of the Constitution and the foot soldiers for the changes it brings. The bench and the bar may and shall disagree about the best way to implement the Constitution, but in the end, it must be implemented for the good of all Kenyans.

So far, the bench and the bar have both contributed to the implementation of the Constitution through access to justice and public interest litigation. But there is still more to be done. Members of the bar and the bench should take note of, appreciate and embrace the effectiveness of other alternative resolutions mechanisms espoused in Article 159(2)(c)<sup>11</sup> of the Constitution such as ADR and traditional dispute resolution mechanisms. ADR promotes the realization of the right of access to justice. If the quest for access to justice by all is to be realized as envisaged under Article 48<sup>12</sup> of the Constitution, then all stakeholders must promote ADR mechanisms aggressively in the justice system. ADR would greatly lower the number of cases proceeding to be heard and determined by the courts and also assist the Judiciary in dealing with case backlogs as well.

## **Development of Jurisprudence**

Although Kenya gained political independence from Britain we developed a legal system that copied the statutes and followed the authority of the judgments of our former colonial master. Additionally, the old judiciary was not independent and was beholden to the executive and the legislature. Thus, the jurisprudence emanating from that judiciary was mechanical jurisprudence that made it impossible for the citizenry to challenge State power and policies in any meaningful way. This mechanical jurisprudence emptied the judiciary of compassion and empathy in its

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<sup>11</sup> “In exercising judicial authority, the courts and tribunals shall be guided by the following principles – alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted...”

<sup>12</sup> “The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

juristic methods and outcomes and robbed it of sensitivity in its orientation and processes. As a result, Kenya's jurisprudence took a conservative outlook. Judicial officers took the socially remarkable position that quiescence was the most desired judicial quality even when such judicial restraint fuelled direct social oppression. The wooden application of the law without sensitivity to jurisprudential consequences was the hallmark of the jurisprudence that emerged from this era.

Our transformative Constitution requires the judiciary to win back public confidence and express itself with such authority and integrity that the public will always respect its opinions and decisions. The judiciary must recapture public imagination, not through its outdated poise and ritual, but rather through the rigour of its jurisprudence. Our judges have a place in history as the first generation of judges to interpret new Constitution. Just as the venerated case of *Marbury v Madison*<sup>13</sup> shaped American constitutional jurisprudence for centuries, we are standing at an epochal moment and the jurisprudence we develop will shape the lives of future generations of Kenyans in powerful ways. The principles of the new Constitution impose a greater intellectual burden. This is particularly true with regards to Social, economic, social and cultural rights, public interest litigation (PIL) and devolution. It is a call to and for endless scholarly inquiry and the bar cannot therefore allow itself to become an intellectually indolent bar.

The Supreme Court Act, 2011, calls on the Supreme Court to develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth.<sup>14</sup> The Judiciary Transformation Framework, the blue print for the transformation of the Judiciary also calls on us to grow our jurisprudence.<sup>15</sup> With regard to schools of jurisprudence, our Constitution does a purely positivist approach. While we must master the law as contained in the Constitution, statutes and case law, it is its critique on the basis of non-legal phenomena that will breathe life into the transformation of our nation. Our Constitution allows our judges to develop and make law so that it conforms to the implementation of human rights principles and values of the Constitution. It allows the judiciary, in interpreting the Constitution, to give national direction in matters that are non-legal. It also adumbrates the skeletal elements of a progressive and functional jurisprudence whose key ingredients include a jurisprudence that is not legal-centric, but one that is multi-disciplinary and internationalist. Thus the job description of judicial

<sup>13</sup> 5 U.S. 137 (1803).

<sup>14</sup> Supreme Court Act, 2011 (No. 7 of 2011), Section 3(c).

<sup>15</sup> See *Judiciary Transformation Framework 2012-2016* (Nairobi: Judiciary, 2012), Key Result Area No. 7.



officers emerging from the constitutional provisions is to generate progressive jurisprudence that concretizes the human rights state created by the new Constitution and to guide society to realize the promise of social justice that is inscribed in our Constitution. It is therefore not in doubt that the Judiciary is a critical part of the engine that drives the country to its social democratic trajectory.

Although the judiciary has the responsibility to interpret the Constitution, that responsibility is not isolated. The bar has an active role in the development of a robust, progressive, indigenous and patriotic jurisprudence that will give the country direction in its democratic development.<sup>16</sup> This means that our jurisprudence must both abide by the imperative of international law and rules, which are expressly made part of the new Constitution and show openness to comparative law and its methodology as well as demonstrate sensitivity to our local circumstances. Former Justice Krishna Iyer of the Indian Supreme Court expressed the same ambition, in his inimitable style:

Jurisprudence must match jurisdiction and jurisdiction must broaden to meet the challenges of the masses hungry for justice after a long night of feudal-colonial injustice... The rule of law must run close to the rule of life and the court, to be authentic, must use native jural genius, people-oriented legal theory and radical remedial methodology regardless of Oxbridge orthodoxy, elitist petulance and feudal hubris.<sup>17</sup>

The bar can play a very active role in the development of jurisprudence because a vast majority of its members practise before the High Court. Article 165 of the Constitution gives the High Court a critical jurisdiction that makes it the most important court in the implementation of the new Constitution.<sup>18</sup> It is the entryway into the sphere of emerging jurisprudence because it has the original jurisdiction to interpret the Constitution.<sup>19</sup> The High Court also has appellate jurisdiction to hear appeals from the magistracy<sup>20</sup> on civil and criminal matters and therefore develops and refines the jurisprudence of the judicial grassroots that is the magistracy.

The bench and the bar have a joint responsibility to set the foundations for a jurisprudence of social justice and human rights. Our modern Bill of Rights provides for economic, social and cultural rights to reinforce the political and civil

<sup>16</sup> See generally Willy Mutunga, "Speech on the launching of the Judiciary Transformation Framework", (2013) 65 *Socialist Lawyer*, 20 at p. 22 (available on the Haldane Society website at [www.haldane.org](http://www.haldane.org)).

<sup>17</sup> "Judicial Excesses – Myth and Reality" in *Our Courts on Trial* (Delhi: B.R. Publishing, 1987) at p. 120.

<sup>18</sup> Article 165(d) "...jurisdiction to hear any question respecting the interpretation of this Constitution..."

<sup>19</sup> See *The Kenya Section of the International Commission of Jurists v Attorney General*, Crim. Appeal 1 of 2012, (<http://kenyalaw.org/caselaw/cases/view/84871/>) at paras. 24-26.

<sup>20</sup> Article 165(e) "...any other jurisdiction, original or appellate conferred on it by legislation."

rights giving the whole gamut of human rights the power to radically mitigate the status quo and signal the creation of a human rights state in Kenya. Article 19(2) for example explicitly gives the purpose of recognizing and protecting human rights and fundamental freedoms as guide to interpretation.<sup>21</sup> This Article is explicit in its blending of the deontological and consequentialist justifications for human rights. The import and importance of this Article is a reminder that the Bill of Rights is not only aimed at affirming human dignity, but it is explicitly aimed at promoting social justice as well. The jurisprudential dance between the bar and the bench has led to the development of socio-economic rights jurisprudence which is being aptly developed in the High Court. For example, in *Mitu-Bell Welfare Society v Attorney General & 2 Others*,<sup>22</sup> a right to housing case, Justice Mumbi Ngugi found that the fundamental rights of the petitioners were violated when their homes were demolished and they were forcibly evicted from the settlement. In another right to housing case, Justice Musunga in *Satrose Ayuma & 11 Others v Registered Trustees of The Kenya Railways Staff Retirement Benefits Scheme & 2 Others*<sup>23</sup> applied the Constitutional principles of Article 43 (Economic and Social Rights)<sup>24</sup> and held *inter alia* that the respondent's action in evicting the petitioners amounted to a breach of the petitioners' fundamental right to accessible and adequate housing. The continued development of our social justice jurisprudence will ensure the fundamental and core pillars of our progressive Constitution shall be permanent, irreversible, irrevocable and indestructible as should be our democracy.<sup>25</sup>

### Public Interest Litigation

Many of the procedural innovations in public interest litigation are already enshrined in our Constitution<sup>26</sup> and the types of jurisprudence that the courts have been so creative in developing are already part of our Constitution. These are protection of the environment, recognition of rights of communities especially in land,

<sup>21</sup> Article 19(2) "The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings."

<sup>22</sup> Petition No. 164 of 2011 [2013] eKLR <http://kenyalaw.org/caselaw/cases/view/87948/>

<sup>23</sup> Petition No. 65 of 2010 [2011] eKLR <http://kenyalaw.org/caselaw/cases/view/90359/>

<sup>24</sup> Article 43(1)(b) "Every person has a right to accessible and adequate housing, and to reasonable standards of sanitation."

<sup>25</sup> See Chief Justice, Concurring Opinion in *Jasbir Singh Rai and Three Others v Tarlochan Singh Rai and Four Others*, Supreme Court Petition No. 4 of 2012, at para. 91, <http://kenyalaw.org/caselaw/cases/view/90132/>

<sup>26</sup> See Article 22.

affirmative action, rights of persons with disability, right to education, health and food, and redress of past injustices. The first President of the South African Constitutional Court, Arthur Chaskalson said of their constitution what can be said of ours:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and in a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and quality, lies at the heart of our new constitutional order.<sup>27</sup>

Further, our appointment process is designed to give us independence of the executive and the legislature so that we can, if necessary, force other institutions of governance to do what they are supposed to do. Upendra Baxi wrote of public interest litigation (PIL):

The Supreme Court of India is at long last becoming...the Supreme Court for Indians. For too long the apex court had become “an arena of legal quibbling for men with long purses.” Now increasingly, the court is being identified by the Justices as well as people as “the last resort of the oppressed and bewildered.”<sup>28</sup>

Our society is no different from that of South Africa and India and the development of new jurisprudence must be a collaborative effort between the bench and the bar. The judiciary has generally embraced PIL by allowing applications for *amici curiae*, interveners, and interested parties. The judiciary has additionally *suo moto* inviting individuals and institutions to join in proceedings as *amici curiae*. It can and it must take a central role in public interest litigation by spearheading a social movement to enforce the rights enshrined in our Constitution. It has the resources and needs to build capacity to undertake *pro bono* specific PIL briefs in a consistent and continuous manner. It has been encouraging to see the LSK appear as *amici curiae* in several cases that are of general public importance. However, the bar can do more. The bar can tap into the expertise of its more experienced members to spearhead the strategic cases while pairing them up with newly admitted lawyers who will in turn gain invaluable experience while receiving much needed mentorship. The bar can also coordinate the activities of other civil society groups working on public interest litigation and appear as an interested party or as *amici*

<sup>27</sup> *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at para. 17.

<sup>28</sup> In “Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India” in Dhavan et al., *Judges and the Judicial Power* (London and Bombay: Sweet and Maxwell and Tripathi, 1985) 289 (citations omitted).

*curiae*. The success of our implementation of the Constitution directly correlates with the quality of the input from the bar and the bench.

### **Access to Justice**

Article 48 of the Constitution states that the government shall provide access to justice for all persons. One of the four pillars of the Judiciary Transformation Framework (JTF) is *a people-focused delivery of justice*. This is based on the Constitution that stipulates that judicial authority is derived from the people and is vested in the Judiciary (Article 159(1)). This is a rare and radical provision which concretizes the fact that the courts are for the public and need to serve the public in outlook, process and procedure.

One of the Key Result Areas of the JTF is access to and expeditious delivery of justice. Article 259(a) of the Constitution requires that it be interpreted in a way that “promotes its purposes, values and principles.” In Roman mythology, justice is depicted as a goddess wearing a blindfold and holding scales. These scales connote the weighing and balancing of rights and privileges. As our partners in the administration of justice the bar has a responsibility to use advocacy and integrity to help us keep the scales of justice in equilibrium.

I believe that the judiciary must become an institution of service to the poor. The inclusion of socio-economic rights in the Constitution is revolutionary because it moves education, housing and health from the territory of privileges to the column of rights accruing to every citizen. Many Kenyans are unaware of their rights and this is a major obstacle to access to justice, particularly among the poor and the vulnerable. The judiciary has responded to this issue through increasing the number of judges and magistrates, building more courts and introducing mobile courts in marginalized areas. However, the courts and judges alone cannot fulfil the unmet legal needs of the poor without lawyers and hence the importance of lawyers cannot be overstated when it comes to access to justice. Advocates have the special privilege of exclusively providing an essential service. It is unfortunate that the profession has closely guarded this prerogative and succeeded in restricting competition from ‘unqualified persons’. This had led to high legal costs that are beyond the reach of many consumers. In the criminal law context, the Constitution and statutes guarantee the fundamental rights of an accused person. Because such rights are best canvassed by advocates, therefore, for the accused, the availability of professional representation becomes a moral entitlement, and a legitimate expectation. Thus, *pro bono* work should become an essential part of an advocates practice. Last year the bar took up

this mantra and the theme of their annual Legal Awareness Week was ‘Access to Justice Through *Pro Bono* Representation.’ The LSK also played a crucial role during the Judiciary Service Week which was launched at Kamiti Maximum Security Prison on 11<sup>th</sup> October 2013. The six-month constitutional deadline for concluding election petitions meant that magistrates and judges had to focus on hearing election petitions to the detriment of other cases. This created a backlog in the criminal justice system. There were 10,289 criminal appeals carried over from 2012 and an additional 3,325 were filed.<sup>29</sup> By the time we were launching the Judiciary Service Week in October, the total number of pending criminal appeals was 13,614. The bench and the bar worked together during this week to address this backlog. The LSK graciously provided *pro bono* services during that period. Another example of bar-bench collaboration happened in the Commercial and Admiralty Division of the High Court. In October 2011 that Division had about 7,500 pending cases.<sup>30</sup> There were also many cases that had been heard, but judgments had not been delivered. A bar-bench committee was formed to discuss and devise ways of dealing with the backlog of cases. A Rapid Response Initiative was launched in December 2011 and after 100 days, the case backlog was reduced from 7500 to 1524. Such efforts show the commitment of the bench and the bar to ensure that access to justice becomes a reality for those who would otherwise be denied that access.

### **Our role in legal education**

Not only must the bench and the bar demand excellence from one another, they must ensure that our future lawyers meet or exceed our high standards. The next generation of lawyers will realize our dream of a progressive Constitution. As a result, the quality of their jurisprudence depends on the quality of training. In this regard, universities play a vital role in legal reform. However, there is a crisis in our higher education and legal training. The Carnegie Foundation for the Advancement of Teaching has observed that most law schools have contributed to the low quality of legal education by giving “only casual attention to teaching students how to use legal thinking in the complexity of actual law practice.”<sup>31</sup> With a large number

<sup>29</sup> *Chief Justice’s Statement to Launch the Judiciary Service Week at Kamiti Maximum Security Prison* (Nairobi, 11 October, 2013).

<sup>30</sup> Remarks by Mr. Justice Daniel K. Musinga at the Monthly Luncheon of the American Chamber of Commerce (Hilton Hotel, Nairobi, 19 June, 2012).

<sup>31</sup> See William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, Lee S. Schulman, “Educating Lawyers: Preparation for the Profession of Law” The Carnegie Foundation for the Advancement of Teaching (2007), at p. 6 available at [http://www.carnegiefoundation.org/sites/default/files/publications/elibrary\\_pdf\\_632.pdf](http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf).

of law schools mushrooming around the country, it is lamentable that the bar has failed to exercise any supervision of the quality and standards of training given in these law schools. Instead of teaching through focus on decided cases, law schools need to embrace apprentice-style learning in legal clinics, and to provide courses that train students for multiple roles as advocates and counsellors, negotiators and problems-solvers. The bench and the bar must make it a priority to rescue our profession from ignominy. Lawyers who are more experienced and qualified must take up the challenge to mentor and lead their colleagues. They need to find ways to expand opportunities in legal training. To this end, the Office of the Chief Justice is launching the first ever Chief Justice's Moot Court in May this year. This will be a yearly event and all the accredited law schools in the country will be invited to take part.

### **Quality and standards of advocacy**

The bar and the bench can also have an impact on the next generation of lawyers if the quality of the advocacy and the content of our decisions improve. Again, both institutions need each other to do this. The bar has an obligation to help the judiciary in its efforts to transform by matching the intellectual competence of the courts with scholarly acuity. The judiciary must, in turn, raise its game to match the bar's intellectual rigor. Ultimately, for advocates to win cases before the judiciary, they will need to work hard at research, not just of law, but of other disciplines, embrace the use of expert witnesses, and technology. Advocates can no longer hide behind legal jargon because modern judges along with the rest of the world have grown impatient with Latinisms. Although Latin phrases may, on occasion be necessary to express a term of art that has no English corollary, that is an exception to the rule. More often than not, Latinisms serve as a substitute for reasoning. Advocates need to be aware that Latinisms can make their prose dense, difficult to read and unclear.

Standards of advocacy need to improve as well as the quality of written and oral submissions. Well-written submissions enable judges to better understand the arguments and better able to interrogate the arguments of counsel. Equally important, clearly written arguments make legal reasoning accessible to the layperson. After all access to justice doesn't mean opening the courthouse doors, but doing our best to ensure that people understand what happens inside.

## Holding the Judiciary accountable

The bar must hold the Judiciary accountable for the clarity and quality of its decision-making. Because lawyers are the primary readers of judicial opinions and the most skilful evaluators of these opinions they are therefore the most regular and most skilful critics of judge's work. There is a need for high quality commentary on judgments coming from the courts and the bench should not be overly sensitive to criticism. Hopefully critiques of judgments will revive legal writing and literature in Kenya, which is currently disappointing. In sum, the quality of our jurisprudence from the bench will only improve if the bar openly critiques the soundness of our judgments.

The bar can and has also held the judiciary accountable in other ways. In September 2011 members of the Bungoma Chapter of the Law Society of Kenya announced that they would boycott all Court sessions until a second judge was posted at that station.<sup>32</sup> The former Chief Justice had promised them that a second judge would be posted in Bungoma after the enactment of the new Constitution. This did not happen, which led to the boycott. Similarly in Kisii the LSK Kisii Chapter went on strike protesting the failure of two resident judges to deliver rulings and judgments on time.<sup>33</sup> In another instance, inside the courtroom, the bar and the bench were at opposite ends when the High Court stopped the removal of several Court of Appeal judges who had been found unfit by the Judges and Magistrates Vetting Board, a constitutionally mandated entity.<sup>34</sup> The LSK deemed the High Court decision an interference with the vetting process. This case is currently before the Supreme Court.<sup>35</sup>

These are a few examples of conflict that arises between the bar and the bench. We welcome the criticisms and appreciate the freedom the bar has to hold us accountable.

<sup>32</sup> "Bungoma lawyers to boycott court over judge", *The Star*, 31 September, 2011, available at <http://ads.the-star.co.ke/news/article-47346/bungoma-lawyers-boycott-court-over-judge>.

<sup>33</sup> Benson Nyagesiba, *You must go, lawyers in Kisii tell two judges*, *The Star*, 17 July, 2012, available at <http://www.the-star.co.ke/news/article-10098/you-must-go-lawyers-kisii-tell-two-judges>.

<sup>34</sup> Judie Kaberia, *Kenya: Lawyers to Boycott 'Unfit' Judges*, Capital FM, 5 November, 2012, available at <http://allafrica.com/stories/201211051754.html>.

<sup>35</sup> I therefore cannot comment on it.

## Corruption

Unethical judicial conduct frequently implicates lawyers. While the bar should hold the Judiciary accountable and keep vigilant to ensure that the Judiciary is free of corruption, they must also address corruption in their midst. The Swahili proverb – *nyani haoni kundule, huliona la mwenziwe*<sup>36</sup> is an apt analogy. Under the new Constitution, the bar of public morality has been raised, and the frontiers of public disclosure greatly enhanced.<sup>37</sup> Although LSK members are not State or public officers, the values of accountability espoused in the Constitution should be used as guidelines for their conduct. It is common knowledge that money obtained through corruption is sanitized by lawyers through client accounts. When questions regarding these monies are raised, lawyers are quick to invoke the advocate-client relationship which is confidential. Whereas the principle behind advocate-client relationships is understandable, there is a need to debate and rethink the manner in which lawyers establish client accounts.

The legal profession's disciplinary system needs to address legitimate public concerns, particularly those involving legal costs, quality and accessibility of legal services, protection of social interests and inadequate sanctions for lawyer misconduct. Lawyers have argued that they require a measure of professional independence from governmental and external control if they are to check governmental abuses. While autonomy is vital, the profession must continue to remain accountable to consumers of legal services and the country at large. The Advocates Disciplinary Tribunal, which was launched on 4 October, 2013, must therefore execute its legislative mandate with absolute fidelity to the law as a way of helping us create the strong institutions and a conscientious elite that our democratic ambitions demand.

## The way forward

The Constitution has breathed new life into the justice system. It is a social-democratic Constitution that demands social, economic and political reform. The implementation of this reform through access to justice, public interest litigation, development of jurisprudence, improved advocacy and legal education, and accountability is the responsibility of the bench and the bar.

<sup>36</sup> The ape does not see his own backside, he sees his companion's.

<sup>37</sup> Article 10(2)(c) "The national values and principles of governance include - good governance, integrity, transparency and accountability."



Although the stature of the Law Society of Kenya has been diminished significantly in recent years and the moral space it once occupied has contracted considerably, there are indications that the organization is reclaiming its position as an important site for intellectual rigour. For example, when the government made it impossible to register not-for-profit organizations to work in the human rights and democracy sector, the LSK stood up and provided not just ideas, but also space for progressive forces to rally and to organize. The judiciary on the other hand had little if any moral standing prior to the promulgation of the Constitution.

The current relationship between the bench and the bar is at best genial, however, there is vast room for improvement. Cooperation between the bar and the bench is impossible in an environment where there is a trust deficit and no confluence of values. One way of improving the relationship would be to have training that includes both judges and lawyers. Most, if not all, judges are trained lawyers and share the same legal education. Judges are drawn from the ranks of the bar. These joint trainings would help in demystifying the judiciary, assist the bar and the bench in working together effectively and provide a mechanism for constructive dialogue between the bar and the bench. This can start informally through a bench-bar lunch series where judges and lawyers can discuss important issues, of course keeping in mind that cases pending in court cannot be discussed.

The LSK has to help the judiciary in its transformation. More than any other section of our society, we are the officers of the Constitution and the foot soldiers for the changes it brings. We must realize that we have a radically different constitutional order which in turn requires us to make an immediate mental shift. The bench and the bar have to reform together otherwise the change we are seeking will be illusory. It is only by simultaneous reform in both institutions that the whole legal profession can regain the confidence of the public.



# THE LEGAL PROFESSION AND CRISIS OF ETHICS

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PLO Lumumba

## Introduction

“All professions, especially one as central... as the legal profession, should undergo a continuing process of examination and self-evaluation. Any group that does not engage in such an exercise loses much that makes it a profession: a shared set of principles and customs that transcend self-interest and speak to the essential nature of the particular calling or trade.”<sup>1</sup>

“Today the “hungry and unscrupulous advocates” are not “few”, they are not merely “hungry and unscrupulous”, they triple satanic depravity with wicked greed and an ever-increasing ethical decadence. Their number grows by the day. The “few occasions” of “serious abuse” spoken of in 1991, are today almost common routine; “serious abuse” now comes with cruel ravishment. The wrongs done are in a litany which stretches, like Banquo’s line of kings, to the crack of doom.”<sup>2</sup>

In recent years, the public has evinced dissatisfaction and disappointment with members of the legal profession, which has inspired the need for enforcement and punishment to protect the public. The diminished respect for the profession has expressed itself in sour humour, ridicule and criticism. This is not an entirely new phenomenon; lawyers, have for centuries been vulnerable to periodic bouts of public disdain. Popular scorn of lawyers is reflected in the works of early

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<sup>1</sup> Arlin Adams, “The Legal Profession: A Critical Evaluation” (1989) 93 *Dickinson L. Rev.* 643.

<sup>2</sup> Kuloba J (as he then was) in *Apollo Insurance Company Ltd v Scholastica K. Kamau & Muthanwa & Company Advocates* Civil Case No. 1945 of 1999.

writers like Plato, Shakespeare, Dickens, Sandberg and many others who have contributed to the anthology of lawyer-bashing literary allusions. When Roscoe Pound authored his classic essay on “The Causes of Popular Dissatisfaction with the Administration of Justice” in 1906, he began his thesis with a collection of ancient English barbs against the legal system and profession.<sup>3</sup> When John dos Passos wrote his monograph, *The American Lawyer*,<sup>4</sup> he reminded his readers that the condemnation of lawyers resonated through the *pronunciamento* of the Papal Legate at the Council of London in 1237, who “heard the cry of justice, complaining that it is greatly impeded by the quibbles and cunning of advocates.”

Over the centuries, people have been moved not only to write in, but to act on, spite for lawyers. When Shakespeare has Dick the Butcher tell the rebel leader Jack Cade, “The first thing we do, let’s kill all the lawyers,” he is echoing the actual agenda of 1381 revolutionaries as recounted in Holinshed’s *Chronicles*. History records that rebels at least tried to make good on their campaign promise. So did the debt burdened Massachusetts farmers who waged Shays’ Rebellion some four centuries later, scorning lawyers as “the pests of society.”

Much of this public dissatisfaction with lawyers has originated from time immemorial in impatience with the restrictions and procedures of the law itself and the misconception of the lawyers’ role in society. The intrinsic character of law as a restrainer and regulator necessarily builds up impatience in those groups who see themselves as disadvantaged by its application. And, as the law becomes more pervasive, this impatience appears to grow and spread. Coming at a time when institutions having custody of the vision and values of the society are felt to be in general disrepair and disrepute, a generalized climate of disdain is easy to achieve. In short, now as for centuries past, a major wellspring of disregard for lawyers has been a disappointment in the law itself, often generated by exaggerated expectations of what the law can achieve in reality.

Similarly, the expectations of individual clients as to what their counsel can achieve can also be unrealistic. A client may fix such hopes based on a generalized optimism about what the law can do. Sometimes, however, the client’s exaggerated expectations may stem from an imperfect understanding of the engagement or from promises of his or her counsel that cannot reasonably be kept. The perception that law does not work at all because it does not work perfectly and that lawyers do not

<sup>3</sup> (1906) 29 A.B.A. Rep. 395.

<sup>4</sup> *The American Lawyer: As He Was-As He Is-As He Can Be* (New York: The Banks Law Publishing Co., 1907), p. 125-6, available as pdf at <http://kateofgaia.files.wordpress.com/2013/12/american-lawyer-1907.pdf>.

achieve what they should is another general impression- equally exaggerated- infects the public's view of lawyers: the belief that legal services are only realistically available to the high class, that lawyers generally are wealthy and work to serve the rich.

These realities rest on a catalogue of influences beyond the profession's control. While some of the public discontent with the profession is well founded, some of it is based on sheer misunderstanding of the role of an advocate. This is not to say that advocates have been perfect in performing their functions. Indeed, there are many instances where lawyers have been faulted for professional misconduct. However, much of the public debate seems to be lopsided, not appreciating the dynamics of the society in which lawyers operate. It cannot be gainsaid that standards of ethics and competence could be maintained by a combination of social pressures and fair criticism. But where the criticism is not objective, the chances of counter-productive results are high and as a result the main agenda set forth by legal ethics is set aside and those interests of the advocate or the client are pushed as the basis of legal ethics.

What plagues the legal profession is a disease that masquerades as "professional misconduct" and is often described as conduct that includes disgraceful or dishonourable conduct incompatible with the status of an advocate.

### **The Legal Profession Examined**

A consideration of professionalism and ethics among lawyers logically begins with an examination of what the profession is. This paper is far from the first to consider that question; a plethora of literature and case law on the subject exists. In a report of the American Bar Association Commission on Professionalism (1986): 10, the Commission adopted Roscoe Pound's classic definition of a 'profession' as:

A group pursuing a learned art as a common calling in the spirit of public service- no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art is in the spirit of public service is the primary purpose.<sup>5</sup>

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<sup>5</sup> American Bar Association, Commission on Professionalism, *In The Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism* (Washington: ABA, 1986) p. 10 (available [http://www.americanbar.org/content/dam/aba/migrated/cpr/professionalism/Stanley\\_Commission\\_Report\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/professionalism/Stanley_Commission_Report_authcheckdam.pdf)) quoting R. Pound, *The Lawyer From Antiquity to Modern Times* (1953) 5.

The British Royal Commission on Legal Services Report in 1979<sup>6</sup> defined a ‘profession’ as:

...a body of men and women (a) identifiable by reference with some registered record (b) recognized as having some special skill and learning in the same field of activity in which the public needs protection against incompetence, the standards of skill and learning being prescribed by the profession itself (c) holding themselves out as willing to serve the public (d) voluntarily submitting themselves to standards of ethical conduct beyond those required of the ordinary citizen by law (e) undertaking to accept responsibility...

Terence Johnson<sup>7</sup> who catalogues many different theories of professionalism surmises that “a profession is not then an occupation but a means of controlling an occupation”. A profession is therefore a shared body of knowledge often imparted in an institutional setting that certifies competence and quality. It is characterized by exclusivity, application of abstract theoretical knowledge and is definitely autonomous.

Among the common variables of these definitions is a sense of purpose transcending self-interest expressed in the form of duties owed to clients and the public, together with a collective means of self-governance that articulates and enforces the professional ideal. This implies the observation of certain minimum standards to guarantee the provision of the best services and the safety of society. To this we give the name professionalism.

It is important to recognize the distinction between professionalism and ethics at the outset, even though they go hand in hand. The ethical rules are mandatory and acts as black letter standards that establish the minimum level of conduct. Failure to abide by the rules may result in disciplinary sanction. Professionalism, however, is grounded in aspirational goals and traditions that seek to encourage the bar and the bench, towards conduct that preserves and strengthens the dignity, honour, and integrity of the profession. Lawyers must temper bold advocacy for their clients with a sense of responsibility to the larger legal system, which strives to provide justice for all.

## Understanding the Role of Advocates

The role of an advocate is no doubt one of the most discussed themes of the legal profession. At the same time, it is one of the most misunderstood notions. In

<sup>6</sup> (Benson Report) (London: HMSO, 1979) Cmnd 7648.

<sup>7</sup> Terence J. Johnson, *Professions and Power* (London: Macmillan, 1972).

a recent paper titled the “Role of an Advocate in a Changing World,”<sup>8</sup> the author argues that as society becomes more complex, there has been an increasing burden on the role of a lawyer. This is because societal interactions have created relations that demand regulation through the instrumentality of law. This is so because the law establishes mechanisms for the resolutions of disputes in case of a contestation of rights and duties or the apportionment of goods and services. Lawyers inevitably find themselves being called upon to preside over or arbitrate in disputes between adversaries. It is this process that brings the questions of ethics and professionalism to the fore.

A discussion on the role of a lawyer must be anchored on the functions of law in society. The legal profession is premised on the existence of law as a tool of social order and development; the alternative is anarchy. Law is virtually an embodiment of stated common social goods. It establishes and protects society by setting the standards of conduct, the corresponding duties, and the consequences for breach of those duties and standards by either individuals or institutions or both. The interaction between individual members of society within the framework of standards and duties generates a list of expectations. The legal profession must service the three correlatives of standards, duties and justice; these three values place the legal profession on a pedestal. Society demands more from lawyers, while requests from corporate development become more urgent, fervent and exacting.<sup>9</sup>

### *The Advocate as an Officer of the Court*

An advocate plays a vital role in the functioning of the judicial process. The importance of this duty was emphasized by Lord Denning in *Rondel v. Worsley*:<sup>10</sup>

As an advocate he is a minister of justice equally with the judge... He must accept the brief and do all he honourably can because his duty is not only to his client. He has a duty to the court, which is paramount. It is a mistake to suppose that he is a mouthpiece of his client to say what he wants; or his tool to do what he directs. He owes allegiance to a higher cause. It is a cause of truth and justice... he must disregard the most specific instructions of his client if they conflict with the duty of the court.

<sup>8</sup> PLO Lumumba, “The Role of an Advocate in a Changing World,” A Paper delivered at the Law Society of Kenya (Western Section) Annual Forum on 3<sup>rd</sup> September 2004 at Sunset Hotel, Kisumu.

<sup>9</sup> Kalonzo Musyoka, “Challenges for the Legal Profession in Kenya in the 21<sup>st</sup> Century” (A Paper presented at the LSK Workshop held at Whitesands Hotel, Mombasa on 1<sup>st</sup> September 2004).

<sup>10</sup> [1967] 1 QB 443, 502.

Lord Reid in *Rondel v. Worsley*<sup>11</sup> noted that in addition to the duty owed to his client, [an advocate] owes “an overriding duty to the court, to the standards of his profession, and to the public which may, and often does, lead to a conflict with his client’s wishes or with what the client thinks are his personal interests”. Similar statements have been made by Lord Hoffman and Lord Hope in *Arthur J S Hall v. Simons*.<sup>12</sup> From numerous judicial precedents it can be inferred that an advocate, as an officer of the court by oath and by law, has an overriding duty to the court to act with independence in the interests of justice; he must not deceive or knowingly or recklessly mislead the court.

### A Lawyer’s Duty to the Client

Lord Brougham said (in his famous defence of Queen Caroline<sup>13</sup>):

An advocate, by the sacred duty which he owes his client, knows in the discharge of that office but one person in the world – the client and none other. To save the client by all expedient means, to protect the client at all hazards and costs to all others and among others to himself, is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction which he may bring on any other. Nay, separating even the duties of a patriot from those of an advocate and casting them if need be to the wind, he must go on reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his client’s protection.

The above quotation, no doubt, captures the general rule as to an advocate’s duty to his client. Be that as it may, the duty is relative in the sense that such duty is subject to the Advocates Act (Cap. 16) and other written laws and regulations.<sup>14</sup> Indeed, Lord Chief Justice Cockburn asserted that it is the duty of an advocate “to the utmost of his power to seek to reconcile the interests he is bound to maintain and the duty it is incumbent on him to discharge with the eternal and immutable interests of truth and justice.”<sup>15</sup>

<sup>11</sup> [1969] AC 191.

<sup>12</sup> [2000] UKHL 38, [2002] 1 AC 615 [2000] 3 All ER 673 at p.687 and p.693.

<sup>13</sup> For an analysis see Monroe H. Freedman, “Henry Lord Brougham and Zeal” (2006) 34 *Hofstra Law Review* 1319 [http://law.hofstra.edu/pdf/academics/journals/lawreview/lrv\\_issues\\_v34n04\\_bb1\\_freedman\\_final.pdf](http://law.hofstra.edu/pdf/academics/journals/lawreview/lrv_issues_v34n04_bb1_freedman_final.pdf)

<sup>14</sup> These include the Law Society of Kenya Digest of Professional Conduct and Etiquette (2000), The Advocates (Continuing Legal Education) Regulations 2004, The Advocates (Professional Indemnity) Regulations 2004, The Advocates (Practice) Rules, The Advocates (Remuneration) Order.

<sup>15</sup> Quoted by various sources, but available in full in George P Costigan, “The Full Remarks on Advocacy of Lord Brougham and Lord Chief Justice Cockburn at the Dinner to M. Berryer on November 8, 1864” (1931) 19 Calif LR 521, at p. 523.



a) *Duty of Confidentiality*

Confidentiality means that exchanges and other transactions between an advocate and their client should not be disclosed to any party, even to the court. The rationale is to give the client confidence to disclose everything to the advocate without fear that there would be disclosure to third parties.

Privilege extends to oral communication and documentary information received from a client in the course of acting for a client and survives the death of a client, so long as there is an issue in which the client's interests are in question.

In *King Woolen Mills and Another v. Kaplan and Stratton Advocates*<sup>16</sup> the court held that the fiduciary relationship created by the retainer between the client and his/her advocate(s) 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. This principle exists even where an advocate acts for more than one party as a common advocate and continues long after the matter for which the retainer was created has been concluded hence a special type of agency relationship is created.

Under Section 134 of the Evidence Act, an advocate is prohibited from disclosing any privileged communication between himself and his client.<sup>17</sup>

b) *Duty to Disclose Financial Benefits*

An advocate while acting must always disclose all financial benefits to the client. The duty to disclose financial benefits arises from the agency relationship between the advocate and the client that demands, *inter alia*, good faith and transparency. In *United Insurance Co. Ltd v. Dorcas Amunga*,<sup>18</sup> Mr. Justice Alnashir Visram stated that the relationship between the advocate and client is governed by the retainer which is the contract that determines their rights and liabilities subject to terms which the law will infer in the particular circumstances. The authority of an advocate to act for his client will therefore arise from the retainer. The conduct of the advocate under the retainer will also be governed by the Advocates Act.

<sup>16</sup> Nairobi Civil Appeal No.55 of 1993.

<sup>17</sup> Chapter 80, Laws of Kenya.

<sup>18</sup> Nairobi HCCC No. 462 of 2000.

In *Kenya Bus Services Ltd v. Susan Muteti*<sup>19</sup> the court stated that generally an advocate is authorized to act as his client's agent in all matters not falling within an exception which may reasonably be expected to arise for decision in the course of the proceedings.

c) *Duty to Disclose Conflict of Interest*

An advocate should not act in a matter where he or she is likely to be called as a witness. An advocate must ensure that there's no conflict of interest and there is no likelihood of such a conflict arising subsequently during the trial process.

In *King Woolen Mills and Another v. Kaplan and Stratton Advocates* (above), the respondent firm had acted for both a lender and a borrower in a previous transaction. The borrower defaulted and sought to question the security of the transaction. The Court of Appeal held that since the firm was aware that there was likely to arise a conflict between the lender and the borrower, and since having acted for both parties they were in a position to be privy to information pertaining to the appellant's case, they would not purport to enforce the said securities to the prejudice of the appellants.

d) *Duty of Due Care and Diligence*

A lawyer owes a duty of care to the client as a result of the professional relationship between them in which the lawyer is expected to act professionally and not negligently. Lord Denning MR in *Abraham v. Justsun*<sup>20</sup> stated:

[It is an] advocate's duty to take any point which he believes to be fairly arguable on behalf of his client...He is not guilty of misconduct simply because he takes a point which the tribunal holds to be bad. He only becomes guilty of misconduct if he is dishonest. That is, if he knowingly takes a bad point and thereby deceives the court.

In *Gran Gelato Ltd v. Richcliff (Group) Ltd*<sup>21</sup> which involved a solicitor's replies to preliminary enquiries in a conveyancing transaction, the court stated that a solicitor owes a professional duty of care to the client and no-one else. He is subject to professional rules and standards, and owes duties to the court as one of its officers.

<sup>19</sup> Nairobi CA No. 15 of 1992.

<sup>20</sup> [1963] 2 All ER 401 at p.404.

<sup>21</sup> [1992] Ch 560.

Exceptionally, an advocate may owe a duty to a non-client. The holding in *Hedley Byrne v. Heller & Partners*<sup>22</sup> suggests that an advocate who gives out professional advice aware that the person to whom the advice is given would be relying thereon could not argue that there was no contract for the service, and could be held liable. In that case, the court found that there was a special relationship between an advocate and a client that gave rise to a duty of care. There is a useful summary of when liability to a non-client may arise in a recent Federal Court of Australia decision: *Carey v Freehills*.<sup>23</sup>

### Lawyer's Duty to the Legal Profession

The depth of the rot in the legal profession has a long history particularly within the ranks of advocates who practice personal injury cases, normally referred to as 'Ambulance Chasers'. In the 1990s the author was instructed by the Association of Kenya Insurers (AKI) to defend the decision of insurance companies to issue two cheques whenever a claim was settled; one in the name of an advocate for legal fees and another in the name of an aggrieved party in settlement of the claim.<sup>24</sup>

This matter was vigorously resisted by the legal fraternity. Investigations revealed that a good number of these claims were fictitious and were generated by some unscrupulous advocates who then colluded with some doctors to manufacture medical reports, some police officers, pliant magistrates and even insurance officers to fleece the insurance companies.

<sup>22</sup> [1963] 2 All ER 575.

<sup>23</sup> [2013] FCA 954: paras 310ff.

<sup>24</sup> *Apollo Insurance Company Ltd v Scholastica K. Kamau & Muthanwa & Co. Advocates* Civil Case No. 1945 of 1999. The brief facts were: insurance company had sought to pay a decretal sum by way of two cheques one written in the name of the victim of an accident (client) and the other in the name of her advocate. Both were rejected by the advocate on the ground that only one cheque in the name of the advocate should be issued. The advocate threatened to attach the company's assets and the latter filed suit and sought a temporary injunction pending hearing. In the main suit, a declaration was sought that it was proper to use the so-called "two – cheque system". It was held that:

- (i) there was no rule of law that the decretal sums in an accident claim can only be paid by way of a single cheque in the name of the victims advocate.
- (ii) the advocate is not entitled to reject payment on behalf of his client where such payment is made directly to the client; and
- (iii) a temporary injunction will issue to protect a litigant's assets when there is a prima facie case with a probability of success when the litigant is likely to suffer irreparable harm and /or when the balance of convenience lies in favour of the applicant.

The matter later proceeded to the Court of Appeal where it was overturned.

It is noteworthy that these unscrupulous acts have led to the collapse of a number of insurance companies such as Kenya National Insurance, Stallion Insurance, United Insurance, Lakestar Insurance, Motor Pool Insurance and others. Yet in the face of these, very few advocates have been punished. Some of the culpable lawyers are now 'respected' members of the profession and other State organs including County Assemblies, National Assembly and the Senate.

Again, on the 17<sup>th</sup> July 2007, the Association of Kenya Insurers instructed the author to act in a matter involving lawyers in Mombasa. A raid was conducted on several law firms in Mombasa and fake claims worth KShs100 million were unearthed. Once again, this matter simply fizzled out. The net effect of this is that the Association is wary of lawyers because of the conduct of a few who engage in professional misconduct with impunity.

In the 1980s and before, a lawyer's professional undertakings would be accepted by another without question, but when it emerged that some lawyers were 'hawking' undertakings, woe unto the lawyer who accepted an undertaking from his or her colleague without confirming his or her antecedents.

Most recently, professional misconduct has been seen during the campaigns undertaken by candidates for positions in organs in the profession; the Law Society of Kenya representative to the Judicial Service Commission, for Chairmanship of and Vice-Chairmanship of the Law Society and for various Council positions. The campaigns saw some candidates canvassing for votes under the guise of Christmas and New Year greetings inviting their peers to a 'sumptuous lunches' among other unethical behaviour.<sup>25</sup>

In England, case law demonstrates that the courts have generally frowned upon attempts by advocates to disregard professional etiquette in the course of their professional duties. Conversely, in Kenya, courts have not shown their disdain for professional misconduct.<sup>26</sup> In *Re A Solicitor*<sup>27</sup> and *Re Lydell*,<sup>28</sup> the House of Lords held that a solicitor who carried on the practice of undisclosed profit sharing with another who presented conflicting interest was guilty of professional misconduct. In *Allison*

<sup>25</sup> See PLO Lumumba's Letter to the Chairman of the Law Society of Kenya dated 16<sup>th</sup> January 2014, addressing the issues of unprofessional conduct through canvassing for elective positions by members of the profession.

<sup>26</sup> *Mohammed Ashraf Sadique & Another v Mathew Oseko t/s Oseko & Oseko Co. Advocates*, 2009 eKLR Misc. Application Number 901 of 2007 <http://kenyalaw.org/caselaw/cases/view/60936/> is a rare example of a court penalising advocates and even ordering the police to investigate what they had done on the basis that they committed offences under the Advocates Act.

<sup>27</sup> (1905) 93 LT 838.

<sup>28</sup> 1901] 1KB 187.

*v. General Medical Council*,<sup>29</sup> it was held that if a man in the pursuit of his profession has done something with regard to it which will be regarded as disgraceful or dishonourable to his professional brethren and to his good repute and competence, then it is open to say that he has been guilty of misconduct in a professional respect.

In a nutshell, the advocate owes a further duty to his profession. He has the duty to maintain and preserve the independence of the profession. He must strive in all his actions to uphold the dignity and integrity of the Bar. In order to play its role in the administration of justice, the legal profession must remain independent at all times. From this independence stems its strength to uphold the cause of justice without fear or favour.<sup>30</sup>

### **The Legal Profession in the 21<sup>st</sup> Century**

Today, lawyers have to deal with increasing legal complexities; with heightened competition from more and more lawyers; with rising overheads amid expenses and narrowing margins of net income. These demands and economic pressures of contemporary practice are very much at odds with the prevailing notions of lawyers' lives and practices. The contemporary legal profession is thus beleaguered in large part by forces beyond its control. Some have ancient pedigree and are ingrained in populist resistance to law as a stabilizing force or lawyers as learned elites. Others spring from the inherent qualities of law and some from its contemporary growth and pervasiveness. Still others spring from social and economic changes that have particularly affected law and lawyers. Some spring from gross misperceptions of what the actual profile of the profession in the state really is. But part of the problem is the state of individual and institutional decline in the legal profession.

It is not in dispute that there is widespread breakdown in the fundamental values that anchor the profession. First, there are areas in which genuine reform is required to improve professional performance and raise public confidence in the profession. At the institutional level, disciplinary mechanisms and processes should be restructured to recognize the multiple aims of a professional disciplinary system.

<sup>29</sup> [1894] 1 QB 750.

<sup>30</sup> Lee Muthoga, "The Role of a Lawyer in a Developing Country" in *Law and Society : selected papers from a seminar held 24-26 November 1988 at the Green Hills Hotel, Nyeri, Kenya* (Nairobi: International Commission of Jurists (Kenya Section), 1988) p 49.

For these reasons, the legal profession through the Law Society<sup>31</sup> developed and adopted codes and rules of conduct and practice that forge and govern legal professional ethics which illustrate the high standards on which reputations for professionalism are designed. This is reiterated in the case of *R v George Maina Kariuki*<sup>32</sup> in which the court held that the Society of Kenya's main purpose is to regulate affairs and conduct of members.<sup>33</sup> These codes and rules help reassure the general public of two conditions; that any particular set of professional services is being given not only by (i) properly qualified or academically expert persons but also (ii) by persons whose professional standards merit the high degrees of public trustworthiness which are typically required of professionals.<sup>34</sup>

Ethics can be described as codes of conduct upon which a group of persons live in accordance with and changes from time to time while pivoted on the circumstances and dynamic of a society.<sup>35</sup> It broaches on the hopes and aspirations of the particular group and differs profoundly from morals which define personal character. For example, a defence lawyer may find murder immoral but rules of ethics bind a lawyer to represent a murderer in the best possible way.<sup>36</sup>

These ethical standards are derived from copious founts which encompass:-

- i) The role that lawyers perform in society such as undertaking *pro bono* briefs;
- ii) The collective image that the legal profession wants to project to the public as a dignified profession;
- iii) The goals, ideals and aspirations and the challenges faced by the legal profession; and

<sup>31</sup> Established under the Law Society of Kenya Act Chapter 18 of the Laws of Kenya and one of its objectives under its section 4(d) is to represent, protect and assist members of the legal profession in Kenya in respect of conditions of practice and otherwise. Section 81(1)(a) of the Advocates Act gives the Council of the Society authority to make rules with the approval of the Chief Justice with regard to the professional practice, conduct and discipline of advocates.

<sup>32</sup> Criminal Application Number 6 of 1994.

<sup>33</sup> In *Aaron Ringera & 3 Others v Paul Muite & 10 Others*, Nairobi High Court Civil Suit No. 1330 of 1991, the court held that in execution of its objectives, the Law Society Council was found to be in contempt for engaging in politics stating its views as those of its members.

<sup>34</sup> MacFarlane, Peter, "The Importance of Ethics and the Application of Ethical Principles to the Legal Profession: A Working Paper" by (2002) 6(2) *Journal of South Pacific Law*, available at: <http://www.paclii.org/journals/fJSPL/vol06/8.shtml>, accessed on 16<sup>th</sup> August 2014

<sup>35</sup> Ethics in essence is made by man for the governance of man while morality emanates from a supernatural being, beliefs, faith, culture where a deity prescribes what is good and what is bad.

<sup>36</sup> In January 2013, Indian lawyers refused to do so, and gave a declaration that they would not represent the gang rape accused in court even after the police had prepared a 1000 paged charge against the accused men. This is contrary to the "cab rank" rule which indicates that it is the lawyer's obligation to accept any work in a field in which he professes himself competent to practice, at a competent court.

- iv) The best practices adopted around the world by law societies such as those in Australia, Canada and the United Kingdom.

Ethical practice (ABA above) and conduct among professionals is therefore central to the explication of a profession.<sup>37</sup>

In order to ensure enforcement of professional ethics and kindle a type of ‘palm tree justice’<sup>38</sup> for aggrieved clients, disciplinary mechanisms have been inaugurated to ensure implementation to the set standards of professional ethics. This has been clinched through disciplinary action against the ‘rogue’ advocates which is not only appropriate to protect clients (both present and future) and to deter other lawyers but also to maintain the sanctity of the professional standards and the image of the profession.<sup>39</sup>

Thus the *raison d’être* for disciplinary action is that lawyers are likely to be influenced in their own conduct by disciplinary decisions already proffered on others and they will have received the message. At least in the short term, the rules will have been shown to pose a credible threat.

Indeed, professional rules regulate the legal profession and such regulation is carried out by institutions (regulators) established by the Advocates Act. These institutions use statutory legislation, common law and the doctrines of equity to enforce regulation and serve two purposes; instilling ethical and moral discipline and punishing offending members to protect the public interest.

Davis Wilkins noted, lawyers are regulated in the sense by many different institutions, sources of law and norms,<sup>40</sup> which are traditional formal regulators who admit lawyers to practice, discipline lawyers and adopt rules of conduct. Article 28 of the United Nations Basic Principles on the Role of Lawyers<sup>41</sup> provides that disciplinary proceedings against lawyers be brought under an impartial disciplinary committee established by the legal profession.

<sup>37</sup> P.L.O. Lumumba, “The Legal Profession in Kenya: Towards a New Ethos” in Luis G. Franceschi F. & Andrew M. Ritho, eds., *Legal Ethics & Jurisprudence in Nation Building* (Nairobi: Strathmore University Press, Law Africa Publishing Ltd, 2005), p.37.

<sup>38</sup> Bucknill LJ, in the unreported case of *Newgrosh v Newgrosh* (1950) appears to be the first judge to have used the expression judicially when he said, “the principle which has been described here as ‘Palm tree justice’ I understand that to be justice which makes orders which appear to be fair and just in the special circumstance of the case”.

<sup>39</sup> *Bolton v Law Society* [1994] 2 All ER 486, 492-3, the Court held that “A profession’s most valuable asset is its collective reputation and the confidence, which that [confidence] inspires. ....Membership of a profession brings many benefits, but that is part of the price”.

<sup>40</sup> David B. Wilkins, *Who Should Regulate Lawyers?* (1992)105 Harv. L. Rev. 799.

<sup>41</sup> Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 27-Sep. 7, 1990, *Basic Principles on the Role of Lawyers*, at 118, U.N. Doc. A/CONF.144/28/Rev.(1990).

In Kenya disciplinary measures are meted out by disciplinary institutions under the Advocates Act, including

- i) The Disciplinary Tribunal (established under section 57 of the Advocates Act No. 12 of 2012);
- ii) The Advocates Complaints Commission (section 53 of the Advocates Act, 2012);
- iii) The courts;<sup>42</sup> and
- iv) The Regional Disciplinary Committees.<sup>43</sup>

Other, informal, regulators include the media, non-governmental organizations, clients, custom, peer pressure and the public.

A focus of this chapter is on regulation by the Disciplinary Tribunal (herein referred to as the Tribunal) since it is the main regulator mandated to provide a sort of ‘palm tree’ justice after receiving complaints from the Advocates Complaints Commission, the Society and any other private individual for prosecution.

### **The Disciplinary Tribunal**

Prior to Advocates Act 2012, the Disciplinary Tribunal (herein referred to as the Tribunal) was known as the Disciplinary Committee. The reason behind the change from ‘committee’ to ‘tribunal’ was to strengthen and empower the orders and awards issued by the Tribunal. This transition was discussed in the case of *Law Society of Kenya v Attorney General & 2 Others*<sup>44</sup> where the petitioner, the Law Society of Kenya (LSK), through a constitutional petition contended that the amendment replacing the ‘Disciplinary Committee’ with ‘Disciplinary Tribunal’ was an affront to the independence of the legal profession and was tantamount to unlawful creation of a subordinate court within the judiciary, without the judiciary providing for funds and staff for the envisaged Tribunal. The Society further stated that the amendment ‘judicialized’ its role in dealing with professional misconduct and created a spectrum of conflict of interest by the participation of advocates who are elected members of the Tribunal. The question was, were the elected advocates accountable to the bar or to the judiciary?

<sup>42</sup> Section 56 and 64 of the Advocates Act grants courts power to discipline lawyers and further all orders and awards granted by the Disciplinary Tribunal and the Complaints Commission must be registered at the courts.

<sup>43</sup> Established under section 58A of the Advocates Act: the Law Society of Kenya shall choose five representative regions other than Nairobi to act as branches of the Disciplinary Tribunal.

<sup>44</sup> Petition 318 of 2012 [2013] eKLR <http://kenyalaw.org/caselaw/cases/view/87281/>.



In his judgment, DS Majanja J, held that:

The change of the name of the ‘committee’ engendered by the amendment did not change the substance of the Advocates Act nor interfere with the powers of that body. The name was merely cosmetic and within the legislative authority and the use of the word “Tribunal” only established fidelity of that body to the principles set out in Article 159 of the Constitution of Kenya 2010.

### Challenges faced by the Disciplinary Tribunal

The majority of clients’ complaints against the Tribunal are that the discipline administered is slow in responding to complaints, overly lenient to the advocates and notoriously unresponsive to clients’ concerns.

When perceiving the implementation and challenges faced by the Tribunal certain questions crucial to its role arise:

- a) Who should regulate the legal profession? For example should there be a self-regulatory system or a co-regulatory system?
- b) Who or what should be regulated?
- c) When should regulation occur? Is it *ex ante* (before the misconduct of the advocate) or *ex post* (after the misconduct of the advocate)?

#### a) *Self-regulatory Approach versus Co-regulatory Approach*

Deborah Rhode states that no vocational group, however well-intentioned, can make unbiased assessments of the public interest on issues that place its own status, reputation, and income directly at risk.<sup>45</sup> Historically, Kenya’s legal profession has enjoyed independence in its own regulation. It has drafted, adopted and enforced codes of conduct without any significant participation by non-lawyers. The result leaves much to be desired as lawyers are hardly disinterested arbiters of their own standards of conduct as they develop their own rules and instil discipline amongst themselves. The rate of cases withdrawn by clients according to the statistics in the year 2009-2012 show that a large number of clients abandoned their cases; this can be seen from the Tables in the Appendix to this Chapter. This is probably because the Tribunal is made up of only lawyers and this intimidates

<sup>45</sup> Deborah L. Rhode, “Legal Ethics in An Adversary System: The Persistent Questions” (2006) 34 *Hofstra Law Review* 641. Also see Deborah L. Rhode, *In the Interests of Justice : Reforming the Legal Profession*, New York: Oxford University Press, 2000.

clients who have no knowledge of the legal processes and the idea that the Tribunal will be biased against them becomes nothing short of reality.

Such self-regulation is seen through forming legislation, commissions and committees that they themselves manage. There is no room for a lay person or a non-legal professional. Even the sanctions ordered against the errant advocate are light.

This is different from the co-regulatory approach that has been introduced in the United Kingdom where the regulatory board has a majority of non-lawyer members including its chair which maintains oversight over the legal profession.<sup>46</sup> This will assist the complainants whose complaint is dismissed by the Tribunal as not enough to warrant a disciplinary offence such as failure to inform or failure to communicate with the client. A lay person in the Tribunal will be able to see this as a very distressing issue unlike the advocates who will merely issue a warning to the advocate.

The process of prosecuting an advocate is filled with evidentiary rules that offer no solace to the client such as the case when a client is told to get evidence of his advocate's misconduct. What happens to a client who is unable to get his documents from his errant advocate whom he has filed a complaint against? Overall, this system is not friendly to the clients.

*b) What and Who is Regulated?*

A regulator may see its primary duty as the regulation of the licensed individual and in our case the Tribunal may see its duty as to regulate the qualified advocates who hold practicing certificates. It is only recently that the Society has shown interest in court clerks and paralegals who offer some type of legal services as evidenced by the new laws on regulation and discipline of clerks. The Tribunal faces an additional question that most regulators now face and that is how to define their regulatory authority in a world in which lawyers are increasingly seen as "consultants" and non-lawyers are consulted on issues that might be viewed as legal services.

*c) Is Regulation Ex-ante or Ex-post?*

This is largely centred on the timing and the point at which a regulatory body should be involved with lawyers. Traditionally, the Tribunal's approach to lawyer

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<sup>46</sup> Legal Services Act, 2007, c. 29.Pts. 2-11 (UK).

regulation and enforcement has been *ex-post* i.e. wait until a complaint is filed, investigated and evaluated as a *prima facie* case that a lawyer has violated the code of conduct and then impose some sort of penalty. The *ex-ante* approach however allows the Tribunal to prevent lawyers' mistakes and misconduct through routinely monitoring and evaluating the registered and qualified lawyers individually and in their law firms. This has been used in the New South Wales Legal Profession Act 2004 which adopted the proactive "appropriate management systems approach".<sup>47</sup>

### Conclusions on the existing system

This section includes some figures on the fate of complaints to the official disciplinary mechanism.

*Table 1: Advocates' Complaints Commission  
Complaints Handled – (2009-2012)*

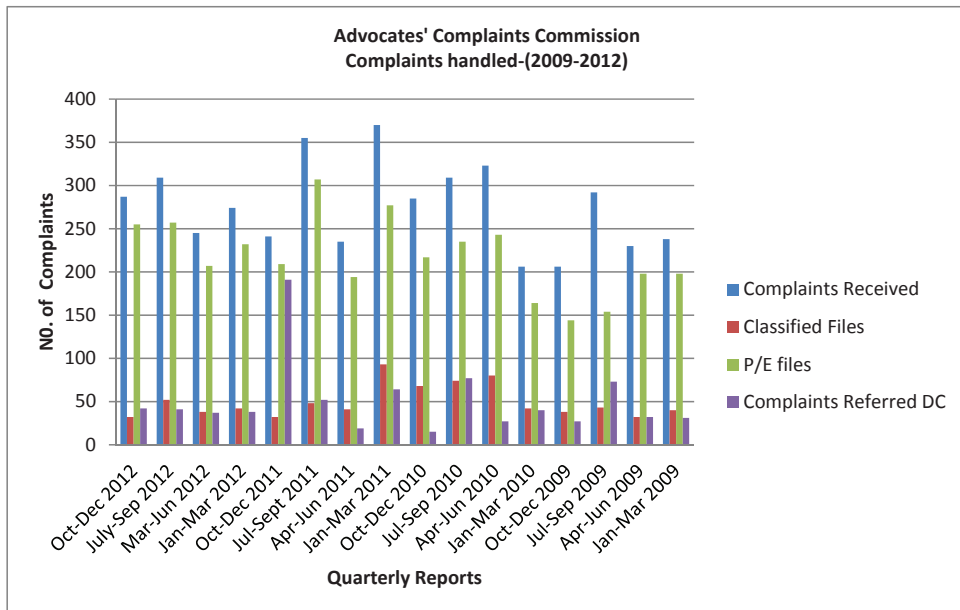
	Complaints Received	Classified Files	P/E files	Complaints Referred DT
Oct-Dec 2012	287	32	255	42
July-Sep 2012	309	52	257	41
Mar-Jun 2012	245	38	207	37
Jan-Mar 2012	274	42	232	38
Oct-Dec 2011	241	32	209	191
Jul-Sept 2011	355	48	307	52
Apr-Jun 2011	235	41	194	19
Jan-Mar 2011	370	93	277	64
Oct-Dec 2010	285	68	217	15

<sup>47</sup> John Briton & Scott McLean, *Lawyer Regulation, Consciousness-Raising and Social Science* 10-11 (July 15-17, 2010) Available at <[http://www.lsc.qld.gov.au/\\_data/assets/pdf\\_file/004/106069/](http://www.lsc.qld.gov.au/_data/assets/pdf_file/004/106069/)> (paper presented at International Legal Ethics Conference IV, Stanford Law School)> Accessed on 27th January 2014.

	Complaints Received	Classified Files	P/E files	Complaints Referred DT
Jul-Sep 2010	309	74	235	77
Apr-Jun 2010	323	80	243	27
Jan-Mar 2010	206	42	164	40
Oct-Dec 2009	206	38	144	27
Jul-Sep 2009	292	43	154	73
Apr-Jun 2009	230	32	198	32
Jan-Mar 2009	238	40	198	31
	<b>4405</b>	<b>795</b>	<b>3491</b>	<b>806</b>

NB. (i) P/E-(Preliminary Enquiry) – Complaints to be investigated.  
 (ii) Classified files – complaints under investigation.  
 DT-Disciplinary Tribunal.

Figure 1



NB. (i) P/E-(Preliminary Enquiry) – Complaints to be investigated.  
 (ii) Classified files – complaints under investigation.  
 DT-Disciplinary Tribunal.

Table 1 as read together with Graph 1 demonstrates that the large number of complaints filed are never dealt with to conclusion suggesting a system that is protective of its own.

If we turn to how these complaints are disposed of without going further we find:

*Table 2 Advocates' Complaints Commission  
Complaints Determined- (2009-2012)*

	Abandoned	No misconduct	Dismissed for no case	Withdrawn	Settled
Oct-Dec 2012	32	29	6	0	14
July-Sep 2012	51	33	4	1	19
Mar-Jun 2012	24	15	1	1	19
Jan-Mar 2012	48	52	2	2	28
Oct-Dec 2011	49	26	0	3	21
Jul-Sept 2011	84	27	1	0	14
Apr-Jun 2011	71	48	5	1	26
Jan-Mar 2011	34	30	3	4	20
Oct-Dec 2010	75	19	0	1	7
Jul-Sep 2010	44	32	2	2	17
Apr-Jun 2010	88	37	4	1	21
Jan-Mar 2010	167	68	1	2	32
Oct-Dec 2009	80	68	0	10	38
Jul-Sep 2009	44	32	2	2	17
Apr-Jun 2009	88	37	4	2	21
Jan-Mar 2009	52	38	3	4	19
	<b>1031</b>	<b>591</b>	<b>38</b>	<b>36</b>	<b>333</b>

NB.

- (i) Abandoned – complaints abandoned by complainants and files closed.
- (ii) No misconduct – complaints closed due to no professional misconduct.
- (iii) Dismissed for no case – complaints closed due to absence of prima facie case.
- (iv) Withdrawn – complaints closed on instructions of the complainants.
- (iv) Settled- complaints closed after settlement agreement with advocates.

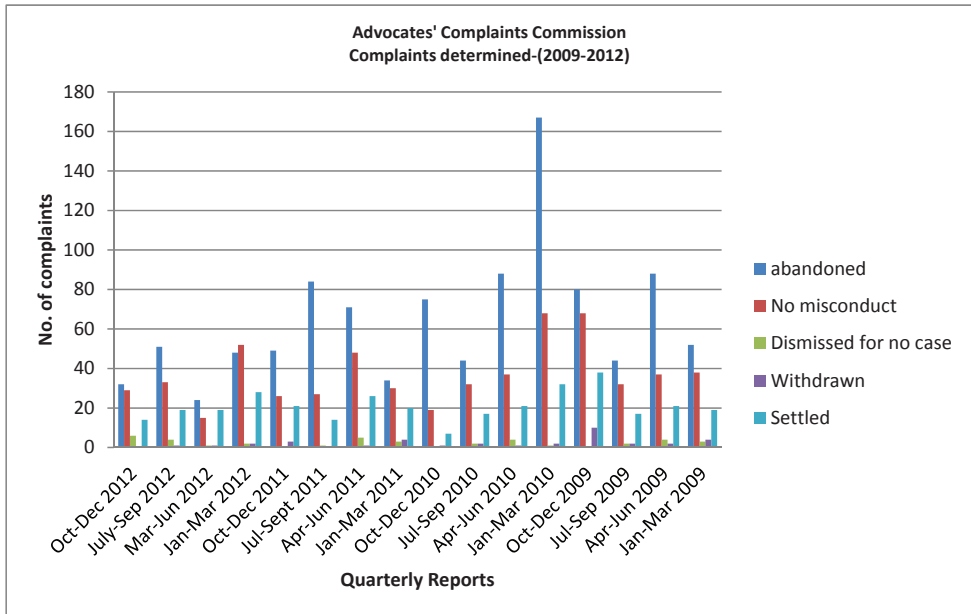


Figure 2

Table 2 as read together with Figure 2 demonstrates how professional misconduct complaints filed by clients with the Advocates Complaints Commission of Kenya are handled with extreme tact thereby protecting the errant advocates from disciplinary action.

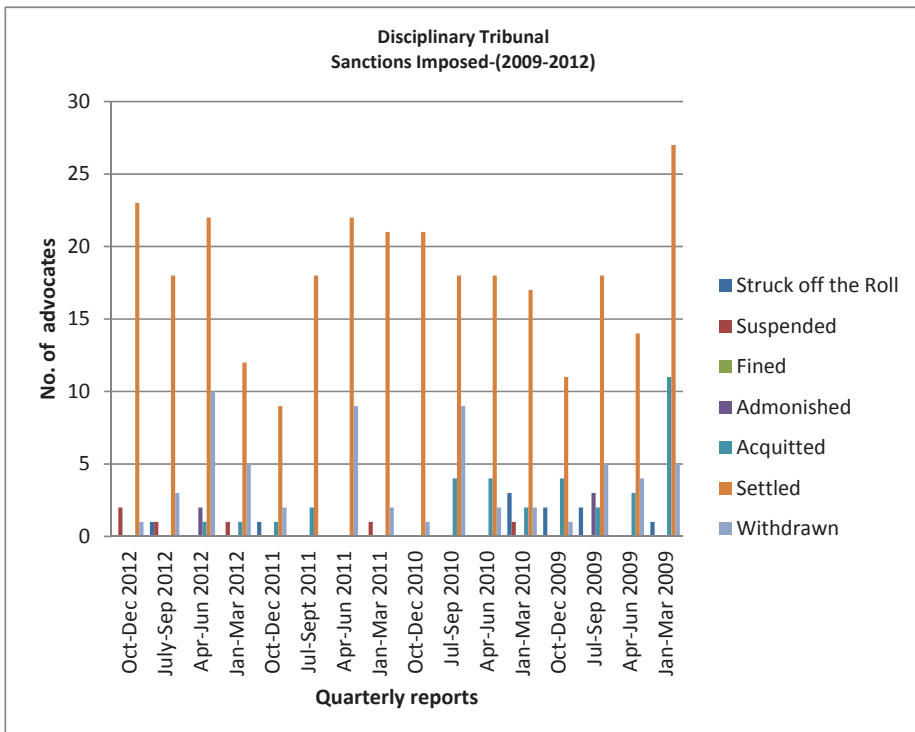
Now we turn to how the cases that actually go to the Disciplinary Tribunal are disposed of. Table 3 and Figure 3 show that the sanctions imposed by the Disciplinary Tribunal of Kenya in accordance with section 60 of the Advocates Act are light and fail to discourage errant advocates from professional misconduct.

Table 3: Disciplinary Tribunal Sanctions Imposed (2009-2012)

	Struck off the Roll	Suspended	Fined	Admonished	Acquitted	Settled	Withdrawn
Oct-Dec 2012	0	2	0	0	0	23	1
July-Sep 2012	1	1	0	0	0	18	3
Apr-Jun 2012	0	0	0	2	1	22	10
Jan-Mar 2012	0	1	0	0	1	12	5

	Struck off the Roll	Suspended	Fined	Admonished	Acquitted	Settled	Withdrawn
Oct-Dec 2011	1	0	0	0	1	9	2
Jul-Sept 2011	0	0	0	0	2	18	0
Apr-Jun 2011	0	0	0	0	0	22	9
Jan-Mar 2011	0	1	0	0	0	21	2
Oct-Dec 2010	0	0	0	0	0	21	1
Jul-Sept 2010	0	0	0	0	4	18	9
Apr-Jun 2010	0	0	0	0	4	18	2
Jan-Mar 2010	3	1	0	0	2	17	2
Oct-Dec 2009	2	0	0	0	4	11	1
Jul-Sept 2009	2	0	0	3	2	18	5
Apr-Jun 2009	0	0	0	0	3	14	4
Jan-Mar 2009	1	0	0	0	11	27	5
	10	6		5	35	289	40

Figure 3



- NB.(i) Struck off the roll – advocates debarred.
- (ii) Suspended – advocates suspended.
- (iii) Fined – advocates fined.
- (iv) Admonished – advocates admonished.
- (v) Acquitted – advocates acquitted.
- (v) Settled – advocates who agreed to inter partes settlement.
- (vii) Withdrawn – advocates whose cases were withdrawn.

### **Conclusions on the existing system**

Overall these figures show that between 2009 and 2012, of 4405 complaints received by the Complaints Commission 3491 were identified as to be investigated; 806 (18.3%) were referred to the Disciplinary Tribunal. Of cases that went to the Tribunal, 40 were withdrawn, 289 settled, 35 acquitted, 5 admonished, 6 suspended and 10 struck off. If this is a complete record of the fate of cases before the Tribunal, 74% were “settled” and 21 (a mere 5.4%) only admonished, suspended or struck off (none was fined). These 21 were only .5% of those complained against during that period.

### *Recommendations*

It is my view that a system that would contribute to the general enhancement of professional standards should be anchored on the principles of independence and impartiality, accessibility, efficiency and effectiveness, procedural fairness, openness and accountability. The disciplinary bodies of the legal profession should also be amenable to external scrutiny and review. Second, at the individual level, professionalism is a personal ideal, characterized in an individual’s attitude and approach to the occupation.

There is need for the legal profession to adopt Afrocentric ethics (*ubuntuism*) that encompasses the duty of care owed to the society in our code of conduct as a whole rather than the Eurocentric ethics which has mostly been adopted from our British colonizers and the western culture and is either centred on the clients separately or on the legal service providers.

There must be a reorientation towards the values of integrity, honesty, honour, independence, service and competence. This is the heart of attaining new ethos in the legal profession.



## Conclusion

When examining the decline in ‘ethical’ standards, we should not restrict ourselves to compliance with the “Ten Commandments” or other standards of common basic morality. A lawyer may fail to meet the touchstones of a true profession and the archetypes establishing canons of service.<sup>48</sup>

Professional ethics imparts mores of right thinking to members of the bar – what anyone who is a lawyer of substance would know – to new bar entrants for the purpose of assuring their proper assimilation into the legal profession.<sup>49</sup>

An advocate therefore has a duty to his client, court, the state, the legal profession but above all a duty to himself that he shall be as far as lies in his power, a person of integrity.

Finally, members of the legal profession must remind themselves of the honourable nature of the profession otherwise there is little point talking about ethics. Comprehensive Codes of Ethics do not guarantee ethical practice; rather, this lies in the fundamental nature of being ‘called to the Bar’. In the case of *Re Foster Street CJ* observed:<sup>50</sup>

It is to be borne in mind that all barristers are members of a profession as distinct from being engaged in a trade. A trade or business is an occupation or calling in which the primary object is the pursuit of pecuniary gain. Honesty and honourable dealing are, of course, expected from every man, whether he be engaged in professional practice or in any other gainful occupation. But in a profession, pecuniary success is not the only goal. Service is the ideal, and the earning of remuneration must always be subservient to this main purpose.

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<sup>48</sup> See Terence Johnson above.

<sup>49</sup> G. Sharswood, *An Essay on Professional Ethics* (5<sup>th</sup> ed., Philadelphia: T and JW Johnson, 1907) available on Project Gutenberg at <http://www.gutenberg.org/ebooks/22359>.

<sup>50</sup> (1950) 50 SR (NSW) 149, 151



# PROFESSIONAL INTEGRITY AND DISCIPLINING OF ADVOCATES: ROOM FOR IMPROVEMENT

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George Kegoro  
Anita Nyanjong  
Janet Milongo

## Introduction

Since the end of KANU rule, Kenya has been absorbed by the idea of the reform of the judiciary, which has seen two significant interventions carried out to deal with integrity in the judiciary. The first of these, popularly referred to as the “radical surgery”, occurred in 2003 and coincided with the entry into government of the NARC administration, which had made the cleaning up of the judiciary an important promise in the campaigns that led it to power.

The second was the vetting of judges and magistrates, a requirement of the Constitution of Kenya that came into force in 2010. The Constitution stipulated that all judges and magistrates in office on the day the constitution entered into force must submit to a process of vetting, which was designed to determine their suitability to continue serving in the judiciary.

Mechanisms to give effect to this requirement were subsequently enacted by the legislature (Vetting of Judges and Magistrates Act No. 2 of 2011). The vetting process has resulted in the removal of 23 judges, and 85 magistrates, who were adjudged to be unsuitable to continue serving in the judiciary.

The rationale for the vetting process was that after years of corruption in the judiciary, the public expected changes that would assure that the judiciary discharg-

es its responsibilities with integrity. The vetting process was presented as the most reasonable of a number of difficult choices available for judicial reform. There has been no comparable attention to the state of the private legal profession in the country. Several possibilities may account for the lack of attention about the reform of the private legal profession: perception that the profession is already upright; little is known about the condition of the private legal profession, and that there has not been a strong enough demand for reform. This chapter looks at the arrangements that aim to guarantee the ethical standards of the private legal profession with a view to assessing whether or not they are adequate to ensure integrity and fairness to their clients.

## Methodology

This paper was written following interviews with actors involved with the management of the disciplinary process in the legal profession. Those interviewed include the chair of the Complaints Commission, and senior personalities in the legal profession, including former chairs of the Law Society of Kenya. Although attempts were made to seek the input of the Law Society, these were unsuccessful.

The paper is also the result of desk research which reviewed previous literature on the subject.

## History of Disciplinary Control

According to Ojwang and Salter (1990)<sup>1</sup> the history of regulated legal practice in Kenya can be traced back to the colonial rule and specifically to the promulgation of two sets of regulations: the East Africa Legal Practitioners Rules<sup>2</sup> and the Native Courts Practitioners Rules.<sup>3</sup>

Ghai and McAuslan also note that the development of the legal profession is divided into two periods: before 1949 when the profession was subjected to a measure of public control and after 1949 when it attained self-governing powers.<sup>4</sup>

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<sup>1</sup> J.B Ojwang and D.R. Salter, "The Legal Profession in Kenya" (1990) 34 *Journal of African Law* 78, 79.

<sup>2</sup> (1897-1901) E.A Prot. L.R. 121-125.

<sup>3</sup> (1897-1905) L.R. 126-128.

<sup>4</sup> Y P Ghai, and JPWB McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (Nairobi: OUP, 1970, reprinted with a new preface by Yash Ghai in 2001) pp. 384-5

In 1901, the legal profession in Kenya consisted of barristers, solicitors and pleaders from the Indian High Courts, who were also referred to as vakeels. The High Court had disciplinary powers and could also review written remuneration agreements by advocates, who could resort to the appeal court in Zanzibar. A further appeal lay to the British foreign secretary (Ghai and McAuslan).

During this time, the Chief Justice was empowered to licence non-lawyers to practice as advocates and would also mediate between lawyers and clients whenever a dispute arose with regard to remuneration agreements.<sup>5</sup>

In 1911, the rules empowered the Crown Advocate, later known as Attorney General, or an aggrieved client, to report an advocate applying to a judge in chambers who could discipline the errant advocate, following a hearing in open court.<sup>6</sup> Legal practitioners were allowed to make agreements in manner they deemed fit provided that the practitioner had no interest in the litigation and that there was no exemption of the practitioner from negligence arising from the agreement, although the agreement could be examined and varied by a taxing master (Ghai and McAuslan 385).

In 1929, a system was introduced which included a six month residence rule for all foreign advocates who intended to practice in Kenya and this remained in force until the profession acquired self-governing powers after 1949.

It is not until 1949, when the Law Society of Kenya gained statutory authority that the legal profession in Kenya began to have a measure of self-regulation. Amos Odenyo (p. 34) notes that the legal profession was able to attain a measure of self regulation because its membership consisted largely of white and Asian lawyers who were in a strong political position to manipulate and negotiate for concessions with the administration. He argues that this pattern for demand for negotiation of political concessions was not unique to Kenya but was also applied in other British colonies including Rhodesia.

In 1949, pressure from the legal profession saw the introduction of the Advocates Act which was designed to regulate the practice of law in Kenya. This Act introduced two committees, the Advocates Committee, which heard complaints relating to the conduct of the advocates and the Remuneration Committee. The Advocates Committee heard a complaints and provided a report to the court with the evidence adduced and this was later heard by a two judge bench who would admonish, suspend or strike the advocate off the roll.

<sup>5</sup> Amos O. Odenyo, "Professionalization Amidst Change: The case of the emerging legal profession in Kenya" (1979) 22(3) *African Studies Review* 33, 34.

<sup>6</sup> Rules of Court (Legal Practitioner) No. 2 (1911) appendix 1, 4 E.A.L.R 3.

## Disciplinary Committee

In 1954, the Advocates Committee was renamed the Advocates Disciplinary Committee and was empowered with more powers including that it could act as a tribunal (Ghai and McAuslan, 390-1).<sup>7</sup> A board of advocates of at least 3 years standing was established to make inquiries on the basis of a complaint and to decide whether to refer it to the Disciplinary Committee, although an aggrieved clients could insist on the complaint going to the Committee, if prepared to pay a fee meant to deter frivolous suits.

If an advocate was found culpable, he or she could be admonished, fined or struck off the roll of advocates. A report would then be sent to the registrar which would be accessible to the complainant and the advocate but not the public. The advocate could appeal to the High Court, and then the East African Court of Appeal, asking the court to reverse, vary or suspend the verdict of the committee. It is also important to note that the Chief Justice had the powers to restore the practitioner to the roll on the recommendation of the disciplinary committee or of his own will (Ghai and McAuslan, 392).

## Complaints Commission

The next significant changes came through the Advocates Act of 1989, and largely represent the current disciplinary framework for complaints.<sup>8</sup> With the exception of a recent amendment (2012) which renamed it the “Disciplinary Tribunal”, the features of the Disciplinary Committee, complete with the appellate structure, were retained. However, the boards of inquiry were replaced by the Complaints Commission. The commission comprises of such number of commissioners as the President may appoint, with a secretary appointed by the Attorney General. It has the mandate to receive and consider complaints concerning an advocate or firm of advocates (s. 53(4)).

If the commission receives a complaint which it considers has substance to it, but which constitutes a disciplinary offence, it refers the matter to the tribunal (s. 53(4) (b)), and, when of the opinion that the complaint has substance but does not

<sup>7</sup> Advocates (Amendment) Act No. 49 of 1954. Its membership included the Attorney General, Solicitor General, three advocates of ten years standing, one of whom had to be in practice outside Nairobi

<sup>8</sup> See Act No. 18 of 1989, Act No. 7 of 1990, with amendments by the following: Act No. 21 of 1990, Act No. 12 of 1995, L.N. 94/1999, Act No. 9 of 2000, Act No. 2 of 2002, Act No. 7 of 2007, Act No. 1 of 2008, Act No. 6 of 2009, Act No. 12 of 2012, Act No. 27 of 2012.

constitute a disciplinary offence, it may call for a response to the complaint by the advocate concerned, within a specified period of time (s. 53(4)(c)). The commission may summon and examine witnesses and their evidence, and make necessary inquiry into the complaint. The commission may use alternative dispute resolution mechanisms (but only if the matter does not appear to be “of serious or aggravated nature”) – s. 53(5)), award compensation (s. 53(6)), and order surrender of funds and property that is not in dispute.(s. 53(6B)) Where the commission is of the opinion that a complaint with substance is best suited to be dealt with in a court of law, it must advise the complainant accordingly (s. 53(4)(e)).

The disciplinary scheme was improved in 2002, providing for compensation for loss due to the misconduct of an advocate, and the vesting of the commission with the power to tax a bill of costs if the question of fees arises on a complaint. The commission was vested with investigative powers over advocates’ accounts, and with greater power of scrutiny into the affairs of advocates.

The membership of the tribunal was expanded in 2002 (Statute Law (Miscellaneous Amendments) Act) to include three additional advocates elected by the society, bringing the total elected members to six, and a further three lay persons appointed by the Attorney-General on the recommendation of the society the last (deleted by statute in 2007). The commission was authorized to sit in panels of three. An offence of non-co-operation with the commission, punishable by imprisonment, was created. A new provision clarified that orders of the commission to pay compensation in cases of loss or damage could be registered in the High Court and enforced as if they were orders of the court (s. 53(6A)). It was given powers to compel an advocate to surrender funds or property to the complainant where the advocate did not dispute ownership by the complainant, to compel an advocate to supply fee notes and to assess fees, and, to investigate the accounts of an advocate were created.

Authority was vested in the tribunal to require an advocate to pay compensation of up to 5 million shillings (s. 60(4)(e)), to determine fees and to tax costs; to deal with inadequate professional services, in particular to reduce the advocate’s fees to an amount commensurate with the adequacy of the services rendered and to direct the advocate to rectify the error or take such other steps in the client’s interests as the tribunal may require (s. 60A(2) – Statute Law Miscellaneous Amendment Act of 2002).

The effect of a person’s suspension or striking off from the roll of advocates is that he or she ceases to be an advocate during this period of time. It is an offence if a person who has been suspended or struck off the roll pretends to be an advocate

or carries out work that is reserved for advocates (s. 34 read with s. 9). An advocate whose name is removed or struck off the roll of advocates can be restored following the recommendation of the tribunal and the written approval of the chairman of the society (s. 71).

The provision, in the same year, for the establishment of a compensation fund (s. 81(1)(f)) for clients seems to demonstrate some concern on the part of the Law Society with regard to public and honest service delivery; but in fact such a fund does not seem to have been established in the 12 years since, and, while the long title of the Law Society of Kenya Bill published in 2013 mentioned a compensation fund, the text of the Bill includes no such item.

### **The Disciplinary System: Issues for Consideration**

The interviews with key informants revealed central issues for consideration in relation to the management of the regulatory mechanisms of the legal profession. These are discussed under this heading.<sup>9</sup>

The main institutions for the management of complaints against advocates are the Complaints Commission and the Disciplinary Committee. Complaints are usually in writing, though occasionally by visits to the commission office. Complaints may also be referred by the society and the Commission on Administrative Justice (ombudsman). To cater for those outside Nairobi, there are plans to open offices for the Complaints Commission in other places.

To deal with complaints, the commission has divided its work among teams of state counsel who deal with various aspects. The first is the intake and review team, which assesses complaints, and forms a first impression about the substance. The team also ensures that there is no missing documentation as would support the complaint. A second team investigates complaints that require further investigation. A third team prosecutes complaints before the tribunal. A fourth team is in charge of outreach and sensitization, raising public awareness about the work of the commission. To aid members of the public who seek to make complaints, the commission has developed a tool, the Helpform, which captures all the important details about a complaint to ensure that no data is missed out.

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<sup>9</sup> The information used in this heading is derived from personal interviews with key informants, including Beattah Siganga, the chair of the Complaints Commission, Justice Lee G Muthoga, former chair of the Law Society of Kenya, and Justus Munyithya, a former Vice Chair of the Law Society of Kenya. Interviews were carried out in Nairobi during the months of June and July 2014.



The most common types of complaints relate to overcharging of clients by advocates, especially in relation to personal injury and death claims. There are also complaints about delay in carrying out the instructions of the client, acting in situations of conflict of interests, and failure to keep the client informed of progress made in carrying out instructions.

In the absence of a limitation period within which complaints can be made, very old complaints relating to cases finalized a very long time back are often made, leading to difficulty on the part of the advocate in responding to the complaint.

It is often the case that advocates who have defalcated against their clients are themselves indigent and have no means of making good any compensation orders made against them. The absence of an indemnity fund out of which such compensation could be made, compounds the problem. Although advocates are obliged to take out professional indemnity insurance,<sup>10</sup> it remained unclear if this rule was always enforced in practice. All these factors limit the practical attainment of any remedies that may be available.

### **Ideological divide on nature of disciplinary control.**

Two macro issues inform the current status of the disciplinary system. The first is the effect of the 1989 amendments which tied the practice of law to Kenyan citizenship (extended in 2002 to Ugandans and Tanzanians) effectively preventing the entry of English lawyers into the profession in Kenya, and breaking the bond between the Kenyan profession and its English forebears. Since then, only a small number of English lawyers (they are Kenyan citizens) are in the profession and their influence on the affairs of the society, once so strong, has considerably reduced. Over time, as the Kenyan legal profession has lost its association with the English model, one aspect that has been affected is the lack of rigour in the management of disciplinary issues. The historical ideological divide on the degree and nature of disciplinary control has persisted, now dividing Nairobi based members and the rest. This divide has been important in the manner in which the society views the regulation of its members. The conservative wing has remained strongly supportive of regulation, while the liberal wing (mostly Nairobi based) views regulation as an unwelcome interference by the government with the affairs of the legal profession.<sup>11</sup>

<sup>10</sup> Under the Advocates (Professional Indemnity) Regulations, 2004 LN 82 of 2004.

<sup>11</sup> Paul Mwangi, *The Black Bar: Corruption and Political Intrigue within the Legal Fraternity* (Nairobi: Oakland Media Services, 2001).

For example, the 1989 enactment of the new Advocates Act came at a time when the profession had a particularly poor relationship with the government. Kenya was then a one party state and in the absence of an opposition, the society had emerged as the de facto opposition to the ruling party which strongly resisted the calls for political pluralism (see Nowrojee's chapter in this book). Attempts at regulation were regarded as an extension of the political differences between the profession and the government, and opposition to these amendments was presented as a fight for the independence of the profession from political control. The then proposed Complaints Commission was presented as a tool for the ruling party to silence members of the profession that were critical of the government.

Notwithstanding the vastly changed political circumstances, where the place of the society in Kenya's public affairs is now greatly altered, and where the government is not necessarily always seen as opposed to the Law Society, residual suspicion from members of the society towards the commission lingers. The true reasons for the enduring suspicion against the commission may have little to do with the perception that it is carrying a political agenda for the government, and may now be more to do with the fact that this is the only convenient response to the commission, from a profession whose members may not always be upright but are looking for somebody else to blame.

To compound the divide between the conservative and liberal wings of the society, from about 2000, another line of fissure has been apparent, pitting Nairobi-based lawyers, on the one hand, and lawyers practising outside Nairobi, referred to as "upcountry" members, on the other. The majority of the society's members, more than half, practice in Nairobi, which dominates the elective positions in the society, and, until 2005, the chair was always Nairobi based. The election of the first upcountry member to the chair occurred in 2005, and was driven by resentment of the dominance of Nairobi members. In what appeared to be a response to this criticism, the Council of the society had, the previous year, resolved to provide modest financial support to the "branches" of the society.

The assertions by this platform were that the disciplinary system in the society was unfair, and was, effectively, the preserve of rich city members, patronizing their upcountry colleagues. A reform of the system, promised in the campaigns leading to the 2005 elections, took the form of Ethics Committees which were set up at the branch level, and to which the public would take any grievances against advocates.

As presented, the ethics committees appeared reasonable, and even benign. However, they impliedly discouraged the reference of complaints to formal struc-

tures of the society, the Disciplinary Committee and the Complaints Commission, which were presented as organs under the control of, and used by, city lawyers to harass their upcountry colleagues.

Further, little thinking appears to have gone into the design of the ethics committees. The council did not reduce this important decision to a document. There was no clarity in the relationship between the ethics committees and the existing disciplinary structures. The limits of the authority of these committees remained unclear, and there was no mechanism connecting their work with the secretariat in Nairobi. As a result, there was no way of knowing if an ethics committee outside Nairobi was working or not, and what its experiences were. Also, no ethics committee was established for Nairobi, even though this is where more than half of the profession practiced. The failure to establish a committee for Nairobi reinforced the view that the formal disciplinary mechanisms were for Nairobi while the alternatives were for the rest of the country. Finally, the public, for whom these committees had been set up, was not informed about their establishment, meaning that committees operated in the hope that members of the public would somehow get to know about their existence and send their complaints to the committees.

However, Cox and Ojienda observed in 2007 that “Significant gains have been made from this innovative approach ... foremost among them being expeditious and convenient resolution of disputes between advocates and clients”.<sup>12</sup>

### **Emergence of the young members of the LSK**

The second major issue affecting regulation is the increasingly young profile of the legal profession. As at 2014, the number of persons who had signed the roll was 11,197, a record size. Table 2 below shows the number of newly admitted advocates for the period 2008 to 2013. It is clear that in the period since 2008 alone, a period of six years, the number of newly admitted advocates constitutes more than a third of the total historical figure. On the other hand, the size of the legal profession has always been rising and has more than doubled in the period covered by the statistics.

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<sup>12</sup> Noel Cox and Tom Odhiambo Ojienda, *The Enforcement of Professional Ethics and Standards in the Kenyan Legal Profession* (Report for the World Bank and LSK, 2007, revised for publication by Noel Cox 2013; published by Cox and Ojienda), para 464 p. 135.

*Table 1: Admission of Advocates in the Last Five Years*

<b>Year</b>	<b>Number of Newly Admitted Advocates</b>
2008	604
2009	465
2010	359
2011	790
2012	812
2013	274
Total	3301

*Source: The Law Society of Kenya*

The elections were also remarkable in the emphasis that they had brought in the divide between the younger and senior members of the society. With more than half of the members of the society classified as young lawyers, their numbers had started taking control of the society when in 2003 a young lawyer, Ahmednasir Abdullahi, was elected chair. All the following elections succeeded in bringing in an ever-larger number of young lawyers to the leadership of the profession, and also in pushing out the older members, now greatly outnumbered, from leadership positions in the society.

The association of discipline with the conservative, often senior, wing of the society has meant that an ever-decreasing number of lawyers in leadership support the disciplinary mechanisms of the society. The fate of an indemnity scheme proposed by the Law Society in 1994 should be understood in the context of these divisions. In contrast with the professional indemnity insurance that is used to compensate clients for losses suffered as a result of negligent acts by advocates, the proposed indemnity scheme was aimed at providing compensation for losses suffered by clients as a result of dishonest acts by advocates. A senior advocate, Peter Hewett, who, after retiring from as a partner in a large settler law firm, went on to become the first chair of the Complaints Commission, and later a judge of the High Court, drew up proposals for the establishment of the indemnity scheme. He also proposed amendments to the Advocates Act which would have provided the Society with the power to examine the client's account maintained by an advocate,

and to require an advocate to submit to a medical examination if it was considered necessary to do so to protect the interest of his client.

The proposals about a compulsory medical examination were inspired by concern over the effect that the HIV/Aids scourge was having on the legal profession. This was at a time when there was relatively little understanding about, and significant amounts of stigma related to, HIV/Aids. Specifically, there was concern that an advocate who contracted HIV could be tempted to spend clients' money on treatment. There was also concern that such an advocate may fail to exercise responsibility to the affairs of his client, in the knowledge that he was about to die.

Whereas advocates became part of the high profile figures in society who succumbed to HIV-related deaths, this response appears to have been motivated by the panic that HIV caused to all sections of the population, and not just in the legal profession.

These proposals were rejected at a general meeting of the Society in 1994. There was considerable opposition to the scheme mainly from the liberal wing who felt that it was an imposition by the conservative wing, of an idea that had no relevance for the Kenyan context.

### **Assessment of the Complaints Mechanism**

While the Complaints Commission and the Law Society are the two institutions on which the functioning of the Disciplinary Tribunal depends, the two have no deliberate mechanisms of working together. Further, the Attorney General, the formal chair of the tribunal has not sat as a member for more than 20 years. Previous holders of the office of Solicitor General used to sit in the tribunal, as the chair in the absence of the Attorney General, but lately, for more than 10 years, the incumbents have not sat in the tribunal.

The lack of involvement by the top government lawyers, the Attorney General and the Solicitor General, in the affairs of the tribunal is viewed as having denuded the tribunal of crucial leadership which the two could have provided.

The commission is required to publish a record of complaints that it handles. The table below shows the number of complaints files opened and closed by the commission over the period of 13 years when it has been in existence.

*Table 2: Closed/Pending Files As At 28-08-2013.*

<b>Year</b>	<b>Total Opened</b>	<b>No. Of Closed</b>	<b>Pending</b>
1990	91	84	7
1991	464	443	21
1992	1710	1690	20
1993	654	644	10
1994	663	636	27
1995	764	646	118
1996	924	803	121
1997	969	784	185
1998	1228	1119	109
1999	1345	1204	141
2000	1374	1240	134
2001	1260	1140	120
2002	1293	1169	124
2003	1880	1193	187
2004	1423	1283	140
2005	348	305	43
2006	410	365	45
2007	373	323	50
2008	355	294	61
2009	165	146	19
2010	276	194	82
2011	218	149	69
2012	173	96	77
2013	100	3	97
<b>Totals</b>	<b>18460</b>	<b>15953</b>	<b>2010</b>

*Source: The Complaints Commission*

In absolute terms, the number of complaints received by the commission has remained relatively small over the years. While the period between 1999 and 2004 saw a dramatic increase in the number of complaints, more than double of the pre-

vious four years, these have reduced in recent years and by 2012, were less than 10% of the highest number recorded, in 2003.

It is plausible that the number of complaints should increase in direct proportion to the increase in the size of the legal profession. The dwindling number of new complaints, however, raises questions that would need further investigation. A number of hypotheses seem reasonable. First, that the ethical standards of the profession have improved, leading to fewer complaints being made against advocates. Secondly, that the system of recording complaints is not reliable and has omitted to capture all the complaints made. Thirdly, there is less public awareness about the complaints mechanisms. Finally, it is possible that the public are no less aware of the mechanism but have decided that complaining is a waste of time.

The year 2003, which has the highest number of recorded complaints, is the year that the NARC government took power, after more than two decades of KANU rule, and announced an ambitious programme to purge the judiciary, of corrupt judges. In the end 23 judges and 85 magistrates were removed in the purge, even though the process has not been without criticism that it was ethnically targeted.

It seems that the hope to fight corruption that was given by the new government also energized the public to seek remedies against advocates, leading to the large numbers of recorded complaints in that year, and the years that followed.

If this assertion is correct, the dwindling number of complaints in recent years must also be explained by political factors, including a sense of apathy that may have set in about the chances of justice before the commission. Whatever the case, it would seem that an independent review of the work of the commission is necessary.

In their book on the disciplinary system of the legal profession, Cox and Ojienda suggest several measures that should be taken to strengthen the commission, including making it legally autonomous as opposed to it remaining a part of the office of the Attorney General (para. 370 p. 112), and providing it with clearer investigative mandates. However, the small number of complaints that it currently handles, and the fact that there is a continuing decline in the number of complaints despite the rising numbers of advocates, would not justify the proposed measures, and as suggested above, there seem to be deeper institutional issues which require to be addressed before any law reform efforts can safely be recommenced.

Without a secretariat of its own, the tribunal relies on, and is effectively part of the Law Society, whose members dominate the tribunal, and whose secretary is

also the secretary to the tribunal. The society serves as the custodian of the records of the tribunal, whose secretarial work it also undertakes.

Whereas, in law, a complaint is made to the commission which may eventually refer the complaint to the tribunal, there is no bar to a complaint being made directly to the tribunal. In practice, the secretariat of the society, as the secretariat of the tribunal, receives complaints directly from the public which it can channel to the tribunal or to the commission for investigation. Also, from time to time, the council of the society refers complaints directly to the tribunal, and without reference to the commission. However, these are relatively few and constitute mainly of complaints against advocates practising without practicing certificates.

In the absence of a register at the society of fresh complaints filed before the tribunal, it was impossible to obtain a statistical sense of the number of complaints received by the society. Also, it was not possible to obtain a record of the number of cases finalized by the tribunal over any particular period, say, annually, making it difficult to build a picture of the movement of complaints within the tribunal, and also of how long complaints takes before the tribunal. Informants, mainly members of the tribunal, or persons who have worked with the tribunal, were asked to provide a sense of how long complaints take before the committee but were unable to provide an answer.

An inquiry was made as to the type of issues raised in the complaints. A common source of complaints is over the failure of advocates to keep their clients sufficiently informed about the progress of the cases. Sometimes, covering of fraud is an underlying reason for failing to inform clients about the progress of their cases.

### **The IBA report**

In 2002, at the request of the society, the International Bar Association carried out a comprehensive review of the disciplinary system for Kenya's legal profession.<sup>13</sup> The report noted that regulatory responsibility in the legal profession is divided among too many individuals and institutions and consequently with no sense of ownership of the system (IBA: para. 145, p. 42). The jurisdiction of courts to discipline advocates as its officers is vague, opening up the system to abuse or under-utilization (para. 170, p. 46). The report recommended that these roles should be streamlined. The society should retain responsibility for the disciplinary com-

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<sup>13</sup> Mark Stobbs *Review of the effectiveness of the disciplinary committee of the Law Society of Kenya and the Complaints Commission* (Nairobi: Law Society of Kenya and International Bar Association, 2002)



mittee which should be taken out of the management structures of the society and should have its own secretariat. A Directions Officer, a position equivalent to the Master in Court in England, should replace the society's secretary on the committee (now Tribunal). The tasks of the officer would be to deal with uncontroversial and administrative matters, set timetables, and ensure that a case is ready for the hearing. The officer would decide whether a case should be continued. An aggrieved advocate should be able to appeal to the tribunal from the Officer's decisions (para. 73, p. 25). Cox and Ojienda support the proposal as to the appointment of a Directions Officer to replace the secretary of the society in the tribunal (para. 52 p. 131).

The report noted the potential conflict between the society and the committee/tribunal and observed that this would be reduced by these changes. It proposed the removal of the Attorney General from the committee (due to the multiplicity of the AG's functions), and recommended that he or she be replaced by a judge. It recommended that there should also be a single agency dealing with investigation and prosecution of advocates. Complaints should only be taken directly to the committee where the prosecutor is the secretary of the society or if the matter is an appeal by a complainant on the failure of the committee to conduct adequate investigations.

The report addressed case management issues, and recommended the appointment of temporary additional staff to bring down the case backlog. Case management had been inefficient due to delays in processing complainants, administrative errors, absence of classifying complainants, failure to update complainants on their cases and discrepancies in numbers of cases in the tribunal and commission (para. 28, p. 16). The IBA recommended the institution of a computerized case management system, with compatibility between the two systems (para. 85, p. 28).

The report noted that cases before the committee tend to take an unnecessarily long time to get resolved: at least four sessions including, hearing, judgment, mitigation and sentencing (para. 31, p. 17). The committee should have a summary procedure to ensure the expedient hearing of simple cases (para. 72, p. 25). It therefore recommended that the committee should endeavour to complete a matter in one hearing unless the issues being addressed are complex in nature.

To address the case backlog, the committee should also be able to hear adjourned hearings in the absence of the full panel, as long as there was presence of one advocate and one lay representative (para. 76, p. 27). The committee should also have its own set timelines for dealing with the different severity of offences (para. 48, p. 21). The IBA recommended several additional administrative and procedural reforms to speed up the completion of the complaints.

Regarding the enforcement of orders, the report noted the tendency of advocates to seek judicial review of orders of the committee which, in many cases, was abused as they did not pursue the matter further after obtaining a stay of sentence against orders of the committee. The report noted that advocates behave like this because of the absence of a stay of sentence in appeals of orders from the committee, and recommended the provision of a stay of sentence in the appeal procedure, especially in reference to sentences of striking off, suspension from the roll of advocates or fines of more than Kshs. 50,000/- (para. 97, p. 31).

Advocates also sometimes ignore the orders of the disciplinary institutions and in extreme cases even continue to practice after being struck off or suspended from the roll of advocates (para. 42, p. 19).

The report recommended the appointment by the society of an officer to pursue payment of court fines and enforcement, and establishment of a formal liaison between the society and the Registrar to ensure that judges are informed of the striking off and suspension of advocates immediately, and the records of the two bodies coordinated (para. 102, p.32). There should be careful assessment of costs of setting up offices of the Disciplinary Tribunal outside Nairobi (para. 107, p. 33). Other options would include employees of the commission visiting the complainant, instructing local advocates to interview the complainant and prepare a report. Where an effective case management system was in place, numbers of required hearing sessions would also reduce (para. 108, p. 33). Alternatively, boards of inquiry, in which local advocates investigate a complaint and take informal action or refer to the tribunal, could be restored if the backlog were reduced (para. 109, p. 34).

### **Other recommendations**

1. The mandate of Cox and Ojienda was to review progress since the Stobbs Report. Many of their recommendations on the legal profession were based on that report, and it is noteworthy how many these are: in other words, practical suggestions in the Stobbs Report that had not been implemented several years later. These repeat recommendations include:
  - that the committee/tribunal should have a summary procedure to deal rapidly with less serious cases (para. 440 p. 130)
  - that there be a procedure for dealing with advocates who become ill before a hearing (para. 445 p. 11)

- that there should be in the rules sanctions for failure to prosecute appeals expeditiously (para. 446 p. 131)
  - that the committee/tribunal should prepare guidelines on sentencing (para. 453 p. 132)
2. However, they also make a number of their own detailed recommendations on the commission and the tribunal, a large number of which address day-to-day management and administrative issues. The recommendations on the commission are predicated on an assumption that all it needs is an improvement of capacities. As indicated above, however, it would be safer if any recommendations on the commission also address the unaddressed systemic issues that have resulted in the decrease in the number of complaints it handles.
3. Among their own recommendations were:
- that the Complaints Commission be renamed the Advocates Investigation Commission (para. 377 p. 113)
  - that the Act be amended to specify the penalty for the offence of failing to assist the commission (para. 379 p. 114) (a redundant recommendation as they apparently overlooked s. 85 of the Act that does just this)
  - that the judiciary be informed promptly of any suspension or striking off of an advocate (para. 454 p. 133)
  - that the committee/tribunal be empowered to order that an advocate be supervised by a specified senior member of the profession (para. 457 p. 133)
  - that greater publicity be given to the disciplinary proceedings and outcome so that the public become aware (paras. 458-9 p. 133)
  - that the Advocates (Practice) Rules be amended in various respects including the inclusion of “general ethical requirements” (para. 492 p. 169).
4. A unique recommendation that they make is for the appointment, by the Attorney General, of a legal profession ombudsman whose tasks would include:
- reviewing a decision of the LSK to close a file on a complaint
  - reviewing the decision of the Commission to do the same
  - Monitoring the whole system and propose improvements (para. 382 pp. 114-5).

5. The authors point to the systems in Ontario and England as examples; the then English system of an Ombudsman to monitor how others dealt with complaints has in fact now been replaced by an ombudsman system to deal with complaints, and also to help lawyers deal with complaints and the public to complain direct to their lawyers about poor service.<sup>14</sup>

To be fair, a few of the Stobbs recommendations were implemented, and the Cox and Ojienda report did identify some improvements that had taken place. And a few of the suggestions of the latter have in their turn been implemented.

## Conclusions

Kenya's private legal profession has had a low trust relationship with the government, in which most actions by the government towards the profession are viewed with suspicion. There has been good reason for the profession to suspect the government particularly during periods of political repression, which the profession stood up to challenge. However, as demonstrated above, the profession also has its weaknesses, including lack of accountability on the part of its members in their relationship with the public that they serve.

The government has a duty to protect the public and to ensure accountability by members of the legal profession to the public, and this duty ranks higher than the profession's craving for independence. As indicated above, the profession has deployed arguments about professional independence to defeat calls for accountability. The government needs sufficient enlightenment as would differentiate between the genuine interests of the profession as to independence on the one hand, and its duty to account to the public, on the other. On its part, and as a matter of enlightened self-interest, the profession needs to invest in processes that would increase and demonstrate accountability to the public as a justification to its continued claim for independence. The uncertainties that characterize the arrangements for the governance of the profession do not provide confidence that the profession is well-run. Further, there is pervasive opacity in the management of the disciplinary committee, making it difficult to demonstrate that this is going well. Further, the society has enabled little public scrutiny of its internal processes and it is not surprising that there is little public understanding of what goes on inside the profession.

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<sup>14</sup> Legal Services Act 2007.

The relationship between the government and the profession is largely dysfunctional in that while, for long periods, the profession has not been able to demonstrate a convincing amount of effective self-governance, this has not translated into greater pressure for control from the government. It seems that government attention to this subject has been discouraged by claims for independence by the profession.

The voice of the Law Society in the judicial reform process has been important. While necessary, the reform of the judiciary is not sufficient to increase access to justice, without the reform of the private legal profession, as a significant counterpart to the judiciary. While there has been abundant attention to judicial reforms, there has not been comparable attention to the condition of the private legal profession.

While the historical ideological divides in the society have played a role in preventing a process of internal scrutiny within the society, it is suggested that times have changed significantly, and the society needs to re-evaluate its relationship with the government, which it should regard as a partner, rather than an adversary. Further, arguments that advance the self-interest of the profession that have been deployed to defeat the process of accountability are easy to see through and cannot be raised in the new circumstances.

The report of the IBA is the most comprehensive recent effort to discuss the internal condition of the legal profession in Kenya. A small aspect of the report, to do with expanding the membership of the Disciplinary Committee was achieved, but the principal recommendations were never discussed or implemented. With a membership of more than 10,000 advocates, the Law Society is now a much larger organization than when the profession's regulatory mechanisms were designed. With the exception of setting up of the Complaints Commission in 1989, the system has remained unchanged for more than half a century. The recommendations that consideration be given to separating the Law Society from the disciplinary mechanisms have previously been made. It is proposed that the time may have come to finally give the disciplinary mechanisms separate status. The Law Society should continue paying for the regulation, but this would institutionally be removed from its secretariat. The secretariat would have its own head, appointed by a board which would have representation from the Law Society.

The outfit would be financed by levies made on members of the society and also fines imposed following disciplinary proceedings. Both in the manner of election and with regard to its functions, the Disciplinary Committee would remain unchanged, but the Attorney General, currently the chair of the committee, would

cede the position to a judge appointed by the Chief Justice in consultation with the society. The committee may sit in panels. The effect of this recommendation is that the Complaints commission which currently investigates complaints would be abolished and the new entity would replace both the commission and the secretariat of the society in addressing complaints against advocates.

It is clear from the available data that the Complaints Commission is in decline. The number of complaints that it receives has decreased alarmingly. It was not the purpose of this study to find out why the commission is facing decline. It is not possible to justify additional investment of resources in the commission, when, from the workload, it has such little business. Given the increased number of advocates, which should translate into a larger number of complaints, it is surprising that the commission is attracting so little work. The foregoing discussion means that the commission would be abolished and it would not be necessary to address its existing weaknesses. However, if a decision is made to retain the commission, it is recommended that the office of the Attorney General should carry out a comprehensive independent probe into the internal affairs of the commission, with a view to repositioning its relationship with the public.

This research was unable to address the question of case management within the disciplinary committee, as the Law Society was not forthcoming with relevant information. The unavailability of the information is itself a problem, and points to the possibility of deliberate opacity or poor information management. It is recommended that a follow up research should deal with this issue and determine the efficiencies and challenges that are evident in the manner in which cases are currently managed. There is a lack of public information about the regulatory mechanisms of the legal profession and of popular championship of the issues that surround the regulation of the legal profession. It is suggested that this issue be addressed through the Law Society issuing regular public information to the effect that it is committed to the regulation of its members and providing them with practical information as to where they can get help when they need to make complaints, and also what they should expect of the mechanisms once they engage with them. By explaining to the public what it should expect, this will also amount to a pledge to a minimum set of standards for the complaints mechanisms.

# LEGAL EDUCATION AND LAWYERS

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Patricia Kameri-Mbote

## Introduction

It may come as a surprise to know that there was no university education in law in Kenya until 1970 (other than service courses for other programmes). During the colonial period the British were reluctant to provide for legal education for Africans, even overseas, convinced they would turn into political trouble makers, like Gandhi and Nehru.<sup>1</sup> Nyerere's commitment to getting African lawyers led to a very rapid implementation of the Denning Report recommendations on *Legal Education for Students from Africa*,<sup>2</sup> with the University College in Dar es Salaam starting in 1961, with law as its only discipline, with 12 students, of whom at least 4 were Kenyan. But Kenyan lawyers had even been opposed to the idea of the Dar es Salaam law school, preferring the system of articles, a form of apprenticeship, followed by a period of formal training – at a time when this method of training lawyers was dying out in England.<sup>3</sup> There is a growing feeling<sup>4</sup> that legal education needs to change to keep up with the times especially in the context of new age constitutions, regional integration and globalization.

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<sup>1</sup> See e.g. Yash Ghai, "Law and Lawyers in Kenya and Tanzania: Some Political Economy Considerations" in CJ Dias *et al.*, *Lawyers in the Third World: Comparative and Developmental Perspectives* (Uppsala and New York: Scandinavian Inst. of African Studies and International Centre for Law in Development, 1981) 144 at p. 173-4.

<sup>2</sup> *Report of the Committee on Legal Education for Students from Africa* (The Denning Report) (London: HMSO, 1961) Cmnd 1255

<sup>3</sup> See Ghai and McAuslan, *Law and Political Change in Kenya: A study of the legal framework of government from colonial times to the present* (Nairobi: Oxford University Press, 1970), pp. 395-6.

<sup>4</sup> See e.g. Ndulo, Muna, "Legal Education in Africa in the Era of Globalization and Structural Adjustment" (2002). *Cornell Law Faculty Publications*. Paper 54. <http://scholarship.law.cornell.edu/facpub/54>

The articling route to qualification did not disappear in Kenya until 1989.<sup>5</sup> Since then the entrant to the profession has required a degree in law, plus a more practically oriented course, taught at the Kenya School of Law (KSL). It is with these elements in professional formation that this chapter is concerned, and not the continuing education process that a practising lawyer must undergo to retain a practising certificate. The University of Nairobi's Faculty of Law, now School of Law, is Kenya's oldest institution offering law training and was opened in 1970. Moi University Law School was established in July 1994 as the second public law school, admitting its first group of law students in September of that year. The Catholic University of East Africa Law School was established in 2004 as the first private law school.

Today, six public and six private universities are offering law degrees in Kenya. From the following Table it can be seen which universities are sufficiently well established to be feeding graduates into the KSL; columns relating to public universities are emboldened and in italics.

*Table 1: Admissions to the Advocates Training Programme between 2003 and 2014*

Year	Nairobi	Moi	Catholic	JKUAT	Kenyatta	Mt. Kenya	Foreign Universities	Totals
2003/04	206	198	N/A	N/A	N/A	N/A	121	525
2004/05	178	146	"	"	"	"	84	408
2005/06	220	156	"	"	"	"	132	508
2006/07	253	242	"	"	"	"	132	627
2007/08	252	242	"	"	"	"	126	620
2008/09	245	199	"	"	"	"	218	662
2009/10	188	289	75	"	"	"	173	725
2010/2011	181	276	118	"	"	"	185	760
2011/2012	182	385	140	"	"	"	168	875
2012/2013	259	413	139	38	"	"	216	1065
2013/2014	299	304	72	43	95	1	210	1024
2003-14	Grand Total							7799

<sup>5</sup> This system was phased out through the 1989 re-enactment of the Act. (See the Advocates Act No. 8 of 1989.



The public universities are: University of Nairobi, Kenyatta and Moi Universities, Jomo Kenyatta University of Agriculture and Technology, and in the last few years, Egerton and Kisii universities have started law degrees. Maseno University says that it is in the process of setting up a School of Law,<sup>6</sup> Jaramogi Oginga Odinga University is also establishing a law school while Pwani University includes a law school in its 2010-20 Strategic Plan.

As at June 2013 the Commission for University Education reported that it had approved the offering of law programmes by the following private universities:

- Proposed Umma University (Bachelor of Arts in Islamic Sharia approved 25/06/2012)
- Riara University (Bachelor of Laws approved 25/09/2012)
- Kabarak (Bachelor of Laws approved 24/03/2010)
- Strathmore (Bachelor of Laws approved 14/12/2012)
- \*Africa Nazarene University (Bachelor of Laws approved 16/11/2009)
- Daystar University (Bachelor of Commerce: Law Option approved 17/12/2008)
- \*Catholic University of Eastern Africa (Bachelor of Laws approved 30/06/2008)
- \*Mount Kenya University LL.B.

Of these we have seen that the ones asterisked have already begun to graduate students who have gained admission to the KSL. Riara, Kabarak and Strathmore have active degree programmes. Africa Nazarene had their first batch of students admitted to KSL in 2014. Umma University, Presbyterian University of Eastern Africa and Daystar University are yet to graduate law students.

Most of the law schools, no matter where the university is based, are to be found in Nairobi: this is true of Mount Kenya University (Moi Avenue), JKUAT (Karen), Kenyatta (Parklands), while Nairobi, Riara, Strathmore, African Nazarene and Catholic Universities are based in or near the capital. However, Nairobi has campuses teaching law in Mombasa and Kisumu. The rise in the number of schools and campuses offering law courses has to be seen within the context of the enhancing access to higher education. Many universities have viewed law as a low investment course that is easy to mount. Many universities view law schools

<sup>6</sup> Newsletter September 2013.

as cash cows and pressure them to become profit centres. The offering of parallel law degree courses<sup>7</sup> in public universities is fuelled largely by this pressure. These programmes have grown exponentially and now account for close to seventy per cent of students studying law in some public universities. Private universities have no parallel courses as their students are all self-sponsored. The pressure on nascent law schools to break even and generate resources for their universities has seen these schools double or triple their intakes within a very short time. For quality to be maintained, increases in law students must be accompanied by increases in teaching and infrastructural resources such as staff and library among others which in most instances has not happened. The role of the Council of Legal Education becomes very critical here to ensure that growth of student numbers does not compromise the quality of instruction.

### **Regulating Legal Education**

Formal and institutionalized regulation of legal education in Kenya is traceable to the colonial days when the Advocates Ordinance 1961 was enacted.<sup>8</sup> Under that framework the Council of Legal Education (CLE) was an administrative body and its function was limited to the vetting of candidates for admission to the roll of advocates. The Akiwumi Report expanded the mandate and status of the Council.<sup>9</sup> It detailed the structural, organizational and operational problems of both the Council of Legal Education and the Kenya School of Law and suggested radical but practical changes. However, it missed the point in failing to see the two facets of the development of legal education as it treated the Council and the School as one and the same institution (Akiwumi Report p. 6). It imposed operational and training mandates on the Council thus making it impossible for it to exercise its oversight role. The Muigai Report is heralded as the most comprehensive report on legal education in Kenya. It formed the basis for the existing legislation which delinks training on law from its regulation.

The Council of Legal Education Act was passed in 1995, but various changes were made under it by regulations, until new legislation could be passed. The CLE was established under the new law as the regulator and tasked, in collaboration with others, to regulate all aspects of legal education including accrediting and licens-

<sup>7</sup> Referred as parallel to the courses for students on government sponsorship.

<sup>8</sup> Report of the *Ministerial Task Force on the Development of a Policy and Legal Framework for Legal Education in Kenya*, (Nairobi: GoK, August 2005) (Muigai Report), para.31, p.5.

<sup>9</sup> *Report on Status and Management of the Kenya School of Law* (Nairobi: Government Printer, 1994).

ing providers and prescribing the core course structure for legal education at the university level and the training of lawyers at the Kenya School of Law. The Advocates Training Programme (ATP) was redesigned to make it a vocational, practical mandatory training programme in 2006 and reviewed in 2009. In 2007 regulations were made to separate the CLE function of accreditation from KSL training sharpening the regulatory role of the CLE. Regulations on Accreditation of Training Institutions were made in 2009.<sup>10</sup>

As noted above, CLE and Kenya School of Law were for a long time essentially one and the same thing. Most of the functions of CLE had been delegated to the Kenya School of Law. This meant that CLE did not have any meaningful framework for establishing links with other actors in the legal education whether as trainers or regulators. Consequently, CLE did not perform the role of licensing or supervising the training of law by either public and private universities and largely operated as the board of the KSL until the regulatory role of CLE was carved out as distinct from management of the KSL (Muigai Report p. 13). There was thus a need to subject KSL to the full rigour of the regulatory and supervisory mandate of the CLE just like any other provider of legal education (p. 18). This has been attained through the severance of the Siamese twin relationship that existed between the Council and KSL by the passage of the Legal Education Act (governing CLE) and the Kenya School of Law Act. The latter is now under a board

### **Legal Education Act**

The Act establishes the Council of Legal Education and the Legal Education Appeals Tribunal, and provides for the regulation and licensing of legal education providers and for connected purposes.<sup>11</sup> The objective of the Act is to promote legal education and maintain the highest possible standards in legal education, and to provide a system of guaranteeing the quality of legal education and legal education providers (s.3). The functions of the Council are to regulate legal education and training in Kenya; license legal education providers; supervise legal education providers, and advise the Government on matters relating to legal education and training (s. 8(1)). It also has the mandates of setting and enforcing standards relating to the accreditation of legal education providers for the purpose of licensing, prescribing curricula and mode of instruction and mode and quality of examina-

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<sup>10</sup> LN 170 of 2009

<sup>11</sup> Legal Education Act, Act. No. 27 of 2012.

tions, harmonization of legal education programmes and the monitoring and evaluation of legal education providers and programmes (s. 8(2)). The Council also has the role of making regulations in respect of requirements for admission into various legal education programmes, establishing criteria for recognition and equation of academic qualification in legal education and advising the government on the standardization, recognition and equation of legal education qualifications awarded by foreign institutions (s. 8(3)).

The Council is a body with roughly equal membership from or nominated by government, and from the profession. Though the Chair is to be a senior counsel, he or she is nominated by the Attorney-General (the legal advisor to the government), and other members of the Council are the Attorney-General, the Principal Secretaries of the Ministries responsible for legal education and for finance, the Chief Justice, four advocates nominated by the Law Society and one academic (s. (5)). This makes for a body that may have little understanding of legal education, and particularly unlikely to know much about modern developments in the field. At least at present both the Attorney General and the Chief Justice are former academics, but this is likely to be rare.

### **Accreditation of Legal Education Institutions**

Accreditation is a public confirmation that an institution continues to maintain minimum standards for delivery of quality programmes.<sup>12</sup> It is thus an assurance to stakeholders that a particular accredited provider is in a position to offer legal education that is relevant and of quality and ensures that graduates are adequately possessed of skills that will make them competitive both locally and globally (p. 8). Accreditation provides an opportunity for supervised self-discovery for purposes of improvement. And lastly, it provides a benchmark in legal education and training (pp. 15-16). In undertaking accreditation, CLE is guided by principles that ensure fairness, merit and equity and institutional autonomy, that accreditation is a collegial process and that accreditation is done for the common good (pp. 12-13). It is done for purposes of licensing, quality assurance and for enforcement of the CLE regulations. It is a mechanism for imposing, supervising and maintaining standards in legal education and training. Accreditation for quality assurance encourages institutions to mainstream quality assurance (p. 18) and to ensure that the rules and

<sup>12</sup> Council of Legal Education, *Handbook for Legal Education Accreditation* (Nairobi: the Council, July 2011), p.7.

regulations are adhered to and respected. It also ensures that any illegal legal education provider is shut down or programme discontinued (p. 19).

CLE also issued guidelines for accreditation which are broad but not exhaustive. Any document prepared for purposes of compliance must include an introduction (form, nature of existence, character and other relevant information), the institution's vision and mission, its objectives, and details of its governance, quality control and maintenance, curriculum development and student assessment, student services and support, staffing, staff qualifications and ethics, research and publications, and infrastructure and academic resources (pp. 21-28). Essentially, therefore accreditation should be understood to require a continuous process of self-analysis, inspection, re-evaluation and improvement which, when complete, should ensure improved programme contents, mode of delivery and supporting resources (p. 13).

Most legal education providers have not met the stringent requirements for accreditation. Only relatively new schools of law - Kenyatta University, Riara University, Strathmore University and Kisii University College - are fully accredited to offer degree programmes in law.<sup>13</sup> Despite the advantages of accreditation, public confidence can be eroded when renowned and older institutions such as the University of Nairobi, Moi University and Catholic University of Eastern Africa are yet to get full accreditation and continue to operate under provisional accreditation notwithstanding their long existence and proven track record in terms of trail blazing alumnae, solid academic programmes and faculty to deliver the programmes. Indeed accreditation seems to work against large and older institutions that have students already going through the law programme. In fact Moi University and Presbyterian University (private) were listed by the CLE as having been provisionally accredited, but having their status under review for "non-compliance" (Presbyterian University is experiencing difficulties in connection with its accreditation generally). Kabarak, African Nazarene, Catholic and JKUAT are also listed as "provisionally accredited". The CLE also indicates that it is "in discussion" with other institutions.<sup>14</sup>

The legal position under the Act is that a person graduating with a degree from a non-accredited institution is not eligible for admission to the KSL. CLE

<sup>13</sup> The CLE's notification of accreditation is on the Riara University website at <http://www.riarauniversity.ac.ke/accreditation-legal-education-institutions-kenya/>

<sup>14</sup> Listed as Bondo University College (now Jaramogi Oginga Odinga University), Chuka College (now University), Elgon View College, now Pioneer College, Nairobi Aviation College, Kiriri Women University, Foundation Institute of Africa Limited, MIS Centre, College of Management, KCA University, Leader Institute and Inoorero University (International University of Professional Studies).

has extended its reach to universities outside Kenya and visited universities offering university education to Kenyan students seeking admission to KSL. It has for instance, barred KSL from admitting students from some universities in Uganda on account of the non-conformance of their institutions with requirements of CLE.

How has this happened? The benchmarks set by CLE for accreditation include lecturer-student ratio (currently set at 1:15) and core text: student ratio (currently at one copy of each core text to five students). These favour smaller nascent institutions. The setting of the lecturer-student ratio does not seem to take into consideration the aggregate number of law teachers available. There are not many committed law teachers in Kenya, and private practice remains more appealing for many. The opening up of opportunities for lawyers with graduate degrees in constitutional commissions and the judiciary with the promulgation of the 2010 Constitution has robbed the academy of a sizeable pool of qualified law teachers, further aggravating the shortage.

Indeed, as new institutions grow, they are likely to cease to satisfy the criteria because, as noted above, while many law schools start with one classroom stream, they expand to a double or triple stream within a very short span without matching the student population growth to the staff, teaching and other necessary resources. In Table 1 above, it is interesting to note that Moi University has a larger output of students – almost doubling between 2010 and 2013 - than Nairobi which has arguably the largest and most sturdy staff contingent. CLE needs to establish the number of schools that can be sustained by the number of law teachers available to ensure that quality legal education is offered. Absent this, all universities will establish law schools without the requisite staff as these are seen as needing least investment in terms of infrastructure and this will affect quality in the long run.

Another issue with regard to the role of CLE is that it may overlap with that of the Commission for University Education (CUE) established under the Universities' Act No. 42 of 2012. The Act seeks to provide for the development of university education; and the establishment, accreditation and governance of universities. Private universities are required to get accreditation from CUE to start new courses and those that have established law schools have had their accreditation by CUE pegged to accreditation by CLE. It is however not clear how CUE and CLE synergise their accreditation processes and issues may arise where a University gets the nod to start a law school from CLE and proceeds without going back to CUE. CUE usually visits law schools after CLE and it is not clear what the former is looking for in addition to what the latter inspected.

## Programmes and Curriculum

The Legal Education Act does not define “legal education” but its specific provisions seem to contemplate only programmes that lead to the award of a certificate, diploma and post-graduate diploma or bachelor’s degree in law that are intended to be professional qualifications in law (s. 22, Second Schedule, and s. 18). Legal education for this purpose does not seem to extend to Masters and PhD programmes which are offered in some universities. It is suggested that this is desirable: there seems no good reason why a body set up to improve the quality of those admitted to the profession should be concerned with programmes not serving that function. This would be an unjustified restraint on the constitutional right of academic freedom (Article 33(1) (c)). It is suggested that the universities and the CUE are the bodies to maintain standards in other courses.

The legislation is very stringent in terms of curriculum content. At the degree level the core courses are outlined in Part II of the Second Schedule. Core courses at the post-graduate diploma (provided by the KSL) level are in Part III of the Second Schedule.<sup>15</sup> Part I of the Second Schedule outlines the core courses at certificate and diploma levels, which are programmes offered for paralegals.

The core courses for an LLB degree are: Legal Research, Tort, Contract, Legal System and Method, Criminal Law, Family Law and Succession, Evidence, Commercial Law (including sale of goods, hire purchase and agency), Law of Business Association, Administrative Law, Constitutional Law, Jurisprudence, Equity and Trusts, Property Law, Public International Law and Labour Law. It is interesting to compare this list with that currently applied to English law programmes, since the whole concept of core courses originated there: i) Public Law (including Constitutional Law, Administrative Law and Human Rights); ii) Law of the European Union; iii) Criminal Law; iv) Obligations (including Contract, Restitution and Tort); v) Property Law; vi) Equity and the Law of Trusts. The English requirements include that law study comprise at least two years of a three or four year degree, including some during the final year (this makes it possible for a student to do a joint “law and another subject” degree). There are requirements about the nature of legal skills to have been acquired during the programme.<sup>16</sup> And the student must

<sup>15</sup> They include Civil Litigation, Criminal Litigation, Probate and Administration, Legal Writing and Drafting, Trial Advocacy (including clinical programme), Professional Ethics, Legal Practice Management, Conveyancing, Commercial Transactions and Pupillage (six months attachment).

<sup>16</sup> See the Joint Statement of the two professions at <http://www.sra.org.uk/students/academic-stage-joint-statement-bsb-law-society.page>. The “skills” requirements are: “**a. Knowledge:** Students should have acquired. Knowledge and understanding of the fundamental doctrines and principles which underpin

have attained at least a lower second class degree.

The Kenyan student takes a four-year degree, during which 16 core subjects must be taken. Universities generally have their own broad courses that all students must take (University common courses) and these vary from institution to institution with some having as many as eight and others as few as one. One of the recommendations of the Akiwumi Report was that the various institutions providing legal education should identify their niche areas of operation and put more emphasis on these areas. Identifying a niche for a law school can be challenging considering that all schools must teach the 16 compulsory courses. In universities that have many university common courses, the identification of a niche can be a tall order when balanced against the time available on the time table and the fact that at undergraduate level, general and basic tenets of law are taught with specialization anticipated to be attained at post graduate levels. There is indeed little room for innovation and schools have found that in the quest to establish a niche, they have overburdened their students with very heavy course loads. Many schools are reviewing their curricula to address this issue. In Nairobi for instance, more time has been allocated to the core law courses required by CLE in the first to third years of law school with the fourth year allowing for electives along specializations grounded on the core courses taught.

Of the accredited schools, the following are the identified niches: commercial, financial and information communication technology law; education; and training for the public service. Schools have interpreted niche to mean different things with some looking at it as a specialization and others as pedagogical approach.

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the law of England and Wales particularly in the Foundations of Legal Knowledge; A basic knowledge of the sources of that law, and how it is made and developed; of the institutions within which that law is administered and the personnel who practice law; The ability to demonstrate knowledge and understanding of a wide range of legal concepts, values, principles and rules of English law and to explain the relationship between them in a number of particular areas; The intellectual and practical skills needed to research and analyse the law from primary resources on specific matters; and to apply the findings of such work to the solution of legal problems; and The ability to communicate these, both orally and in writing, appropriately to the needs of a variety of audiences.

**b. General Transferable Skills:** Students should be able: To apply knowledge to complex situations; To recognise potential alternative conclusions for particular situations, and provide supporting reasons for them; To select key relevant issues for research and to formulate them with clarity; To use standard paper and electronic resources to produce up-to-date information; To make a personal and reasoned judgement based on an informed understanding of standard arguments in the area of law in question; To use the English language and legal terminology with care and accuracy; To conduct efficient searches of websites to locate relevant information; to exchange documents by email and manage information exchanges by email; To produce word-processed text and to present it in an appropriate form.”



Moi University, established as the second law school in Kenya, was distinguished for using clinical legal method of training where students are engaged in offering legal services to live clients under the supervision of qualified lawyers. Since the students are not qualified to appear in court, they only assist in the preparation of cases that are picked for representation in court. It retains this niche – evidenced by the stellar performance of its students in moot competitions. It is also notable that students from the School are a critical partner at the Legal Aid Centre in Eldoret (LACE) which is based at the Academic Model of Providing Access to Healthcare (AMPATH) network within the Moi Referral and Teaching Hospital. LACE represents people whose access to justice is otherwise limited, particularly people living with HIV.

The curriculum for Riara University is crafted to nurture a problem-solving lawyer, aware of the social, economic and political contexts within which the law exists and with an international perspective.<sup>17</sup> It will however be difficult for legal education providers which are faculties or departments of another institution which already has identified its niche area. This may be in discordant with the CLE's aim of equipping graduates with high quality and relevant education in any legitimate field of legal practice, and to contribute to current circumstances and prepare for future developments. The practice has been that the law schools align their niche as far as possible with the broader university niche by introducing related courses. For instance, Strathmore Law School has tailored its curriculum along the lines of business and information technology courses which are well established in the University. Another way in which law schools and faculties fit into the broader university niches is through the University common courses. Strathmore, ethics and philosophy courses are offered for all students. In universities aligned to church organizations require students to take courses in the religious books as common courses.

The CLE also requires legal education institutions to develop visions which are in line with the entire institution's objective. Many universities have global university strategic plans with clear visions and missions, teaching philosophy and objectives. They cascade these to the law school and in most cases uses them to identify a niche. For instance the vision of the University of Nairobi is 'a world class university committed to scholarly excellence'. The University of Nairobi School of Law is to be a 'world class law school' and its identified niche is to equip a highly trained cadre of legal practitioners for the nation, region and internation-

<sup>17</sup> See generally <http://www.riarauniversity.ac.ke/law-school/>, accessed on 18/01/2014.

ally in crucial spheres in the private and public sectors. The School, like the mother University also identifies its role as a mentor to upcoming law schools through training and sharing of its human resources.

Section 22 (2) of the Legal Education Act provides that a legal education provider may, in addition to the prescribed courses, offer any other courses to persons pursuing a certificate or diploma in law. Additionally, a legal education provider offering a course for the award of a degree in law may offer any other programmes that it may consider necessary, taking into account the developments in the law and society generally (s. 23(2)).

According to the Muigai report, a properly planned and integrated education system must have a theoretical (conceptual) segment which is general and broad based; a vocational segment for dispensing specific skills, and a continuing education framework to invigorate professionals in the field (para. 31). However, most universities teaching law are focusing on the theoretical framework, while vocational and continuing professional education is mainly handled by KSL. Most of the new institutions offering law have not incorporated the theoretical, vocational and continuous education frameworks, since their law programmes are not yet fully developed and lack requisite resources. There is probably a case to be made for defining the areas that law schools should focus on as mainly academic and leave vocational and advocacy training to be addressed in the professional training at the KSL or similar institutions. Another way of addressing this issue is by adopting a diversity of pedagogical approaches in teaching at law schools. A clear definition of aims and objectives is imperative in striking the necessary balance. Most law schools have also not started offering masters and PhD programmes. This is probably due to lack of sufficient number of lecturers with a PhD qualification.

The Muigai Taskforce further recommended that the academic programmes in place should allow for progression from one level to another in order for one to be able to develop their skills and in order that they are able to refresh their memories through the continuing education process. This recommendation arose from the fact that most of these institutions only allowed for those who had done well in their secondary school examinations to be admitted for their degree programmes and those who were holders of diplomas were not able to progress naturally to upgrade their qualifications through admission into degree programmes. They would consequently be confined to performing supportive roles or the duties of paralegals. Section 8 (1) of the Kenya School of Law Act now mandates the Council to formulate a system for recognizing prior learning and experience in law to facilitate progression in legal education from lower levels of learning to higher levels. The

ATP is a form of progression in legal education from lower levels to higher levels (Denning Report).

One of the functions of the CLE is to develop curriculum. In this regard, the role of the regulator is to provide a template curriculum, and leave syllabi development with individual institutions.<sup>18</sup> CLE has set benchmarks in relation to programmes. Before developing a legal education programme, an institution must conduct a feasibility study so as to identify a niche area which will act as a justification for the establishment of the programmes (Accreditation Handbook p. 27). The programme should put emphasis on the reasoning, analytical skills and perspectives that a lawyer needs to discharge their many responsibilities.<sup>19</sup> It should also adequately prepare the student for the market. It seems that institutions already established before the drafting of these guidelines will have difficulties complying with this provision. This is because feasibility studies for these institutions may have to be done in a rather subjective manner so that they fit within their niche areas. This will be the case for universities like Moi and Nairobi.

The legal education institutions are also required to provide CLE with the course outlines used for the units they offer. This is meant to guide the students in identifying the areas they need to put more focus on and when and how the respective units are to be taught. Course outlines are to be constantly updated so as to ensure that the courses taught keep up with the constantly changing realities. This is important in light of the rigid curricula in the legal education institutions where there are no incentives to constantly update the curricula. Interestingly, in starting new law programmes, some universities have copied the curricula of other law schools with minimal changes. Such institutions may find it difficult to constantly update their curricula as it is not home grown and well internalised by the staff implementing it. The handbook also provides that legal education institutions are to offer comprehensive programmes which include the offering of all the 16 core units provided for by law and other units meant to develop the professional competencies of the students.

The institutions are also to ensure that their programmes are up to date and that the curriculum used is constantly updated. This is seen to be an important aspect in seeking to encourage research from the institutions towards the development of their programmes and thus more attention given to legal research. The

<sup>18</sup> Muigai Report p. 31.

<sup>19</sup> Samuel O. Manteaw, "Legal Education in Africa: What Type of Lawyer Does Africa Need?" available at [http://mcgeorge.edu/Documents/Publications/02\\_Manteaw\\_MasterMLR39.pdf](http://mcgeorge.edu/Documents/Publications/02_Manteaw_MasterMLR39.pdf) accessed on 18th January 2013

introduction of research-oriented courses, it is said, would enable graduates to conduct independent research on the tasks they face in practice and write meaningful and informative papers.<sup>20</sup> The development of such courses is also seen as encouraging the development of the skills a person would need in order to be competitive both locally and globally. Unfortunately, most of those who teach law have other engagements elsewhere and thus most of their time is not spent in teaching law. Most lecturers are also not qualified to supervise students taking their masters' and doctoral studies. This is because there are only a few professors in law.

Apart from the curriculum and human resources, CLE also requires the legal education institutions to provide a list of the physical facilities available for the provision of legal education and the number of students using these facilities. Great emphasis is laid on information communication technologies. This requirement is necessary in light of the rising number of students joining universities to study law and it is intended to ensure that facilities are aligned to the number of students. This explains why large universities like Nairobi are yet to be accredited. On a positive note however, accreditation has provided these institutions with an incredible opportunity to negotiate for improved facilities, more staff and more investment in the schools generally.

### **Modes of Teaching**

The Akiwumi Report noted that legal education involved passive rather than active learning (p. 25). Modes of training in legal education are diverse. They range from lectures, tutorials (mostly in the University of Nairobi), seminars, group work and clinical approaches. The modes of assessment in universities are varied. At the University of Nairobi 30% normally comprises coursework which includes oral presentations, group work, written assignment and continuous assessment tests. At the Kenya School of Law the mode of training comprises of lectures, participation in moot courts, clinics and any other practical outputs and coursework and assignments (KSL Act s. 19(3)). Most assessment at the KSL includes oral examination constituting 20%, group work comprising 20% and a written final examination constituting 60% of the total marks. Students are required to attend at least two thirds of the lectures offered by most legal education providers.

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<sup>20</sup> Muna Ndulo, "Legal Education in Africa in the Era of Globalization and Structural Adjustment" 20 Penn St. Int'l L. Rev. 487 (2001-2002) online at <http://scholarship.law.cornell.edu/facpub/54>

Notably, the accreditation process has placed a high premium on the establishment of state of the art moot court rooms at the law schools. Given the domains of legal education, there is need, as noted above, to balance the academic and professional (advocacy training). For instance most schools have had to axe procedure and professional ethics courses, which are not core subjects, from the curricula owing to the pressure for time and space on the timetable. Yet law students need to understand the relationship between substantive/normative aspects of law and procedural/adjectival ones. Leaving the procedure courses to training at KSL may already be too late.

### **Foreign Universities**

The Legal Education Act provides that CLE may recommend to appropriate authorities the conclusion by Kenya of reciprocal agreements with the government of any country in the interests of and in furtherance of legal education in Kenya (s. 42(1)). The reciprocal agreements may include arrangements for credit transfers between a legal education provider in Kenya and one in another country; liaison between the Council and a regulator of legal education in another country; and the harmonization of the curricula of legal education in Kenya with those in another country (s. 42(2)). The Kenya School of Law is empowered to cooperate with institutions of higher learning in any manner that may be conducive to the objects of the school. The school can also collaborate with local and international organizations or bodies in the furtherance of the objects of the school (KSL Act s. 5(3)). Such arrangements will make it easier for students in foreign students to transfer to institutions in Kenya; to join or continue the ATP programmes in Kenya; or to access continuous education or any other legal education programme in local institutions. Table 1 above illustrates the number of students from foreign universities admitted to the ATP. Foreign universities account for the third largest number of admissions after the two oldest law schools, Moi and Nairobi.

### **Research in Kenyan Law Schools**

The focus in most law schools has been teaching. Research is not entrenched as part of the law school agenda. This is problematic because it means that lecturers are not generating information to feed into the curriculum. Indeed, there are still far too few local legal texts written by Kenyan legal scholars. While this may be attributable to the failure of the legal education institutions to provide research resources,

it could also be a result of the engagement of law lecturers in legal practice and consultancy to supplement their income. There are very few career law teachers in Kenya. Postgraduate training is also an area that can contribute to research in law schools. This is not available in the majority of law schools and where it is available, students dedicate little time to research and are in a great hurry to complete their studies even if it means getting others to write their research papers. At the graduate level, while legal research and writing is a core course, there is no mandatory requirement that students write a research paper as part of their training.

Few law schools publish law journals regularly, which means that there is no forum for sharing research findings. It would be ideal to have law journals for students and staff to allow for generation of new knowledge as well as publication of students' research papers. It is however important to note that in schools like Nairobi, scholars have been able to raise research funds and work with students to conduct research and publish research findings. The existence of a postgraduate programme in which the top students get scholarships and are engaged as graduate assistants has provided a ready pool of researchers as well as training for the next generation of legal scholars. The dependence of promotion on research outputs as well as supervision has also spurred interest in research.

### **Challenges for Legal Education in Kenya**

Law Schools in Kenya face difficulties encountered by all higher education institutions, but there are other difficulties for them, especially the perception that financial rewards will be far higher in private practice. And those rewards will be gained without having to struggle for a PhD, or even perhaps a master's. In reality many lecturers dabble (if not more) in law practice and consultancy alongside the teaching of law with the latter being relegated to the back burner.

The cost of law books is another issue, attributable mainly to the fact that most texts are imported. As noted above, there are not many local law textbooks. Now that we have a new Constitution, even the textbooks available are in dire need of revision. CLE should not just require text books, it should place a premium on local texts so as to spur the development of local texts. I have argued elsewhere that universities should also emphasise local texts in their curricula.<sup>21</sup>

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<sup>21</sup> Kameri-Mbote, P., 'Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses', Inaugural Lecture delivered on 24<sup>th</sup> January 2013 (<http://www.uonbi.ac.ke/sites/default/files/Mbote.pdf>).

With modern electronic research tools, law students are able to access online resources easily. CLE has required schools to improve their ICT infrastructure. While the acquisition of the infrastructure and online resources was way beyond the reach of most institutions, it is heartening to note that this has changed dramatically in the recent past. The price of computers has reduced and some universities now have laptop policies where all students are required to own laptops while others have invested in computer laboratories to ensure that those who do not own laptops are able to access online resources. Some schools also have e-learning platforms that enable lecturers to share materials with students easily.

While the draft requirements of CUE do not include a PhD until the higher reaches of the teaching profession are attained, public universities' own requirements include a doctorate as a basic requirement for applicants for the lecturer level. This has been a challenge in law and the bulk of many law schools' academic faculty comprises mainly holders of Master of Laws (LLM) degrees. The emphasis on doctoral qualifications and dearth of holders has distorted the ascent up the academic ladder as law schools compete for staff to implement their programmes. Some senior lecturers, in some universities, have less than two years' teaching experience; no experience of postgraduate supervision and no publications, while, in others, ascent to this grade requires at least six years' teaching experience, three publications and supervision of three to five masters' students to completion.

The phenomenon of 'nomadic' lecturers has also emerged as law academics find it possible to teach in several institutions. There are no institutionalized mechanisms for human resource sharing such as would be facilitated by joint hiring of academic staff by different schools to optimize use of the available teaching staff. And with some teachers in two or even three law schools, there is little possibility to offer seminars and tutorials.

Many new schools have impressive buildings but they lack qualified academic staff. Another investment that CLE emphasizes is the library requiring a core text: student ratio of 1 to 10. They require that print copies of at least one volume of the law reports are availed on the shelves even where electronic versions are available. At the end of the day, there is need to ensure that the infrastructure, teaching and human resources are adequate to support the programmes with expansion pegged to exponential enhancement of the resources.

While tutorials and seminars are usually put out as modes of instruction, class sizes have tended to hinder effective implementation of these. Class sizes vary from 30 students to 300 students. The dearth of law teachers also affects the implementation of these modes even where numbers of students are small.

## Conclusion

Legal education at university is the foundation upon which professional training, whether at ATP level or continuing professional level builds. It is therefore imperative that a solid foundation is laid. Improvement in the justice and rule of law sectors is unlikely to be achieved if there are no investments in legal education. Over the years, concern has been raised about the quality of legal education at universities.

The introduction of the accreditation processes for legal education institutions is an important step towards improving legal education in Kenya. The requirements that prospective law students must have scored at least a B in English and that schools seeking accreditation must offer 16 mandatory courses in their curricula contribute towards standardization and uniformity in legal education. Besides the entry requirements and the curricula prescriptions, there is need to look into the processes within law schools to ensure that the broad objectives of legal education are met. Law schools should use the accreditation process as a source of empowerment and an opportunity to demand resources from their institutions. Unless universities are forced to invest in law schools, they can easily neglect them even as they are cash cows for the universities because they are perceived as low investment courses. Accreditation forces institutions to invest in infrastructure, library and human resources which benefits the law teachers and students.

Secondly, while teaching is important, there is need to institutionalize research as part of legal training by requiring that teachers devote time to research and requiring law students to write research papers. Staff should be allowed time off teaching to carry out research with the requirement that they produce research outputs at the end of the time off. Staff could also be allowed to buy time off teaching to engage in research. This raises the need for law journals in law schools as an avenue for disseminating research findings of both teachers and students.

With Kenya's new constitution, institutions should also contribute to its implementation through research and debates as well as scholarly discourses. There are many opportunities for contribution including public interest litigation, appearing as *amicus curiae* in select cases, civic education and proffering research based solutions to issues that proof intractable in the process of constitution implementation. This calls for forging partnerships between law schools *inter se* and between law schools and legal practitioners, and with non-governmental organizations and other justice sector actors.



# THE ATTORNEYS-GENERAL: UPHOLDERS OR DESTROYERS OF CONSTITUTIONALISM?

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Yash Pal Ghai

## I. Attorney General and the legal system

An attorney general plays many roles in a legal system of a country, varying from country to country. Kenya, like other Commonwealth countries, has been greatly influenced by the rules and practices regarding the attorney general (AG) in England, where the origin dates back to the 13th century. At first the role was performed by a legal practitioner, but in the 17th century the AG was appointed as the legal adviser to the Crown—though able to engage in private practice as well, until the 1890s. The office became very powerful, as the legal system developed to cover increasing areas of life and economy. Thus the office and functions of the AG were shaped by history, some at the discretion of the office holder, and some as part of collective decision by the cabinet, with responsibility to it as well as the legislature, and some incorporated in the common law and some in statute. Many aspects of this were adopted in colonies in that form—minus those connected to a democratic system. As the committee on constitutional reform of the House of Lords in the UK said, “The Law Officers carry out functions of great constitutional importance”.<sup>1</sup> I discuss the reform proposals in England at some length in order for us in Kenya to understand better the origins of this office here and the issues surrounding its future. Kenya of course preceded England in this debate when the Constitution of Kenya Review Commission (CKRC) began discussions on the reform of our own system—not surprisingly, the issues were broadly similar in both cases.

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<sup>1</sup> See *Reform of the Office of the Attorney General* (The House of Lords Select Committee on the Constitution, 7<sup>th</sup> Report of the Session of 2007-8, London: Stationery Office, 2008).

The House of Lords' committee identified four major tasks of the AG in England; all have been adopted in varying degrees in the Commonwealth. The most important is as provider and co-ordinator of legal advice to the government. The AG gives legal opinions on important issues, especially of a political nature; these may have a major influence on government policy or acts. A good example is the opinion of the AG in Blair's government on the legality of the British invasion of Iraq. The AG resolves issues between government departments. The AG also chooses private practitioners whom government departments may use for their legal work, and provides overall supervision of government legal services, ensuring that he or she is apprised of important issues. It is not unusual for the AG himself or herself to represent the government in litigation (most AGs have been appointed from among practising barristers).

This role of the AG is particularly important to ensure legality of government policies and acts. The House of Lords' committee recognised that "the provision of legal advice to the Government is important in giving practical effect to the constitutional principle of the rule of law". At the same time it could be difficult, as it may entail rejecting or criticising government initiatives and policies. Politics and legality may clash. An AG of the Blair government testified to the Lords' committee that it is not necessarily difficult for the AG to maintain the rule of law while acting as senior government official. Some experts believe that this balance can be achieved by a member of the government; others doubt it. I return to this issue later.

### *Prosecutorial functions*

The role of the AG in the UK as regards prosecutions has decreased over recent years, although she or he retains ultimate control. The Crown Prosecution Service was established in 1986, under the Director of Prosecutions, which is responsible for, or advises on, most prosecutions. The AG however has broad oversight of the conduct of prosecutions but would rarely have any influence over individual decisions whether to prosecute. Prosecutions in respect of some offences can only be undertaken with the prior consent of the AG, who also retains the power to terminate trials by use of *nolle prosequi* (very rarely used). Otherwise it is only in cases involving national security that the AG would be involved in decision as to prosecution.<sup>2</sup> It is also rarely that the AG would become involved in individual trials. But in view of the AG's overall "superintendence" of prosecutions, he or she

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<sup>2</sup> See <https://www.gov.uk/government/publications/protocol-between-the-attorney-general-and-prosecuting-departments>

is required to take interest in general as well as particular prosecutions.<sup>3</sup> There is also an inspectorate of prosecutions, which the AG oversees.<sup>4</sup>

The AG's responsibilities for legal advice and individual prosecutions are non-ministerial. "In these roles, he or she is not subject to collective responsibility and must act independently of the Government."<sup>5</sup> The influence of the Attorney General can be positive towards a fair and healthy system or it can undermine the fundamental values of that system.

### *AG as minister*

Perhaps the most controversial aspect of the office of the AG is membership of the government as a minister. The AG is not always a member of the cabinet in the UK, but it is not unusual for the Prime Minister to invite him or her to cabinet meetings; the current position is that the AG attends when his ministerial responsibilities are on the agenda. In this way the AG becomes very involved in and identified with government policies.

The AG no longer has responsibility for criminal justice, this being the responsibility of the Ministry of Justice. The AG's office has responsibility for a great deal of drafting of legislation or scrutinising drafting by other departments. More broadly, the AG has responsibility for ensuring the government acts within the law. In relation to the ministerial responsibilities of the AG, she or he is responsible to Parliament, answering questions and defending the office against criticisms. The AG also advises parliamentarians on the meaning of proposed legislation as well as the powers of Parliament.

Most of these tasks are in a sense highly political, and some are sensitive. Is the government, for example, the client of the AG, entitled as in private practice, to the privileges of a client, including confidentiality? How would that square with the AG responsibility to the public?

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<sup>3</sup> The concept of superintendence has been described: "In broad terms superintendence can be understood to encompass: setting the strategy for the organisation; responsibility for the overall policies of the prosecuting authorities, including prosecution policy in general; responsibility for the overall "effective and efficient administration" of those authorities; a right for the Attorney General to be consulted and informed about difficult, sensitive and high-profile cases; but not, in practice, responsibility for every individual prosecution decision, or for the day-to-day running of the organisation" – the AG, Lord Goldsmith in written evidence to the Select Committee on Constitutional Affairs, (Feb. 2007) para. 6, <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/306/306we05.htm> (attributing it to the Glidewell Review of the Crown Prosecution Service Cm 3690 (1998)

<sup>4</sup> See [www.hmcpso.gov.uk](http://www.hmcpso.gov.uk).

<sup>5</sup> Para. 9.

*Miscellaneous functions*

The UK AG has several other roles such as: applying to the High Court for orders to restrict the activities of vexatious litigants; involvement in contempt of court proceedings; the right to bring to the Court of Appeal complaints of too lenient a sentence; refer questions of criminal liability to the same Court; and responsibilities in relation to charities. The AG can also intervene as an *amicus* in other proceedings.

*Issues*

In a White Paper on constitutional reform, the UK government said that its “commitment to rebalancing power between the executive, legislature and the people inevitably involves reform of this historic office, which straddles different part of the Constitution”.<sup>6</sup> The White Paper set out a number of options for change, around which much of the discussion revolved.

There was an emerging consensus that the two functions of the AG (the political and the independent) were inconsistent, and there was a particular fear that the quality and tone of legal advice (with wide implications) would be influenced by AG’s political affiliations—or at least be seen to be so. This was seen as a major problem since an essential role of the AG is widely regarded as upholding legality and the rule of law.

However some argued that the two types of functions were compatible; indeed an advantage, because the AG who was also a minister would have greater influence on the cabinet when it came to policy issues, including those related to the enhancement of the rule of law. It was also argued that it was perfectly possible for a professional like a lawyer to perform advisory and prosecution functions independently while taking part in political and policy matters (and several former AGs testified that was exactly what they did). Some in this camp did caution against the AG attending cabinet meetings, unless there was a specific legal issue on the agenda.

The legal advice given by the AG to Prime Minister Blair on the legality of the invasion of Iraq was pointed to as an example of partisan advice (it was well known that Blair could not wait to drop bombs on Saddam) as was the giving in, through a legal opinion, to pressures from the Saudi Arabian government on the British government to drop charges of corruption against highly placed Saudis who

<sup>6</sup> *The Governance of Britain (Cm. 7170)* (London: Stationery Office) para. 8.

had requested and received bribes from a British military equipment firm in return for purchasing their products—this Kenyans will well understand, a less sophisticated variation of Anglo Leasing!

There was considerable discussion of whether the AG's legal opinions should be made public. Is the model of a private matter when confidentiality may be important to protect the interests of the clients? Or a public function requiring transparency and publication of legal advice? There was considerable support for the second option, but it was also recognised that there may be instances when secrecy would serve the national interest better (e.g., involving foreign relations or national security). The opponents made a less than convincing case when they argued that by publishing the opinion, the contrary arguments would also be disclosed, and this might not be so good! Lord Bingham was characteristically robust: "There seems to me to be room to question whether the ordinary rules of client privilege, appropriate enough in other circumstances, should apply to a law officer's opinion on the lawfulness of war; it is not unrealistic in my view to regard the public, those who are to fight and perhaps die, rather than the government, as the client."<sup>7</sup>

There was also the question of the public interest (vague though the term seems to be), and whether this would be better protected by an independent authority or a political appointee. There was considerable support for the former, for fear that political party considerations might displace the public interest.

There was also support for the idea of dividing the advisory and prosecution functions (based on the public interest) from the policy functions and vesting the former in an independent office and the latter in a ministry concerned with justice, though some as to its practicality.

Even among those who wanted a measure of independence for the AG, there was concern about accountability. So long as the AG was a member of Parliament, he or she would be responsible to Parliament for policy and personal conduct. It was not difficult to think of other methods of accountability, as for example of the electoral commission. Kenyans are well familiar with modes of accountability outside Parliament, which in any case they do not regard as particularly effective body from point of accountability!

Of particular interest to Kenya are two rules: the AG must be consulted in good time before the government is committed to critical decisions involving legal considerations. And the AG, as part of his or her law drafting functions, has the

<sup>7</sup> The Sixth Sir David Williams Lecture 2006 - "The Rule of Law" Centre for Public Law, University of Cambridge <http://www.cpl.law.cam.ac.uk/Media/THE%20RULE%20OF%20LAW%202006.pdf>

responsibility to ensure compatibility with human rights as well as constitutional propriety of all Bills—and declare so to Parliament.

## II. History of Attorneys General in Kenya

The British introduced the office of the AG based in part on the English model, allowing for differences between Britain and Kenya as regards the place of law in society and traditions of legality. Kenya as a colony was administered by a bureaucracy, from the governor downwards. So the framework of democracy did not determine the role or appointment of the AG, as it did in Britain, the character of the AG changing with the democratisation of the state. In the early years as colonial rule was being established, legal opinions and sometimes legislation in the form of Orders-in-Council were prepared in London under the supervision of the English AG. At that time various difficult questions about British jurisdiction over protectorates and colonies had to be clarified, particularly as affected land, which were best resolved in London.<sup>8</sup>

The colonial AG was appointed, like other senior officials, from London by the Colonial Office. Though all office holders were bureaucrats (and at first all British), there were occasional differences in their approach, the governor biased towards the administrative approach to justice, and the AG towards the judicial (as for example in dispute resolution or penalties).<sup>9</sup> During the Emergency for example, the role of the AG was diminished, giving wide powers to administrators as regards interrogation and investigations.

In many respects the role and status of Kenya's AG were influenced by those of the English AG, including membership of the Legislative Council when it was established. With that to some extent came ambiguity of roles, responsibility and, especially in the relationship to provincial and district officers—and the overarching authority and accountability of the Colonial Office in London. It is clear that the AG played an important role in the drafting of the independence constitution, not merely the technical aspect of it, but making some decisions, as African political parties could hardly bear to be together in the same room, and negotiations were conducted by the British as the go between (and more).<sup>10</sup>

<sup>8</sup> Y.P. Ghai and J.P.W.B. McAuslan, *Public Law and Political Change in Kenya*, Nairobi: Oxford University Press, 1970) Chapter 1 (henceforth Ghai and McAuslan).

<sup>9</sup> Ghai and McAuslan, Chapter IV (The Development of the Administration of Justice).

<sup>10</sup> A detailed account of constitutional conferences and negotiations on the self-government and independence constitutions is Robert M. Maxon, *Kenya's Independence Constitution: Constitution Making and End of Empire* (Lanham, Maryland: Fairleigh Dickinson University Press, 2011).

Since independence, the status and role of the AG has changed at least three times: independence, first anniversary of independence and the 2010 constitution (and possibly under the 2012 Office of Attorney-General Act, see below). The changing role of the AG tells us something about the political system in which he or she operates. Constantly the AG must have been faced by the dilemma of serving the interests of the government or preserving the integrity of the legal system—perhaps not many were troubled by primacy given to the former, as I try to show in this chapter.

Since independence Kenya has had six AGs: Charles Njonjo (1963-80), James Karugu (1980-81); Joseph Kamere (1981-83), Mathew Guy Muli (1983-1991), Amos Wako (1991-2011) and Githu Muigai (2011)—if Wako had the longest in-nings, Njonjo has been the most influential on the administration.

### *AG under the independence constitution*

Under the independence constitution, the AG was a civil servant, as the principal legal adviser to the Government (s. 86 (1) and (2)). At the same time the AG had considerable powers, particularly in relation to criminal prosecutions—the AG could initiate prosecutions, and take over prosecutions commenced by others, and discontinue any prosecutions. In these matters the AG could not be directed by any other authority (s. 86(7)). Other acts where the AG enjoyed similar authority were initiating proceedings to challenge election of any parliamentarian (s. 50(2)), and requiring the Inspector-General of Police to investigate matter which in his or her opinion related to any offence or alleged offence (sec. 167)—a power that has stayed with the AG since. These powers have remained, despite other constitutional changes (discussed below).

To strengthen the position of the AG, the appointment was to be made by the head of state (at that time the Governor-General) on the recommendation of the Public Service Commission, and after consultation with the Prime Minister. The AG could be removed only for misconduct, after inquiry by an independent tribunal, giving the office a high degree of independence and security of tenure (s. 189 (7) and (8)). The post of the AG was essentially bureaucratic. But there seemed some anomaly in that the AG was both adviser to the government and director of prosecutions (no doubt a reflection of English practice) and able to challenge the result of parliamentary elections—it is hard to see how he could be truly independent of government influence. The position became even more anomalous when the constitution was changed a year later, and the AG became an ex-officio member of

the legislature (and, in practice if not law, of the cabinet)—but the provisions relating to prosecutions remained the same.

For long periods the AG also assumed responsibility for preparing and drafting legislative Bills, although this power is not granted to the office.<sup>11</sup> This has been the situation except in 1963-4 when Tom Mboya was minister of constitutional affairs, and shortly before and after the 2010 constitution when a substantive ministry of justice was established by the government. And now again there is no ministry of justice, this is a function assigned to the AG, by Executive Order<sup>12</sup> and now by statute (see below). There was no provision that the AG would be an ex-officio member of the cabinet until the current constitution (Article 152), but there was a rule soon after independence that the AG would be ex-officio member of parliament. Throughout, the AG has directed the work of the registrar of companies, and societies, and for some time that of political parties, and the work of the Public Trustee. The position of the AG was an altogether powerful position, and particularly so during Njonjo's "reign" due to his closeness to Kenyatta and the Kikuyu elite.

### *Charles Njonjo*

A civil service post though it may have been, the first AG grossly politicised it, depending on a handful of his staff and police officers to handle legal affairs, at his strict and politically driven instructions. His skills as a lawyer were limited. Njonjo studied law in South Africa and Gray's Inn in London, but had little experience as an advocate before his appointment. He obviously had more time for politics and business than law—but he certainly politicised law.<sup>13</sup> He was very fond of the British aristocracy and colonisers, and was said to favour capitalism though his understanding of it was very limited, more like an economy administered by the state in favour of particular groups. It is said that he ordered the detention of the distinguished writer, Ngugi wa Thiong'o, for his novel *Petals of Blood* because Njonjo was upset at his criticism of capitalism (Hornsby, 290).

<sup>11</sup> It is ironic that the debate in England is about transferring certain key tasks of the AG from political to administrative (e.g., decisions on prosecution) while in Kenya the development has been from administrative to political—at least until the 2010 constitution (see later).

<sup>12</sup> Executive Order No. 2 of 2013, Organization of the Government of the Republic of Kenya.

<sup>13</sup> There are several accounts of Njonjo's tenure as AG: Yash Ghai, "Law and Lawyers in Kenya and Tanzania: Some Political Economy Considerations" (see footnote 8), Paul Mwangi, *The Black Bar: Corruption and Intrigue within Kenya's legal fraternity* (Nairobi, 2001), Daniel Branch, *Kenya: Between Hope and Despair, 1963-2011* (New Haven: Yale University Press, 2012) and Charles Hornsby, *Kenya: A History Since Independence* (London: I.B. Tauris, 2012) (henceforth Hornsby). I have drawn extensively from these sources, and several conversations with people who knew him well or his machinations.



He became extremely powerful, less because of his constitutional status than his closeness to President Kenyatta—he ended up being the second most powerful person in the government (the historian Hornsby described him as “kingmaker”, at least during Kenyatta’s regime, p. 15, fn 9). For this and other reasons it is not easy to discuss Njonjo’s role as attorney general. As Hornsby reminds us, Njonjo “straddled the police, the legal fraternity, the civil service and politics” (p. 231)—and he might have added “business” and “real estate”. Due to the many interests he had or served, it would not be surprising if occasionally he was tempted to use his considerable constitutional authority to achieve personal goals. In fact he did so liberally—not only his own interests, but also of those he served, particularly Kenyatta and his family and friends. Few believed that he exercised his prosecutorial powers objectively and only for proper purposes.<sup>14</sup>

Njonjo set a bad precedent for his successors. Except for the short tenure of his anointed and immediate successor, Karugu, all AGs have followed his improper practices and undermined the rule of law. The most serious allegations of abuse are recited in Paul Mwangi’s book *The Black Bar*, Daniel Branch’s recent book on Kenyan politics and Charles Hornsby’s magisterial history of post-independence Kenya. Mwangi writes that “the Attorney-Generals [sic] in Kenya have always acted as hitmen for the government. They never portray that public defender image that goes with their post and instead emerge as mercenary cutthroats. With only one exception, all country’s Attorney-Generals have performed well below accepted standards of professionalism and in fact badly enough to earn them the wrath of all but the government” (the exception being James Karugu, p. 134). But no AG has abused power as much as Njonjo. Hornsby describes him (along with Jomo Kenyatta, Moi and Kibaki) as “conservative, patriarchal and authoritarian” and one who has “been accused of corruption and self interest” (p. 6).

Njonjo had a wide, “rich” and occasionally chequered career, difficult to summarise briefly. Although very fond of the British way of life, he had no commitment to democracy, and used his position as AG to, quietly, strike off the register political organisations to immobilise radical groups and to refuse, quite illegally, applications for registration by new political parties (to destroy political opponents and

<sup>14</sup> Yash Ghai, “Law and Lawyers in Kenya and Tanzania: Some Political Economy Considerations” in C.J. Dias, R Luckham, D.O. Lynch, and J.C.N Paul (eds), *Lawyers in the Third World: Comparative and Developmental Perspectives* (Uppsala: Scandinavian Institute of African Studies, 1981), pp.168-172. The distinguished criminal lawyer, the late A R Kapila, at one time a great friend of Njonjo, was harassed by Njonjo when they fell out, by being charged for a trivial offence under foreign currency law. In his defence Kapila said, “This prosecution is back to front. You choose the accused person first. You look for an offence afterwards...It is not the first time I have defended a case of this kind” (p. 171).

facilitate one party rule). He used this and other measures (such as censorship and media restrictions) to destroy KPU; he ensured the cancellation of the candidature of 1800 KPU candidates for improper completion of nomination papers (Hornsby says, “It was an example of the bizarre constitutionalism that Njonjo now epitomised: the discriminatory application of the law and the use of legal technicalities to control political activity” (p. 173)).

Nor did he share the British commitment to human rights. He was instrumental in legislating to make detention without trial much easier by amendments to the constitution and the Preservation of Public Security Act in 1966, and using that power massively, as well as other restrictions on human rights such as assembly. In introducing the changes he suggested that they were only linguistic – and had nothing to do with detention.<sup>15</sup>

“The police and the attorney-general’s office were openly declared to be the tools of the incumbent government” (Hornsby, 170), Njonjo being the architect. He was closer to the British colonial model than the more democratic model practised in Britain. Hornsby says, “Njonjo represented a direct line of both policy and style from colonial days” (p. 355). He comments also on the ethnic protection for Kikuyu elite from prosecution (p.264) and that Njonjo had no qualms about waiving the law in favour of his party or tribe (p.270).

He had no respect for the independence of the judiciary. He did not hesitate to instruct judges on how to resolve a case in which he had personal or professional interests, or indeed to dismiss them (by not renewing their contracts—this weapon could be applied in respect of foreign judges who were employed on contract, itself a violation of the independence of the judiciary). He fixed cases; Hornsby says (pp. 228, 344) that election cases were set to be heard by only non-African judges, no doubt out of a sort of racism and his control over expatriates. He instituted a case against Bildad Kaggia, the famous freedom fighter who remained true to the cause and was bitterly opposed to policies of Kenyatta and his associates of grabbing public and private land. Acting Chief Justice Denis Farrell halved Kaggia’s sentence (to six months) and was promptly (and illegally) sacked by Njonjo. On the other hand, he could ensure impunity for the favoured.<sup>16</sup> Hornsby says (what Kenyans know well) that “the judiciary took their advice from Njonjo” (p. 287). Njonjo’s practices

<sup>15</sup> House of Representatives Debates, Official Report, Vol. IX, 2 June, 1966, Cols. 279, 280.

<sup>16</sup> See Njenga Karume (with Mutu Wa Gethoi), *Beyond Expectations. From Charcoal to Gold* (Nairobi: Kenway Publishers, 2009) 160-161 on how Njonjo acceded to Karume’s plea to ensure Chairman of the National Bank of Kenya, Stanley Githunguri, who had been arrested for alleged theft of public money was released on bond.

played a major role in corrupting the judiciary, which became a serious impediment to justice and the protection of human rights.

On the one hand, when it suited him, he turned a blind eye to gross violations of the law. He prevented proper investigations into the killing of eminent politician JM Kariuki and no-one thought to be implicated was brought to justice (Hornsby, 284). On the other hand, prosecutions were brought against people the government wanted to punish regardless of the evidence. The plotters of the so called coup in 1971 were prosecuted on trivial evidence; the motive was to get rid of senior Kamba army officers, and replace them with Kikuyu (Branch, 101) as well as to replace Chief Justice Mwendwa (as years later the Ringera Tribunal was used to get rid of non-Kikuyu judges to replace them with Kikuyu (in collaboration with Wako)). Njonjo frequently manipulated the law to suit his purposes, for example he promoted the law to enable Kenyatta to forgive Paul Ngei for electoral offences, enabling him to stand again on orders of Kenyatta (Hornsby 287); he threatened to repeal the law protecting MPs from prosecution for what they said in Parliament unless they stopped criticising the government (Hornsby 290) (though the AG could not do this alone). In order to ensure that Moi succeeded to the presidency (Moi then being his close collaborator) he prevented any discussion of constitutional change about succession on death of the president, which Moi's opponents intended to introduce, making the now infamous statement that those who talked of constitutional amendment were "imagining the death of the president", which was treason punishable by mandatory death penalty (Hornsby 324-5)—which even he must have known was a distortion of the law. And to ensure that Moi was indeed installed, he arranged for him to be sworn in by the Chief Justice in Njonjo's office (Hornsby, 327).

He failed singularly to enforce the law against corruption (Hornsby 175) and was tolerant of corruption within his own office. He built a huge fortune in relatively short time. He was involved in dubious deals with Bruce McKenzie and other local business men. Most grievously, it has been alleged that he was not above the use of violence against opponents (Branch, using the archives of the British Foreign Office, and Hornsby provide several examples).

Njonjo later became the victim of the same subservience to the whims of the executive that became his legacy to his successors, when Moi engineered his downfall in 1983 through a tribunal chaired by no less than one of the most corrupt of Kenya's Chief Justices, Miller (for an interesting account of the "trial" see Mwangi, 75-84). But Njonjo's legacy continued and all his successors (except James Karugu) were compromised, one even moving a constitutional amendment to remove the independence and tenure of the office of the AG and the judiciary (arguing that

Moi's grace was a stronger guarantee for the judiciary than formal constitutional guarantees).

One role not contemplated in the constitution which Njonjo arrogated to himself was that of the preserver of the European and Asian monopoly of the legal profession and the regulator of legal education and admission to the Kenya Bar. This is best documented by Mwangi (23-27) and, in this book, by Patricia Kameri-Mbote. One way to prevent the emergence of what Mwangi calls the "black bar" was to prevent the establishment of legal education in Kenya (since few African families, unlike Njonjo's, could afford to send their children to England for training). Under Nyerere's insistence the University of East Africa did set up a law school in Dar es Salaam for students from East and Central Africa. Njonjo showed intense resentment of the Dar school (perhaps he objected to Tanzania's *ujamaa* policies), while elsewhere it was highly acclaimed. He placed major obstacles in the way of Kenyan graduates from Dar getting admitted to practise law, in an endeavour to protect white dominance of the profession.<sup>17</sup> A Council of Legal Education was set up to control entry into the profession; he and the Chief Justice were members (at first I was a member also, nominated by the University, but one fine morning he de-gazetted my appointment, getting my name wrong, and usurping the authority of the Chief Justice who alone could initiate the process to remove of a member). I need say little about the somewhat negative impact of the council on the development of legal education and the important role of the AG—a very unusual arrangement (see Kameri-Mbote in this book).

### *AG Njonjo and impact on the constitutionalism and the rule of law*

Njonjo's responsibility was to preserve legality and the rule of law, and other values of the 1963 constitution. Not only did he not protect them, but he took deliberate steps to disregard and violate them, and to promote their antithesis: discrimination, violence, brutality, theft and corruption, in massive abuses of office. He undermined human rights and freedoms as well as democracy. So deeply had he destroyed the rule of law and the independence of the judiciary, and promoted the corruption of the legal profession, that to this day the rule of law eludes us. But it is not only in the legal and judicial spheres that he did damage; his involvement in politics and government in general, poisoned those institutions. His destruction was extensive (see the Conclusion below).

<sup>17</sup> Ghai and McAuslan, chapter X, and Mwangi chapters 3 and 4.

*From Njonjo to Wako: Interregnum*

The longest serving AG is Amos Wako (in the entire Commonwealth as he was fond of saying), “serving” 20 years, compared to Njonjo’s 17. But before we turn to Wako, let us consider briefly the AGs in between these two “giants”. Little needs to be said of James Karugu, handpicked by Njonjo from his own community. Mwangi says that “Karugu was too honest to survive” (p. 134). He earned Njonjo’s wrath when he refused Njonjo’s request to drop treason charges against his cousin (by this time Njonjo had reached retirement age, become member of parliament, and minister of constitutional affairs). Njonjo failed to persuade Moi to sack Karugu (unconstitutional though it would have been) and to combine the AG post with Njonjo’s ministerial portfolio. Moi, now secure in his post as president (thanks to Njonjo) refused, fearing Njonjo’s own presidential ambitions. In due course Njonjo was got rid of through a commission of enquiry, and Karugu sacked for good measure (Mwangi p. 134). The sensible Karugu left the legal profession and turned to coffee farming.

“Karugu was succeeded by a man who stands a very good chance of winning distinction as the world’s dimmest Attorney-General”, says Mwangi talking of Joseph Kamau Kamere (p. 134). A protégé of Njonjo, he quickly alienated members of parliament by unkind remarks about their “election debts” and inability to sleep at night. He also alienated the Law Society of Kenya for refusing to attend a reception to mark his appointment unless he received the LSK chair’s speech in advance. In addition he seemed to have entered into contract with a commercial firm under investigation for fraud and other “misdemeanours”.

Even in Moi’s regime, he had to be got rid of—succeeded, unusually by a judge, Mathew Guy Muli. Muli lasted eight years, escaping the ignominy of Njonjo and Kamere—he was appointed to the Court of Appeal (then the highest court). Mwangi’s verdict is that unlike Kamere, Muli “needed no prompting in facilitating abuse of power by the Moi government. He readily perverted legal philosophy to hoodwink the country as it adopted autocracy through democratic means. When he moved the constitutional Bills removing the security of tenure for all constitutional offices, Muli explained that the concept of security of tenure was a relic of colonialism and “inconsistent and obnoxious” as it ran against the prerogative power of the President to dismiss civil servants (Mwangi, 137). His conduct of his office seems by all accounts to be a mixture of the nasty and the absurd. He used “all available means to put behind bars those that the government wished to silence” (Mwangi 137). He used foul language when referring to the accused, in one instance call-

ing them “thankless donkeys”. He often talked of irrelevant things, as pointed out by Gitobu Imanyara (in Imanyara’s prosecution) (Mwangi 137)—on this occasion Muli was reprimanded by the higher court. In one case (a court martial) he influenced the court, securing his promotion to the High Court once he had obtained a verdict of guilty. In the trial of Peter M. Kariuki, former Air Force head, for failing to prevent a mutiny in 1971, Muli appeared before the Court Martial (on what basis is not clear) to say that a witness the accused wanted to call “will not be called”. In 2006 Kariuki sued for compensation. The Court of Appeal commented,

Even assuming that the Attorney General, as the chief legal adviser of the Government had audience before the court martial, that did not warrant the kind of intervention that he made and it does not surprise us that the appellant perceives his denial of the right to call General Mulinge as a witness as decision made by the Attorney General, and by extension, by the Government rather than by the court martial. It appears that the possibility of embarrassing the General was allowed, without much reflection, to override and trump and trample over the appellant’s constitutional right to have the General summoned as a witness.<sup>18</sup>

Muli pursued and prosecuted those the regime did not like, “students, lecturers and politicians” (Mwangi 23) ensuring long sentences. The rich (even if evidently guilty) he released by *nolle prosequi*. Apparently less greedy than Kamere, he did authorise payment to himself of Kshs 500,000 for appearing three times as *amicus curiae* in the judicial enquiry investigating Njonjo.

### *Amos Wako*

When Wako became AG in 1991, he was partner in a leading Nairobi law firm.. Though dubbed a survivor, he eventually had to leave office within 12 months of the promulgation of and in accordance with the 2010 constitution (Sch. 6, sec. 31(7)). At the time of his appointment he was a member of several international organisations interested in human rights. He was clearly the best qualified of all the Kenya AGs up to then. Much was expected of him. Unfortunately he disappointed them all. He was not as brutal as Njonjo, but undermined the rule of law just as effectively. An interesting and sharp commentary on his tenure was published by Africog at the time of his retirement.<sup>19</sup> An earlier assessment and a sort of warning by Maina Kiai was published by the KHRC soon after his appointment.<sup>20</sup> I rely heavily on these two reports, and also on my own contacts with and knowledge of Wako

<sup>18</sup> [2014] eKLR) Civil Appeal No 79 of 2012 (<http://kenyalaw.org/caselaw/cases/view/96060/>).

<sup>19</sup> Africog, *Assessing Amos Wako’s Performance: Poisoned Legacy* (Nairobi, August 2011).

<sup>20</sup> Kenya Human Rights Commission, *Amos Wako: The Fallen Angel* (Nairobi, 1993).

(he was my student in Dar es Salaam, and seems to have played some role in Moi's request for me to chair the Constitution of Kenya Review Commission (CKRC)).

Wako was the most intelligent of all Kenya AGs, but also the most devious and cunning. His longevity in office may be due to his ability to ingratiate himself to all and sundry, but his primary loyalty was always to the most powerful person, the president. Sometimes he would second guess the president rather than ask him his preference.<sup>21</sup> Knowing the opposition of President Kibaki and his inner cabal to the Bomas draft, Wako refused to submit the draft to the Speaker after handed over by Ghai, saying that he was receiving it in the capacity of a delegate, not AG! But a few days earlier he had helped the Bomas process by telling me in confidence that the government with certain individuals was about to challenge the constitutionality of the Bomas draft constitution in a court presided over by Justice Ringera (who had applied for the much coveted post of the head of the anti-corruption body—the highest paid job in the country). He said we had 10 days to finish our work—and I had never seen such speed and sense of purpose among Bomas delegates (pro-Kibaki/Kiraitu delegates having kindly walked out of Bomas about two weeks earlier).

The KHRC/Kiai report was fairly damning: allegations, supported by facts, included that Wako kept a low profile in any matters relating to human rights of Kenyans; abstained from voting on an LSK resolution on the abolition of detention without trial and authorised long incarceration of treason suspects without trial; investigated members of the Council of the LSK to restrain them from speaking out on public issues affecting the democratisation of the country; in his maiden speech in the National Assembly he pronounced that “no man, except the President, is above the law”;<sup>22</sup> he refused permission for QCs from England to defend in a trial for contempt of court, encouraging police brutality; pursued biased prosecutions, only against opponents of the regime; dishonestly reduced the time for election campaign to suit Moi, by “correction” or more accurately, misrepresentation of the

<sup>21</sup> A good example is his resistance to entrenching the CKRC Act, which would not have been possible to trample the process. I pleaded with him on several occasions, but he refused saying Moi would refuse (second guessing him). Once when he was in Geneva, I requested Moi directly. He called his close advisers to whom I explained my request. They agreed and I was told to instruct the AG Chambers to draft a Bill. It was duly drafted and tabled in Parliament. At its first reading, Paul Muite objected on the ground that it did not specify that its intention was to amend the constitution. It was withdrawn to insert that, but by then Wako returned and the Bill was never re-introduced. If the Bill had been adopted, parliamentarians would not have been able to mess with the Bomas draft nor Ringera to argue that the CKRC/Bomas process was unconstitutional—and we would have got an even better constitution than the 2010!

<sup>22</sup> National Assembly Official Record July 2 1991.

electoral law (changing “not less than 20 days” to “not more than 20 days”—noted also by Africog). All this in his first 2 years.

The Africog report 18 years later was even more scathing. It identified the abuse of power to prosecute, particularly the refusal to prosecute for egregious human rights abuses and massive corruption (Hornsby noted, pp. 548-9, his refusal to prosecute the leading Masaai leader, Ntimama for the killing of over 20 Kikuyu who had moved there, presumably because he was associate of Moi). Hornsby also drew attention to the occasion when the LSK had prosecuted Wako over a contract for passports and forensic tests (along with Awori and Mwiraria)—only for Wako to take over the case and terminate it using his *nolle prosequi* powers! (Hornsby, 727). Hornsby notes his attempts to tighten controls over the media (p. 590). Africog gives many illustrations of his undermining human rights (curtailing the freedom of expression, listing the number of journals which were impounded, and frustrating the right to fair trial).

Africog shows how police brutality became a prominent feature during Wako’s tenure. In January 1993, police officers launched a coordinated assault in Nairobi that involved the beating of civilians, property destruction and looting. In the same year, the police beat up civilians participating in a legal religious march led by Muslim and Christian clergy and destroyed 600 kiosks in Nakuru. These actions went unpunished. It was also common for opposition members of parliament to be beaten and later charged for various offences. Although Wako had the power to direct the Commissioner of Police to launch an investigation into these human rights violations, he did not do so.

Africog notes : “Wako’s role as a handmaiden of the ruling party has perhaps been exemplified by the fact that, throughout the one-party era, he was a permanent fixture in the public rallies of the ruling party KANU. Through his presence in KANU meetings, a large number of which were the forum for the most vitriolic hate against the opponents of the ruling party, Wako displayed the obvious fact that his independent office had been captured by the ruling party and it was no longer possible to protect the public interest where this was in conflict with the wishes of the ruling party”. Upon the advent of multi-party politics, Wako maintained the practice of open companionship with the ruling party.

The cancer of corruption worked its way through the body politic in the wake of Wako’s custody of the constitution and criminal law process. The two most notorious scams took place then, first Goldenberg and then Anglo-Leasing. They are too well known to all Kenyans to need another account of the greed, selfishness and audacity of its perpetrators (the first bringing the country close to total financial



collapse). The highest political leaders and bureaucrats were involved with well-known crooks from the private sector. There is no way that these scams could have been perpetrated without the knowledge and connivance of the AG—nor legal suits against the government deliberately lost. As Africog says, “Giving the government legal advice in local, international, administrative and commercial contractual issues was and is a key responsibility of the AG. In such instances, he was required to provide legal opinions while taking into consideration the financial and technical evaluations provided by the relevant Government departments. What was to become known as the Anglo-Leasing scandal provides an opportunity to assess Amos Wako’s performance of his duties in this important area”.

Wako’s duplicity in conniving at the illegal infliction of violence in times of political crisis is well illustrated by the “Waki Report” by the Commission of Inquiry into the Post-Election Violence (October 2008) on post-election violence in 2007-8. It expressed considerable scepticism at Wako’s assertion that he had done all he could to gather evidence and direct the police, in earlier tribal clashes as well as in 2007-8 (p. 451). The Commission reached the following conclusion, “In view of the lack of any visible prosecution against perpetrators of politically related violence, the perception has pervaded for some time now that the Attorney-General cannot act effectively or at all to deal with such perpetrators and this, in our view, has promoted the sense of impunity and emboldened those who peddle their trade of violence during elections to continue doing so” (p. 455). At an earlier stage, when the Akiwumi Report on Tribal Clashes was published (July 1999), Wako took no action (pleading the reluctance of President Moi). The UN Rapporteur on extrajudicial, arbitrary or summary executions, Professor Philip Alston, was particularly critical of Wako in his report on the police, describing him as “the chief obstacle to prosecuting anyone in authority for extra-judicial executions”.<sup>23</sup> Alston went on: “He (Wako) has presided for a great many years over a system that is clearly bankrupt in relation to dealing with police killings and has done nothing to ensure that the system is reformed. In brief, Mr Wako is the embodiment in Kenya of the phenomenon of impunity.”.

The “laughing” AG was impervious to criticism or to his mandate. His constant concern was to preserve his job. With presidents like Moi and Kibaki, disdainful of the rule of law, that was not hard to achieve. The only way to remove him was through the constitution, an option adopted by the CKRC. The 2010 constitution

<sup>23</sup> Press statement on release of Report 25 Feb 2009 (<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=8673&LangID=E>) ; the actual Report is A/HRC/11/2/Add.6 26 May 2009, at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/137/05/PDF/G0913705.pdf?OpenElement>).

provided for the compulsory retirement of the AG within a year of its promulgation, to pave the path for the reform of that office. His successor is Githu Muigai, a former academic, combining teaching with a lucrative practice in his law firm. Before we turn to his record, it is necessary to turn the provisions of the new constitution that pertain to the AG.

### III. AG under the 2010 Constitution

The CKRC (of which Githu Muigai was a member, albeit not very active) was very aware of the behaviour of Kenya's attorneys general, which had led to the demise of the rule of law, the breach on a massive scale of human rights, and the culture of corruption and impunity. Aware also of the corruption and incompetence in perhaps the majority of the judges, the CKRC wanted to establish a regime of constitutionalism and the rule of law to redress many of the ills of the Kenyan state and society. It placed a special emphasis on the rehabilitation of the legal and judicial system. It had already decided on independent institutions as a way to guide some policies and to discipline state and its agencies. It wanted to separate certain powers and responsibilities from politics. There was a limit on how far the attorney-general as legal adviser could be separated from the government. Some CKRC members considered doing away with the office of a government legal adviser and let the government brief lawyers from the private sectors as and when necessary, in this way being able to get the best advice on the legal issue in question. This is not as unusual as it may appear, and South Africa had dispensed with the government legal adviser (leaving only the Director of Prosecutions). But it might have been too radical for Kenyans—but we did want to define the role of adviser in terms of the promotion of the rule of law. Instead, we decided to separate prosecutorial functions from policy functions, and to make the Director of Public Prosecutions an independent officer so that decisions about prosecutions would be made not on party politics basis but professional judgment (which does not of course rule out policy considerations, made by the DPP). I turn to the office of the AG (returning to a brief note on the DPP, whose role is well discussed by Waikwa Wanyoike in this book).

The provision on the AG appears in the chapter on the Executive (Art. 156). The AG is appointed by the President with the approval of the National Assembly. There is no provision for removal (unlike the previous provision protecting the tenure), so presumably the President can dismiss the AG. The major task of the AG is as legal adviser to the Government (presumably meaning the national government, Art. 156 (4) (2)). "Legal adviser" could cover much ground, and most likely

include actually doing things, like negotiating and signing agreements. More specifically, the AG may appear as friend of the court (*amicus*) in any case to which the Government is not a party, with the leave of the court (Art. 156(5). The AG “shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings” (Art. 156(4)(b)). And Article 156(4)(c) is very broad: AG “shall perform any other function conferred by an Act of Parliament or by the President”. There must be some limits on what the President can require the AG to do—for example it must be to do with some national government responsibility, not his personal matter, and must be related in some way to the law.<sup>24</sup> Moreover the President himself or herself is bound to observe various principles, including the protection of human rights and the rule of law (Art 131(2) (e), and more broadly: “respect, uphold and safeguard the Constitution” (Art. 131 (2) (a)). The same must apply also to what legislation can require of the AG (I discuss below the Office of the Attorney-General Act (49/2012)). The clue to the limits of the authority that can be conferred on the attorney-general or tasks that can be required is to be found in Article 156(6): “The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest” (emphasis added). Under this Article most acts of past AGs to bolster the government or harass its opponents would be unconstitutional—and grounds for the disqualification to hold public office. The AG is an ex-officio member of the Judicial Service Commission, which recruits judges and can initiate the process for their removal, and generally plays an important role in preserving judicial standards, educational, professional and ethical. This gives the AG (and through him or her the President) a significant say in the composition of the judiciary.<sup>25</sup>

Turning to the Office of the Attorney-General Act, the Act is testimony to the appetite of Kenya AGs for loads of power—and impunity. Muigai introduced the Bill saying that the constitution required an Act on the subject—incorrectly, as it merely permits it. He also said that the law will provide “sufficient oversight over the occupant of the office” and that “it would reinforce the rule of law in this coun-

<sup>24</sup> There has been considerable criticism that the Attorney General Githu Muigai spends more time tending to the ICC prosecution of Uhuru Kenyatta than to the business of the government.

<sup>25</sup> The constitution gives the Attorney-General a special responsibility in its implementation. Chapter 18 sets out the scheme for the enactment of legislation specified in the Fifth Schedule to give effect to stipulated provisions of the constitution. Article 216 (4) gives the responsibility of preparing the Bills to the Attorney-General in consultation with the Commission for the Implementation of the Constitution. This chapter does not discuss how the AG has discharged the responsibility for reasons of lack of space. For the same reason this chapter does not discuss the AG’s role on the Advisory Committee on Mercy (Art. 133).

try and accountability to the people that elect the government”.<sup>26</sup> The effect of the Act is to increase the powers of the AG while it says nothing of accountability. He was also inaccurate when he said in the past the powers of the AG were regulated by convention.

The Act will greatly extend the powers of the AG as stipulated in the constitution. The Act will make the AG the legal adviser to constitutional commissions and state corporations. This is likely to create problems in respect of the commissions for they are supposed to be independent (as was remarked by Mrs Odhiambo-Mabona in the National Assembly) and to sometimes take action against a government agency—the AG cannot be advisor to both! The Hansard record shows that the reference to “commissions” was deleted but it has reappeared in the Act (shades of Wako?). State corporations also have a separate identity and their own lawyers, presumably specialists in the field of the corporation’s work. And it is entirely possible that there may be differences of interest between the government and the corporation—hard luck for the corporation, for the AG has assumed the right to direct the work of all lawyers in all government departments and agencies. The AG has also given his office all the responsibility for drafting legislation for the government, leaving no role for the relevant department or ministry, and claimed jurisdiction over matters relating to companies, partnerships, trusts, societies, and charities (all of them raising issues of policy for which other government agencies are much better qualified). In consultation with the LSK, the AG will be able to regulate the legal profession. The AG will represent all government agencies in civil and constitutional disputes and have priority in the right of audience over other advocates, in addition to a right of audience in any hearing (cutting into the authority of the courts). The Act also carves out a fundamental role for the AG in foreign affairs and treaties. To emphasise his importance, the AG got the Act to proclaim the AG the head of the Bar (which in the case of Kenya, will cover all practising lawyers, unlike merely barristers as in the UK and some Commonwealth countries)—a strange, unnecessary and unfair historical anomaly out of sync, with a modern, forward looking constitution (ironic that the LSK – which insisted the AG was only “titular” head of the Bar – is seeking effectively Muigai’s dismissal from the ranks of advocates).<sup>27</sup>

<sup>26</sup> Proceedings of the National Assembly 11 December 2012.

<sup>27</sup> I say the AG has arranged all this because the Bill was produced by the office of the AG, one assumes under close direction of the then new AG (contrary in some cases to the advice of the Law Reform Commission). If so Githu Muigai has his work cut out for himself. Of the offices of law officers in several countries where I have worked, that in Kenya is the worst organised (as I noticed during the CKRC). Poor library, incompetent drafters, undistinguished legal staff, and little co-ordination, leaving representative of the Chambers mostly confused in trials. Muigai recognises this, but does he have the time or the will or the skills to organise the enormous responsibilities he has given the AG’s Office?

The AG is entitled, under section 29, to have access to persons, relevant records, documents and property pertaining to a civil or criminal case, “in the performance of duties of the AG”. It is unclear what the duties of the AG are in this situation, or what he is doing in a criminal case, since the AG has no authority over criminal matters. And what does it mean to have access to “persons” (brought to him forcibly?). In another megalomaniac moment the AG inserted a provision that “All Government Ministries, Departments and State Corporations shall seek the opinion of the Attorney-General on any matter raising substantial legal or constitutional issues” (sec. 19). But the Attorney-General himself or herself is not accountable to anyone—section 6 (5) says that in the exercise of the powers and performance of functions of the Office, “the Attorney-General shall not be under the direction or control of any person or authority”—not even the president?

Having armed himself with such massive powers, the AG has secured impunity for himself and his staff. Section 8 (1) protects them from suit “in respect any proceedings in a court of law” or “in the discharge of the functions of the Attorney-General under the Constitution and this Act”. The first seems somewhat superfluous and the second outrageous, a complete denial of the rule of law which the AG is obliged by the constitution to sustain. Section 8(2) exempts the AG and staff from personal liability “if the matter is done in good faith for executing the functions, powers or duties of the Commission” (it is unclear what Commission is being referred to, it can only mean the Public Service Commission – or perhaps this is a careless cut and paste from another Act). Why should the AG and his staff (all AGs have been male) be treated differently from any other civil servant or indeed any other advocate? There is some irony in that the protector of the rule of law is placed above the law (even Wako claimed that only for the President!). It is very worrying given what looks like a built-in lack of integrity, efficiency and contempt for constitutionalism in Kenyan AGs. It is also interesting to note that while all the staff in the Office (from Solicitor-General down) are bound by a rigorous code of conduct, the AG is not. Why not?

On the contrary, Muigai has secured the tenure of office of the AG well beyond what the Constitution envisages; it is not for nothing that the AG does not have a protected tenure—the government like other clients should be free to sack their advocates in favour of another. But the Act says that the Attorney-General can be removed only for serious violation of the constitution or any other law, misconduct, incompetence, incapacity or bankruptcy (s.12). However this tenure lasts until the elections, when the incoming President can appoint another person as Attorney-General. The constitution is silent on the question of the removal of the

AG (although the appointment involves both the national assembly and the president). The AG is not a “state officer” and so escapes the procedure for the removal of state officers (which usually involves an independent tribunal after an enquiry). The AG was conceived of essentially as a lawyer for the government, and as such could be dismissed by the government (i.e., the president), more like a Cabinet Secretary (but a Cabinet Secretary can effectively be dismissed by the National Assembly on the motion of an MP and after due enquiry, Art. 152 (6)). Muigai rejects the view that some similar procedure should apply to the AG, who after all sits in the Cabinet and performs many ministerial functions, apart from being legal adviser to the government and a host of institutions, Article 5(1) of the Office of the AG Act. Muigai’s view has been upheld by the National Assembly.

What kind of AG emerges from this account of the Office? Perhaps neither one thing nor another: civil servant, advocate, or politician? The constitution proceeds on one assumption: advocate, with the state as client, client able to replace advocate, and the Act on another assumption, as a tenured and sole civil servant cum advocate. And yet the requirement in Article 156(6) of the AG to “promote, protect and uphold the rule of law and defend the public interest” compels the AG to make independent judgments of propriety by reference to constitutional values and injunctions (public interest would have to be determined by reference to Art. 10, which binds all who interpret or apply the constitution). The public interest is a complex concept, more so than in a corrupt state like in Kenya. The AG could find herself or himself in a difficult situation when under pressure from the president to follow a line of thought and action contrary to constitutional values.<sup>28</sup> There is very real possibility (danger) that the AG will emerge as a politician. With that introduction, we turn to Githu Muigai, a likely candidate for politician?

### *Githu Muigai*

In the few years he has been AG, Muigai has shown himself no different from his predecessors. As before with AGs, the compulsion to please the President appears to be determinative. So it is not surprising that the first topic to attract his attention was the Kenyatta trial. A recent High Court decision (by Justice Lenaola) has reprimanded Muigai for defending Kenyatta and Ruto on charges brought

<sup>28</sup> For an insightful discussion of obligations that flow from the requirement of protecting public interest, see Godfrey Musila, “The Office of the Attorney-General in East Africa: Protecting Public Interest through independent prosecution and Quality Legal Advice”, in Kithure Kindiki, *Reinforcing Judicial and Legal Institutions: Kenyan and Regional Perspectives*, (Nairobi: Kenyan Section of the International Commission of Jurists, 2007) especially pages 2-3.

against them in their personal capacity and for failure to make distinction between the various capacities and responsibilities of the AG.<sup>29</sup>

When the AG is a respondent in court cases, submissions are often not filed, counsel sometimes do not appear, and when they do, are poorly prepared and do not seem to have been instructed by the AG. Justice Majanja expressed himself strongly in *Kenya Bus Service Ltd & Anor v Minister For Transport & 2 Ors*.<sup>30</sup>

The Office of Attorney General is a constitutional office with special responsibilities under **Article 156(4)** particularly representing the national government in court. By virtue of **Article 156(6)**, the Attorney General is required to promote, protect and uphold the rule of law and public interest. It is imperative that in proceedings such these that the voice of the Attorney General is asserted in order to assist the court. Failure to take this responsibility seriously by that office and its officers is a dereliction of duty.

Those who have followed eviction cases will realise that the state authorities' legal representation (especially from the AG) are scanty, show ignorance of, and sometimes contempt for, the constitution, often not answering the allegations of the evictees, or obeying court orders. The AG has defied court orders and has failed to advise the government or parastatals of their obligation to obey court orders. He has refused to enforce decisions of African human rights courts or tribunals. Like his predecessor he sees the interest of the state (which is basically an exploitative and coercive mechanism) as his interests (at least as A-G). For the dereliction of his duties to inform relevant state agencies of court decisions and orders affecting them, Justice Majanja strongly criticised Muigai in *Joseph Ihugo Mwaura v AG*.<sup>31</sup>

30. In my view, the Office of the Attorney General bears great responsibility in ensuring that the rule of law is not undermined. Article 156 of the Constitution imposes on that office and all those officers who serve under it a specific obligation. Article 156(6) is clear that, "the Attorney General shall promote, protect and uphold the rule of law and defend public interest." Clearly by permitting the demolition to proceed in light of a clear court order, the office of the Attorney General did not live up to its responsibilities and failure to live up to its responsibilities has undermined the rule of law and the petitioners' rights under Article 43.

<sup>29</sup> Justice Lenaola said that the question of "advise", "legal representation" and "public interest" cannot be lumped together because the Constitution has demarcated them as such. Whereas the AG is enjoined to uphold the public interest in the discharge of his mandate, the Constitution specifically limited his role as "advocate" and one cannot properly import public interest as a basis for legal representation." (*Isaac Alouch Polo Aluochier v Uhuru Kenyatta and William Ruto* [2014] eKLR, Petition 360/2013, <http://kenyalaw.org/caselaw/cases/view/100144/> para 23. The case concerned whether these two politicians were entitled to be ministers at the same time as they were leaders of their political parties (contrary to Chap. 6 of the Constitution).

<sup>30</sup> [2012] eKLR Civil Suit 504 of 2008 <http://kenyalaw.org/caselaw/cases/view/82366/>

<sup>31</sup> [2012] eKLR Petition 498 of 2009 <http://kenyalaw.org/caselaw/cases/view/81175/>

31. I would hold that it is the unconditional obligation of the Office of the Attorney General and those who act under it, to inform the every State organ, department, state organisation or any public officer affected by an existing of a court order immediately it is made or known and ensure compliance therewith. This is the duty cast upon by Article 156(6) and it cannot be avoided by trick or device.

That the AG has paid scant regard to this admonition is clear from subsequent, similar complaints by judges and litigants. The mild and gentle Justice Mumbi Ngugi was forced to express her frustration at this behaviour in *Mitu-Bell Welfare Society v AG, Kenya Airports Authority* when she said in rebuke to the AG that she was constrained by the “dearth of useful information with regard to the exercise by the state of its constitutional mandate... It appears to me that the state has yet to appreciate fully the obligations placed upon it by the Constitution”. She criticised strongly the breach by the state authorities of the earlier court order to desist from evictions pending resolution of legal issues.<sup>32</sup>

It cannot therefore be said that Muigai has upheld the rule of law or defended the public interest. Nor has he discharged well the responsibility of drafting laws, especially to implement the constitution. Most drafts are sloppy, products of cut-and-paste, internally inconsistent, and uninformed by constitutional or government policies (a striking example was the Lands Bill). Though he promised to clean up the Wako mess in the Chambers, there are rumours that the Chambers are even a worse mess, without direction or co-ordination, to the frustration of younger colleagues who are anxious to do their job well. Further, it has been observed that his office seems to be strikingly mono-ethnic at the higher levels, in violation of the constitutional value of inclusion: as well as the AG himself, the Solicitor General, Deputy Solicitor General, the Chief Litigation Counsel and the Principal Litigation Counsel are all Kikuyu, a state of affairs included in a suit against the AG for various constitutional breaches.<sup>33</sup>

The refusal to respect the constitution has not only discredited him among many people but also landed him in trouble with the LSK, which has petitioned the National Assembly for the AG’s removal for his refusal to defend the Republic in legal proceedings instituted by the notorious owners of Anglo-Leasing.<sup>34</sup>

<sup>32</sup> *Mitu-Bell Welfare Society v. The Attorney General, Kenya Airports Authority and the Commissioner of Lands* [2014] eKLR Petition 164 of 201 High Court Nairobi <http://kenyalaw.org/caselaw/cases/view/87948>.

<sup>33</sup> Okiya Omtatah Okoiti v AG Petition 292 of 2014 instituted in early July.

<sup>34</sup> The petition, under Art. 119(1) is dated 19 May 2014 and is entitled: *In the Matter of Removal from the office of the Attorney General*. In addition to the AG’s refusal to defend the suit (against advice from the London legal advisers of the government), so the judgment was given for default in favour of Anglo-



#### IV. Conclusion

I started this chapter with a discussion of the debate in Britain on the reform of the office of the attorney-general. When we examine the British experience, we are struck by how much earnest thought went into both the process and substance of the issues compared to that in Kenya. This is particularly striking as regards the relationship of the reform of the AG's office to the wider political reform, examining carefully its different functions. The lack of discussion in Kenya is the more striking given that its attorneys general have played havoc with its constitutional and legal system. The discussion in Kenya, especially on the Act, was confined entirely to the National Assembly with no opportunity for wider consultation. The Act was drafted by the AG who had a vested interest in increased powers. The discussion in the Assembly was short and terse, at all stages, with little reference to the broader reform incorporated in the 2010 constitution or the conflicts between professional and political obligations. So we have, as argued above, an Act that determines the AG's responsibilities and procedures that has little relation to the constitutional scheme and values. For example, accountability and participation are completely missing from the Act. In Britain the debate generated a consensus that the AG's advice to the government would be published (as a measure of transparency and accountability for the observance of the law), but for most exceptional circumstances. No one in Parliament raised this issue, perhaps because of lack of public debate.

Nor did any MP raise two critical issues relevant to the rule of law and transparency. The first is that the AG should be consulted by the government at an early stage of discussions on a matter which has important legal angles, rather than, as I suspect often happens here, at the last minute, or indeed after the last minute (as apparently in the Standard Gauge Railway project; characteristically the AG abandoned his first advice on the illegality of the procurement once it became clear that the President wished otherwise). If this were done, various scams and short cuts in procurement could have been halted. The second point is the general consensus that emerged in discussions in England that the AG should not sit in the cabinet, unless exceptionally he is invited to do so when a major issue is involved. The reason was to "over-politicise" the AG so that he or she failed to separate law from proposed policy: some distance is necessary to ensure an objective, impartial legal opinion. Alas, our AGs have been more political than the most seasoned ministers—and

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Leasing, the AG is also accused of reversing his legal opinion that procurement in respect a major railway project violated the constitution. On 26<sup>th</sup> June 2014 the National Assembly invited the public to make submissions on the suitability of Githu Muigai.

openly hobnob with them, even in public. The Act gives unnecessarily wide powers to the AG, in areas where other ministries have greater expertise, confuses issues of legal advice and administrative responsibilities, and leaves the AG, however diligent and committed (a species not known in Kenya so far), hopelessly unable to carry out obligations responsibly and effectively. This is very obvious even in such an important area as law making, which the AG has reserved for himself over the entire spectrum. Particularly disturbing is the way in which both Wako and Muigai discharged their responsibilities in respect of legislation required for the implementation of the constitution.

The second issue I have tried to explore is the effect of constitutional provisions on the behaviour of the AGs, as compared to other factors, such as the broader political and economic contexts or frameworks. In Kenya the dominance of the president has been a key factor. Of significant importance has also been the exploitation of the state and the resources and other opportunities it offers to those who have captured it—the problem of corruption. And related to both is ethnicity, which in our context means mobilising one's ethnic community for support as well as hostility towards others. Exclusion of communities is central to a system based on ethnicity. Gaining and maintaining control of the state is the primary task of politicians, regardless of the law or other ethical considerations. We have not had a single AG (with one possible exception) who has placed a higher priority on law than on these other considerations. Constitutions have been replaced by the politics of greed and exclusion—the consequences of which are wide ranging. It has not only produced illegal wealth for a handful of corrupt people, but caused misery to millions of Kenyans, denying them the basic necessities of life and depriving them of any trace of human dignity.

The third issue on which I conclude the chapter is the consequences of the lack of integrity of attorneys general. This lack of integrity means not only that the AGs have failed to defend the supremacy of the constitution, particularly democracy, the rule of law, and human rights but actively undermined and negated them. They have not only turned a blind eye to the crimes and misdeeds of presidents, their cronies and conspirators, but have joined in the plunder of public and private resources, and the use of the coercive power of the state to intimidate and if necessary, kill those who stand in their way. No AG has done anything to install the spirit of the rule of law or respect for the rights of the people in the police or other armed forces.

The wrecking of the legal and the judicial system by Njonjo, Wako and others meant that the system lost all creditability and effectiveness—most people did not expect any justice, nor did they for the most part seek it through the legal process.

So instead they resorted to violence, self-help, undermining further the legal and criminal justice system. Njonjo himself is reported to have exhorted the people to kill a thief when they find him—there is no hearing by the crowd, and it is likely that many an innocent person has been killed in the melee. Few have talked of or analysed this supreme irony—the official defenders of the schemes for integrity, democracy, human rights, protection of the people have become major accomplices in their destruction. AGs and the people they have served are enemies not only of large sections of the people but also of the state. They steal money from the Treasury, they steal public land, abuse the power of the police, undermine the institutions of the state, etc. They wield power in the name of the state to undermine the state, and have sworn to protect the constitution and uphold the rule of law only to destroy the basic principles of good governance. Should we be surprised that people have resorted to self-help, sometimes the killing of innocent people, and the destruction of their property—in utter frustration at the unwillingness of government to use the police, and now increasingly, the incompetence of the police?



# THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE CONSTITUTION: INSPIRATION, CHALLENGES AND OPPORTUNITIES

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Waikwa Wanyoike

## Introduction

The prosecutor occupies the most critical position in the administration of criminal justice. At one level, the prosecutor's role is quasi-judicial, that is, the holder of the office has to make an objective decision whether to prosecute offences referred by the police or other law enforcers. At another level, the prosecutor operates as counsel, pushing the case on the culpability of an accused person with the aim to obtain a conviction.<sup>1</sup> Prosecutors decide when a matter already before a court may be withdrawn. The prosecutor also largely determines whether to allow a plea bargain (where the system allows it) and significantly affects the type of sentence that result from such a plea bargain. In all, the powers of the prosecutor are immense.

Kenya's 2010 Constitution has changed the status and role of the Director of Prosecutions. Article 157 establishes the office of the Director of the Public Prosecutions (DPP). This is one of the independent offices established by the Constitution.<sup>2</sup> This is a departure from the former constitution which placed the office of the prosecutor within the office of, and under, the Attorney General who had the ultimate powers in respect of prosecutions.

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<sup>1</sup> Ideally prosecutors should not work at getting a conviction but towards a fair resolution of the matter, even though that may lead to acquittal. Practically and in most cases, prosecutors will always work towards establishing that an accused is guilty.

<sup>2</sup> The others being the Controller of Budget and the Auditor General.

This chapter outlines the role of the DPP under the Kenyan Constitution. It analyses the various powers and functions assigned to the office and examines why the Constitution provided for such elaborate and codified mandate. In this regard, there is a brief review of how the prosecutor operated before the 2010 Constitution. Moreover, the chapter will look, albeit in a cursory manner, the way in which the current DPP has interpreted and discharged his mandate in the three years since the promulgation of the Constitution.

### **The Place and Role of the Prosecutor under the Former Constitution**

Kenya adopted the British prosecutor model at independence in December 1963. The British model places prosecution under the office of the attorney general by establishing a Crown Prosecution Service which is superintended by the Attorney General. Under the model, the AG appoints the departmental head responsible for public prosecution and although the prosecutor makes decisions on what cases to prosecute, sometimes the consent of the AG is required before prosecution. This model was adopted by many Commonwealth countries,<sup>3</sup> although with time different countries have tinkered with the model to make it more responsive to their circumstances and needs.<sup>4</sup>

In Kenya, as mentioned above, the former constitution vested the power to prosecute mainly in the office of the AG.<sup>5</sup> Section 26 of the former Constitution established the Office of the Attorney General. Under that section, the AG was the principal legal adviser to the government. He was also accorded powers to institute criminal proceedings, to take over prosecutions initiated privately, to enter *nolle prosequi* (i.e., to stop the prosecution) on any matters instituted or being prosecuted by him or by any other person or authority. Section 26 also gave the AG powers to require the Police Commissioner to investigate any matter which related to the commission of a criminal offence. In the exercise of prosecutorial powers, the AG

<sup>3</sup> See, for example, Uganda, Nigeria, Ghana, Australia.

<sup>4</sup> For example, Brian Grossman argues the Prosecutor in Canada has come to resemble more his French, Scottish or American counterpart in that he plays little role in initiating criminal prosecutions, acts in non-political manner and is responsible for directing police investigations. See Brian A. Grossman, "The Role of The Prosecutor in Canada", (1970) 18 (3) *American Journal of Comparative Law*, 498, at pp. 499-500. See also Ghai's chapter in this book on AGs which explores debates on reform of prosecutor powers in UK.

<sup>5</sup> For a more detailed reading on the Role of the AG as prosecutor under the former Constitution, see Momanyi Bwomwonga, *Procedures in Criminal Law in Kenya* (Nairobi: East African Publishers, 1994) at pp. 48-52 and 154-160.

was to act independently, but given Kenya's political practices, this proved impossible.

Although the Constitution seemed to accord the AG significant powers, the AG however, was not immune to the centralization of the government around the presidency that incrementally took place from 1963 to the late 1990s. In fact, while the independence Constitution had provided for security of tenure for the AG, the 1986 and 1988 Constitutional amendments deleted that security of tenure.<sup>6</sup> This change was noted with concern by the Constitution of Kenya Review Commission (CKRC) in its final report where it observed:

Third, in 1986, a far-reaching amendment removed the security of tenure of the Attorney-General. Hence he or she could be dismissed by the President. The exercise of the functions of that office, which include providing independent legal advice to the government, and impartial prosecution, were henceforth exposed to political influence.<sup>7</sup>

However, even the constitutional amendments may not have been necessary since President Daniel arap Moi had removed the AGs whenever they had acted in a manner that did not please him. In fact, this was the fate that befell Attorney General James B. Karugu, who criticized a decision of a judge who had passed an uncharacteristically lenient sentence but which was favoured by President Moi. The AG was soon dismissed from office. Korwa Adar and Isaac Munyae (above) explain the intrigue as follows:

Two major events happened before Act 14 of 1986 was passed in Parliament to symbolize the unchecked power of the executive. In his ruling in a case in which an American marine had murdered a Kenyan woman in Mombasa, a judge found the accused guilty but fined the marine only Kenyan shillings 500 (about \$50) and bonded him for one year probation. The issue was raised in parliament thereafter because of the light sentence imposed by the judge. The then Attorney General, James B. Karugu, as the chief legal advisor to the government, responded by criticizing the decision of the judge. He did not last long in his position.

<sup>6</sup> See Korwa Adar and Isaac Munyae, "Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-2001" (2001) 5(1) *African Studies Quarterly* 1. Adar and Munyae write:

The 1986 and 1988 constitutional amendments provided for the removal of the security and tenure of the Attorney General, the Controller and Auditor General, the judges of the High Court and the Court of Appeal. Parliament, which at this time was under the control of the executive arm of the government, did not resist these amendments. The control of parliament and the judiciary meant that the office of the president was in a position to manipulate the functions of the two branches of the government. Both Parliament and the Judiciary ceased to have the constitutional rights to control the excesses of the executive. There were no checks and balances on Moi's personal authority.

<sup>7</sup> See Constitution of Kenya Review Commission, *Report of the Constitution of Kenya Review Commission*, The Main Report, Volume One (Nairobi: CKRC, 2003) at p. 50

While the constitution still maintained that the AG was to exercise his powers without direction or control from anyone that largely remained a legal fallacy in the absence of the security of tenure. Because of lack of tenure and the complete politicization of all senior government positions, the work of the AG in relation to prosecution was significantly compromised. The AG became an agent of repression, initiating or allowing for initiation of many unmeritorious criminal cases against persons perceived to be opposed to the political regime, while terminating or failing to prosecute many meritorious criminal cases for persons considered to be supportive of the regime.<sup>8</sup> Criminal law in many ways became a tool not for procuring criminal justice but for punishing political dissent. The objectivity expected of the AG was substituted by subjective and partisan considerations.<sup>9</sup> A dangerous culture of how the prosecutor handled his/her role was established. Unfortunately that culture seems to persist to some extent even with a new Constitution that gives independence and tenure to the DPP.

### Article 157 of the Constitution

Article 157 of the Constitution establishes the office of the Director of Public Prosecutions (DPP). That office is independent of the Attorney General.<sup>10</sup> The appointment of the DPP is made by the President after approval of his nomination by the National Assembly (Art. 157(2)). Unlike the Attorney General who has no security of tenure, the Constitution provides the DPP with security of tenure for a non-renewable constitutional term of eight years.<sup>11</sup> The Constitution further provides for elaborate procedures of removal of the DPP from office.<sup>12</sup> These additional provisions for the protection of the DPP are also not available to the Attorney General.

<sup>8</sup> See generally, African Centre for Open Governance, “*Assessing Amos Wako’s Performance: A Poisoned Legacy*” (Nairobi: Africog, August 2011) available at [http://www.africog.org/reports/Poisoned\\_Legacy.pdf](http://www.africog.org/reports/Poisoned_Legacy.pdf). See also Nowrojee and Mutunga in this volume.

<sup>9</sup> See, for example, the admonishment of the AG by the Kenya Section of International Commission of Jurists relating to his entering a *nolle prosequi* in the case against the then first lady Lucy Kibaki which was initiated by a journalist Clifford Derrick and the case of Tom Gilbert Cholmondley available online at <http://www.icj-kenya.org/index.php/media-centre/press-releases/219-attorney-generals-exercise-of-powers-to-enter-nolle-prosequi> The ICJ, in the press statement dated May 24, 2005 states that “in proceeding as he has, the Attorney General has sought to frustrate the Administration of Criminal Justice by applying differential standards, and protecting select individuals from the law.” See Ghai’s chapter for a detailed analysis of the abuse of prosecutorial and other state powers by the AGs.

<sup>10</sup> See Article 156 of the Constitution of Kenya 2010 which limits the role of the AG being the principal legal advisor to the government and to represent the national government in legal proceedings.

<sup>11</sup> Article 157 of the Constitution of Kenya 2010.

<sup>12</sup> Article 158 of the Constitution of Kenya 2010.



The functions of the DPP are also elaborately set out in Article 157. One critical power of the DPP is the authority “to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct” and the Constitution requires compliance from the Inspector General. This provision, more than any other, gives the DPP the most potent tool of ensuring action where there is suspicion of criminal activity.

Additionally, Article 157 provides the DPP with state powers of prosecution, including:

- instituting and undertaking criminal proceedings against any person in regard to any offence alleged to have been committed;
- taking over and continuing any criminal proceedings initiated by another person or authority but with permission of that person or authority;
- discontinuance of any criminal proceedings being undertaken by DPP at any stage, except that the DPP requires leave of Court to discontinue the case and that the discontinuance taken after the close of the prosecution’s case must result in acquittal.

Article 157 secures the prosecutorial independence of the DPP. The relevant sub article states:

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

However, prosecutorial powers must be exercised in accordance with Article 157 (11): he or she must “have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

The powers and functions of the DPP are further elaborated in the Office of the Director of Public Prosecutions Act of 2013 (ODPP Act).<sup>13</sup> The Act elaborates and regulates the operations of the office of the DPP.

### **Rationale for and Historical Foundations of Article 157**

Article 157 is a manifestation that the drafters of the Constitution were concerned with the dismal past performance of the office of the AG in regard to prosecutions. This issue received a lot of prominence when the Constitution of Kenya

<sup>13</sup> Act No. 2 of 2013. Section 3 states:

3. The object of this Act is to give effect to the provisions of Articles 157 and 158 and other relevant Articles of the Constitution.

Review Commission (CKRC) sought people's views on what they wanted reflected in the new constitution.<sup>14</sup> There were concerns that the AG was performing too many roles – that of Member of Parliament and a member of the Cabinet – and this compromised his ability to act as an independent prosecutor. The people were also concerned by the ability of the AG to take over private prosecutions since over the years AGs had used this powers to frustrate the abilities of individuals to prosecute cases that the political establishment was unwilling to undertake.

People who offered their views to CKRC concerning the skewed prosecutorial practices considered that the problem could be addressed through separating fully the office of the AG from that of the DPP, giving the DPP security of tenure, providing the DPP with powers to require police to conduct investigations in certain circumstances and by expressly stating that the Inspector General of Police must comply and by providing the office with complete independence and insulating it from external influences.

These recommendations were eventually adopted when the CKRC drafted its proposed constitution.<sup>15</sup> Luckily, the text of the provision on the DPP developed by CKRC did not change much during the other stages of constitution-making.<sup>16</sup> Even where there were minor changes,<sup>17</sup> those did not derogate from the core principles spelt out by the people during the CKRC constitution-making process, including the separation of the office of the DPP from that of AG, tenure of office, prosecutorial independence, power to direct Inspector General of police to conduct investigations and the requirement that the DPP could only withdraw charges with the leave of the Court.

### **The Role of the DPP in Entrenching Constitutionalism**

As explained above, Kenyans had little confidence in the country's prosecution system under the previous constitution. Abuse of office had led to a pervasive culture of impunity amongst senior government officials and other well connected individuals. Unfortunately impunity still remains the greatest threat to constitution-

<sup>14</sup> See Constitution of Kenya Review Commission, The National Constitution Conference, *Verbatim Report of Plenary Proceedings – Presentation of the Draft Bill, Chapter 9 – Judicial and Legal Systems*, held at the Bomas of Kenya on 20<sup>th</sup> May 2003 at pp. 11-12 (on file with author).

<sup>15</sup> See Recommendations 138 and 140 in CKRC Main Report, Volume One, p. 327

<sup>16</sup> Other constitution-making process followed that of CKRC. They were the National Constitutional Conference in 2004 and later the Committee of Experts (COE) process of 2009-2010 that eventually resulted in the passage of the Constitution of Kenya 2010.

<sup>17</sup> For example the CKRC draft Constitution proposed that the DPP should hold the office for a single term of ten years, whereas the Constitution of Kenya 2010 provides for a term of eight years.

alism in Kenya.

A number of past studies show how entrenched impunity was under the former constitution. For example, the Commission of Inquiry into Post-election Violence (CIPEV) found that impunity was very prevalent and was a significant contributor to the post-election violence. CIPEV noted that:

Impunity is especially common in countries that lack a tradition of the rule of law, suffer from corruption or that have entrenched systems of patronage, or where the judiciary is weak or members of the security forces are protected by special jurisdiction or immunities.<sup>18</sup>

CIPEV found that impunity was thriving in the country and was fuelled by “elements of systemic and institutional deficiencies, corruption, and entrenched negative socio – political culture.” (p. 444) It concluded that the “issue of impunity is directly related to the ability of the state to prosecute persons for criminal offences” (p. 445). Importantly, CIPEV indicted the AG for helping fuel impunity in the country. The Report illustrates (p. 453) how entrenched impunity is in Kenya:

In view of the lack of any visible prosecution against perpetrators of politically related violence, the perception has pervaded for some time now that the Attorney General cannot act effectively or at all to deal with such perpetrators and this, in our view, has promoted the sense of impunity and emboldened those who peddle their trade of violence during the election periods, to continue doing so.

One of the main concerns expressed by CIPEV on Amos Wako was his failure to take any action in relation to persons identified by *The Judicial Commission of Inquiry on the Tribal Clashes that occurred in various parts of Kenya since 1991* otherwise known as the “Akiwumi Commission.” Despite the Commission recommending numerous persons to be investigated and possibly prosecuted, Wako failed to show any meaningful action taken in this regard. Although he tried to defend himself as having done everything he “ought to have done” which was “to direct the Commissioner of Police to investigate” (p. 453), there was no convincing evidence that he had been resolute and forceful enough in pursuing the investigation and prosecution of those named by the Akiwumi Commission (most of whom were still influential in government).

In fact Wako’s record was dismal from the start despite initial expectations that he would be guided by his human rights background to help entrench rule of

<sup>18</sup> *Report of Commission of Inquiry into Post-election Violence* (Nairobi: Government of Kenya, 2008) (Waki Commission) (CIPEV) p. 444 [http://www.kenyalaw.org/Downloads/Reports/Commission\\_of\\_Inquiry\\_into\\_Post\\_Election\\_Violence.pdf](http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf).

law and respect for human rights.<sup>19</sup> For example, according to the Africog Report cited earlier (p. 4):

... the A.G made frequent attempts to frustrate fair trial of various persons that challenged the government. Specifically, he used the colonial strategy of charging accused persons in their original home districts and, in so doing, distancing those that he charged from their legal counsel.

Allowing political exigencies to restrain his powers and always willing to protect the powerful, it is clear it was not luck that ensured that Wako remained as AG for 20 years. Concerns that impunity continues to constrict Kenya's prosecutorial abilities, have also been raised during the term of the current DPP, Keriako Tobiko.<sup>20</sup>

### **Starting from the Wrong Foot – Controversies over Tobiko's Appointment**

Keriako Tobiko is the first DPP appointed under Article 157 following the promulgation of the Constitution of Kenya 2010. However, his appointment was shrouded in controversy – something that may have undermined greatly what those who conceptualized Article 157 wanted to achieve – creation of an independent, objective and potent office of prosecutor. This supremely ironic because Tobiko

<sup>19</sup> See, generally, African Centre for Open Governance, *Assessing Amos Wako's Performance: A Poisoned Legacy* (Nairobi: Africog, August 2011) available at [http://www.africog.org/reports/Poisoned\\_Legacy.pdf](http://www.africog.org/reports/Poisoned_Legacy.pdf). The Report chronicles many instances where Wako manipulated the law and acted improperly in order to stay in favour with the political regime.

<sup>20</sup> For example a Parliamentary Committee criticized Tobiko's failure to implement the recommendation of Joint Sessions of the Departmental Committees on Administration, National Security and Local Authorities and Administration of Justice and Legal Affairs that was adopted in late 2010 and which required the DPP to institute criminal investigations against two Armenian nationals known as Artur Margaryan and Artur Sargasyan as well as well as a businesswoman Mary Wambui. See Francis Mureithi, "MPs want Tobiko to Act on Artur Brothers Report", *The Star*, February 17, 2012. Available at: <http://www.the-star.co.ke/news/article-29706/mps-want-tobiko-act-artur-brothers-report#sthash.l7FJJcU.dpuf> (accessed January 27, 2013).

Also see Ndungu Wainaina, "DPP Tobiko's Performance is Below Par", *The Star*, February 6, 2012. Available online at <http://www.the-star.co.ke/news/article-31386/dpp-tobikos-performance-below-par> (accessed, January 27, 2014). Wainaina states:

Tobiko has actually demonstrated his will to frustrate wheels of justice. This is despite the constitutional paradigm shift that created a completely new and independent institution to bring an end to impunity, corruption and abuse of public office.

This can be well exemplified by Tobiko's failure to seriously pursue and prosecute post-election violence middle and low offenders. Further, he lacks the zeal to prosecute and get convictions even on minor charges relating to corruption brought against perpetrators despite him having constitutional powers to direct investigations. Also the suspended Deputy Chief Justice Nancy Baraza's case whose prosecution has not commenced as well as a number of cases involving high profile or politically correct people that has terminated despite conclusive investigations having been done on them.

was a member of the CKRC that first proposed these reforms although there seems to have been questions whether he was committed to the constitutional making process or the ethos of CKRC. For example, Prof. P.L.O. Lumumba notes:

Keriako is without doubt an intelligent man. My only regret is that his intellectual might was not fully applied for the benefit of the review process.<sup>21</sup>

Many other factors relating to the candidature of Tobiko illustrates the sense of a false start. First, he was serving as the Deputy Public Prosecutor<sup>22</sup> under Attorney General Amos Wako, for a period of six years before being appointed as the first ever Article 157 DPP. This period included a period when CIPEV found that impunity was so prevalent and that the AG had failed to take action against those who were the masterminds of Post Election Violence (PEV). Beyond PEV issues, perhaps the clearest summation of the failures of the public prosecutor's office when it was under the AG was a statement made by Abdikadir Mohamed, the then Chairperson of the Parliamentary Committee on the Implementation of the Constitution (CIOC), presenting his Committee's report relating to Tobiko's vetting process. He noted the following:<sup>23</sup>

Deputy Speaker, Sir, on the issue of past experience, the Committee was very strong that this gentleman and the Attorney-General and that department had nothing to write home about in terms of work product. The Committee was very clear that as far as we were concerned, quite a number of Committee Members felt that the very fact that the Attorney-General had come to support the current nominee, was negative in terms of the nominee's chances with the Committee.

Second, there were many accusations<sup>24</sup> brought against Tobiko during his vetting by parliament for the position of the DPP. For example, in its Governance Report of 2011, the African Centre for Open Governance (AfriCOG) wrote that:

<sup>21</sup> PLO Lumumba, *Kenya's Quest for a Constitution: The Postponed Promise*, (Nairobi: The Jomo Kenyatta Foundation, 2008) at pp. 12-13. Prof. Lumumba also chronicles other concerns relating to Tobiko's commitment to CKRC process.

<sup>22</sup> The Deputy Director of Prosecution under the former constitution was the person responsible for the day to day management of public prosecution. In many ways, the current office of DPP is seen as elevation of the former Deputy Director of Prosecution office by separating it from the office of the AG and making it a standalone independent office.

<sup>23</sup> The Official Report of Parliament of Kenya of 15<sup>th</sup> June 2011(pm) available online at <http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/hansards/official-report-15.06.11p/view> (accessed, January 27, 2014)

<sup>24</sup> See the Constitution Implementation and Oversight Committee, *Report on the Approval of Dr. Willy M. Mutunga for Appointment to the Office of Chief Justice, Ms. Nancy M. Baraza for Appointment as Deputy Chief Justice and Mr. Keriako Tobiko for Appointment as Director of Public Prosecutions* (Clerk's Chambers, National Assembly, June 2011) <http://s3.marsgroupkenya.org/media/documents/2011/09/6489a76ee124ae98a7e6da89115cc075.pdf>.

The nomination of Keriako Tobiko as Director of Public Prosecutions (DPP), unlike that of the CJ, attracted criticism from independent observers and several civil society organizations that cited a lack of transparency in the process that led to his nomination and appointment. In particular, critics of his nomination and appointment as DPP argued strongly that Tobiko's alleged lack of professional integrity and dismal record of lack of meaningful action against corruption were raised on several occasions during the vetting process but inadequately interrogated or altogether dismissed. The following were the main concerns highlighted with respect to the appointment of Tobiko as DPP:

- a. The panel gazetted by the President to shortlist names for the position of DPP failed to permit public participation - one of the national values under Article 10 of the constitution.
- b. The panel failed to pay due regard to at least one complaint received from the public in connection with Tobiko's suitability for possible nomination.
- c. The selection panel conducted its proceedings in an opaque manner and one open to question.
- d. The panel failed to examine Tobiko's record in respect of prosecutions which, it was alleged to the Constitutional Implementation Oversight Committee (CIOC), was extremely poor.
- e. The CIOC failed to investigate allegations about Tobiko which spoke directly to his leadership and integrity.
- f. The CIOC had a split vote with respect to its review of the nomination of the DPP, and it was seen as quite inappropriate for such a result to be reported to the House as a recommendation to approve the nomination, especially bearing in mind that, in normal parliamentary practice, if there is a split vote on any motion, the motion is lost.

In fact, Tobiko's candidature was so controversial that the Committee of Parliament that vetted him split in the middle in its decision whether or not to recommend him for endorsement for the position.<sup>25</sup>

Interestingly, Tobiko was the only person within the newly created independent offices who managed to succeed to his own role under the Constitution of Kenya 2010<sup>26</sup> even at a time when the office was said to have performed so dismally. Regardless, qualified or not, Tobiko's nomination and subsequent confirma-

<sup>25</sup> See, "Vetting: Tobiko Scrapes Through", *Daily Nation*, Thursday June 9, 2011. Available online at: <http://www.nation.co.ke/News/Panel+clears+Mutunga++Barasa+and+Tobiko/-/1056/1177764/-/sqd-82fz/-/index.html> (Date Accessed February 10, 2014)

<sup>26</sup> The other independent offices created by the 2010 Constitution, that is: the Office of the Auditor General and the Comptroller of Budget all saw new officials who had not previously been associated with those offices. In fact the transitional provision of the Constitution required the Chief Justice, the Attorney-General and the Auditor serving on the effective date to vacate office within a specified period afterwards without the option of re-appointment (Sixth Schedule ss. 24 and 31(7)).

tion as DPP has been frequently characterized as a political horse-trading instead of a legal and transparent process that the Constitution anticipated. A statement<sup>27</sup> released by a number of civil society organisations on June 8, 2011 cautioned the dangers of horse-trading given the concerns raised against Tobiko:

These and other disturbing allegations are in the public domain. As such, the Constitution Oversight Implementation Committee (COIC) must make every effort to get to the bottom of them before making any recommendation on Tobiko's candidacy. Any attempt to engage in unprincipled political horse-trading at the expense of a rigorous search for the truth in these charges and others will be rejected and opposed by all legal and constitutional means. Kenyans have not come so far in order to compromise on the possibility of real change at this critical point in our history.

The concern whether the nomination of Tobiko complied with the requirements of the Constitution did not end even after his appointment. For example, on June 24, 2011, *Africa Confidential* reported that:

President Mwai Kibaki swore in Keriako Tobiko as Director of Public Prosecutions (DPP) on 20 June following an acrimonious vetting last week. Members of Parliament on the Constitution Implementation Oversight Committee (CIO) had accused him of corruption and conflicts of interest. Tobiko, an accomplished lawyer, denies any wrongdoing. After horse-trading between the parties and ethnic factions, the Committee confirmed Tobiko's nomination and ignored recommendations for an investigation into the accusations that had been presented to the vetting panel.<sup>28</sup>

But the foregoing contentions have to be put into context of a judicial process that considered whether the appointment of Tobiko was in violation of the Constitution. On June 16<sup>th</sup> 2011, the Kenya Youth Parliament, Kenya Youth League and a Patrick Njuguna filed a constitutional Petition<sup>29</sup> in the High Court of Kenya to try and restrain Tobiko from assuming office on account of allegations relating to "corruption, incompetence, conflict of interest and lack of reform credentials." They also alleged that the process leading to the confirmation of Tobiko as DPP was inimical to the principle of public participation. The Court however upheld the

<sup>27</sup> See, generally, *Civil Society Statement on the Process of Vetting for the Chief Justice, Deputy Chief Justice and Director of Public Prosecution*, dated June 8, 2011 (available at <http://www.khrc.or.ke/media-centre/press-releases/88-civil-society-statement-on-the-process-of-vetting-for-the-chief-justice-deputy-chief-justice-and-director-of-public-prosecutions.html>).

<sup>28</sup> See "Kenya: The Trouble with Tobiko", *Africa Confidential* June 24, 2011, Vol. 53 no. 13 available online at [http://www.africa-confidential.com/article-preview/id/4042/The\\_trouble\\_with\\_Tobiko](http://www.africa-confidential.com/article-preview/id/4042/The_trouble_with_Tobiko) (accessed February 13, 2014)

<sup>29</sup> *Kenya Youth Parliament & 2 others v Attorney General & 2 others* [2012] eKLR Constitutional Petition No. 101 of 2011 at the High Court of Kenya (Nairobi), available at <http://kenyalaw.org/caselaw/cases/view/79843> (accessed January 27, 2014)

appointment of Tobiko on the basis that it was constrained from “entering into the arena of merit review of a constitutionally mandated function by another organ of State that has proceeded with due regard to procedure.”

This holding is interesting for a number of reasons. First, Article 165(3)(d)(ii) gives the High Court original jurisdiction to determine “whether anything said to be done under the authority of this Constitution or of any other law is inconsistent with, or in contravention of, this Constitution.” This clause provides the High Court with unfettered original jurisdiction powers to determine whether the Constitution has been rightly interpreted. However, in its determination the Court seemed to have confused or conflated its original jurisdiction with that of judicial review of administrative action, tending, in the larger part, to have interpreted its mandate as being that of Court sitting on a judicial review determination. This is illustrated in the Court’s reasons where it states that it could not get into “merit review” and that it could not substitute “its value judgment for those of the constitutionally mandated organs” an approach that is more consistent with a court exercising judicial review powers as opposed to original jurisdiction, which undoubtedly must incorporate an exhaustive merit review.

Secondly, the failure of the Court to get into merit review did not assist Tobiko much in eradicating adverse allegations made against him, which would have helped to diminish the concerns by some that his was a politically inspired appointment. In fact, the Court process, by failing to conduct a merit review of the complaints made against Tobiko, seemed only to add to processes of appointment that shunned resolving allegations leveled against him in a meritorious manner. This was especially discernible given that parliament, in approving Tobiko, largely adopted a political strategy which obscured relevant legal and factual issues raised against his candidature. Both the judicial and parliamentary processes assisted in diminishing the independence, integrity and professional stature that Tobiko and the office of the DPP needed, to inspire public confidence that it was capable of discharging independently and with integrity the constitutional mandate conferred upon it from the beginning.

## **Performance of the Office of the DPP**

### *Institutional and Administrative Reforms*

There have been genuine efforts at streamlining the Office of the DPP since it became an independent constitutional office. These efforts include massive personnel recruitment drives which have seen the increase of the number of state counsel



representing the DPP in Court and which has led to the reduction of the number of police officers acting as prosecutors in Court.<sup>30</sup> These have instilled professionalism in ODPP; there is discernible change of professional attitude. The DPP office has also made efforts at institutionalization, including by setting various directorates headed by senior and experienced advocates or persons with reputable qualifications.<sup>31</sup> These departments are responsible for ensuring proper prosecutions of offences falling within their thematic ambits. The ODPP has prepared an ambitious agenda to guide it over the next few years.<sup>32</sup> However, the DPP office continues to face myriad challenges, including underfunding and inability to attract and retain qualified staff.<sup>33</sup>

### *Interpretation of DPP's Prosecutorial Authority*

The DPP office has also come out strongly, through a number of court processes, to try and assert and safeguard its independence and mandate especially that of instituting prosecution. A number of issues have come up before courts in regard to the mandate of the DPP. Two critical issues have been the independence of the DPP especially in relation to his power to initiate prosecution, and the interpretation to be given, and the standards required, in exercise of his power in relation to having “regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”<sup>34</sup>

### *Independence and Power to Prosecute*

The DPP has been assertive in protecting his power to decide what cases must be prosecuted. For example in *Evans Odhiambo Kidero & another v. Director of Public Prosecutions & 2 others*,<sup>35</sup> the DPP argued that it was the preserve of his office to decide whether or not to prosecute a matter despite parties' consent to

<sup>30</sup> The office of the DPP has over the years relied heavily on police officers to act as its prosecutorial agents. This practice is still ongoing although in a lesser scale. There are valid questions whether it is constitutional for police officers to act as prosecutors, especially where the Constitution expects the National Police Service (NPS) as well as the DPP office to be independent and where the DPP has to decide exercise independently whether to initiate prosecution in relation to charges laid by the police.

<sup>31</sup> See, Office of the DPP, *The Annual Report of the ODPP 2012-2013* (Nairobi: ODPP, 2013)

<sup>32</sup> See Office of the DPP, *ODPP Strategic Plan 2011 – 2015* Nairobi: ODPP, ([www.odpp.go.ke](http://www.odpp.go.ke) – which is seemingly no longer available).

<sup>33</sup> ODPP *Annual Report 2012-13*,

<sup>34</sup> Article 157(11) of the Constitution of Kenya, 2010

<sup>35</sup> [2014 eKLR] Petition 11 and 14 of 2014 at High Court of Kenya (Nairobi) (<http://kenyalaw.org/caselaw/cases/view/95707/>) (Accessed April 20, 2014)

withdraw complaints of criminal behaviour against each other. The Court agreed with the DPP and stated as follows:

7. I agree with the respondents that the proper order is to mark the matter as withdrawn. The settlement of the parties cannot bind the DPP, an independent office, established under Article 157 of the Constitution unless he consents to the settlement. He is entitled to assert his authority to reconsider his decision in light of the accord between the petitioners and the withdrawn proceedings having regard to public interest and other factors outlined in Article 157(11).<sup>36</sup>

Similarly in *Republic v. Director of Public Prosecutions & another Ex-Parte Communications Commission of Kenya*,<sup>37</sup> the DPP in exercising his powers to decide on whether to prosecute, declined an invitation by the Communication Commission of Kenya (CCK) to prosecute Royal Media Services (RMS) and its Directors for use of unauthorized broadcasting frequencies. CCK had moved to court claiming that the DPP had abdicated his constitutional obligation in failing to prosecute and had acted in excess of his constitutional and statutory powers in ordering the police to cease further investigative action against RMS. The court held that the Constitution bestowed upon the DPP the discretion to determine when or not to prosecute and unless it was shown that he acted illegally or in abuse of his discretion, the court will not interfere with the DPP's decision. On the DPP's duty to prosecute, the court held:

The duty to prosecute or not to prosecute lies with the Respondent [DPP]. Kenyans through the Constitution and Parliament specifically assigned that power to the Respondent. The Respondent, it is assumed, is equipped with the skills and tools of analyzing a case and deciding whether the same has a realistic prospect of conviction.

The court's enthusiasm to interpret the DPP's mandate as requiring minimal interference from the court is consistent with the provisions of Article 157. However, given the historical realities where the powers to prosecute were variously abused to victimize persons who did not deserve to be subjected to criminal pro-

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<sup>36</sup> However, in *Republic v. Mohamed Abdow Mohamed* [2013] eKLR Criminal Case 86/2011 <http://kenyalaw.org/caselaw/cases/view/88396/> the DPP agreed to withdraw murder charges against the accused on the grounds that he and the family of the murdered person had reached settlement under Islamic law. It is an extraordinary decision, in the middle of an urban area, with problems of law and order, on a serious matter like murder. See discussion of the case by Yash Ghai, "Interpreting the Constitution: Balancing the General and the Particular" in Yash Pal Ghai and Jill Cottrell Ghai (eds) *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives* (Nairobi: Katiba Institute and the Global Centre for Pluralism, 2013) pp. 162-167.

<sup>37</sup> Judicial Review No. 221 of 2013 (Nairobi High Court) <http://kenyalaw.org/caselaw/cases/view/95112/> (accessed April 20, 2014)

cesses as well as failing to prosecute those who have committed crimes because of their social or other extraneous status, it would be necessary for the court to approach the DPP's exercise of his discretion to prosecute with considerable caution. Additionally the manner in which the current DPP came to office is further supportive of the need for the judiciary to exercise its judicial review powers on DPP's decision with abundant keenness.

*Public interest, interests of the administration of justice and abuse of legal process*

The keenness we suggest is actually anticipated by the Constitution in Article 157(11) where DPP's independence in exercising prosecutorial powers is circumscribed by the requirements that in exercising his prosecutorial authority he must have "regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."

Courts have held that, while they will safeguard the independence of the DPP to decide on what cases to prosecute, they will not hesitate to interfere where it is shown that the prosecution is an abuse of process or is inspired by factors that are inimical to public interest or where the nature of prosecution would bring the administration of justice into disrepute.<sup>38</sup>

Article 157(11) is especially important in ensuring that the DPP does not perpetuate a two-tier prosecutorial system, something that has existed in Kenya for long. By "the two-tier prosecutorial system" is meant the fact that in most cases relating to prosecution of persons high in authority or well-known personalities, or generally privileged persons within the society, the findings of criminal investigations are most often seen and evaluated by the ODPP before formal charges are laid (and very often they are not laid), whereas in other cases, the DPP hardly engages in this prior evaluation of the merit of case even though it is required by law.

The opposite is true in relation to most other people who face criminal prosecutions, where most of the decisions to charge are made by the police and the prosecutor practically gets to know of the charges when the matter is already before the court. Additionally, there is little evidence to show that once the matters are already in the court, the ODPP has established any structured mechanism of evaluating the

<sup>38</sup> See for example, *Musyoki Kimanathi v Inspector General of Police & 2 others* [2014] eKLR, Petition 442 of 2013 (<http://kenyalaw.org/caselaw/cases/view/96823/>); *Stanley Munga Githunguri v Republic* [1985] KLR 91; *Josephine Akoth Onyango & another v Director of Public Prosecutions & 4 others* [2014] eKLR, Petition No. 471 of 2013 (<http://kenyalaw.org/caselaw/cases/view/95332/>).

evidence to determine whether it discloses a “realistic prospect of conviction”<sup>39</sup> in order to determine whether to continue with prosecution. Because disclosure of evidence to the accused person is mostly administered by the police, it is not uncommon that the prosecution will not have seen the actual evidence before the charges are laid, or the accused person is required to take a plea, or even in extreme circumstances, moments before the trial of an accused person commences. In such instances, the ODPP would have failed in its obligation of evaluating whether the matter ought to be prosecuted in the first place, often exposing the accused persons to various constitutional violations including those relating to the security of the person under Article 29 of the Constitution.

## Conclusion

ODPP has undertaken genuine efforts to institutionalize and professionalize in order to meet the specific demands of Article 157 of the Constitution. However, there are still numerous internal and external factors that undermine and slow its progress. They include being tethered to historical factors and manners of operations that necessitated the call to reform the prosecutorial system in the first place and which inspired the inclusion of Article 157 in the Constitution. Another factor is the failure of the national government, including parliament, to fully appreciate the critical role of the ODPP by providing it with sufficient resources needed to achieve functional independence and to facilitate high-level professionalism.

Nevertheless, an evaluation of the performance of the ODPP so far leaves an impression that while it has been vocal in pushing for the recognition of its prosecutorial independence; the office has done very little in using its powers to prosecute cases that foster systemic impunity, especially against persons in authority or the elites in society. This is a significant failure on the part of the ODPP since the

<sup>39</sup> “Reasonable prospect of conviction” is the test that the DPP should use in deciding whether to undertake or continue prosecution. This test was elaborated by the Divisional Court of the Queen’s Bench Division in *R v DPP Ex p Manning* [2001] QB 330:

21. Section 10 of the Prosecution of Offences Act 1985 requires the Director to issue a code for Crown Prosecutor giving guidance on general principles to be applied by them in determining, in any case, whether proceedings for an offence should be instituted. The Code applicable in this case laid down two tests before a decision to prosecute would be made. The first test was described as “the evidential test” which had to be satisfied before the second ‘public interest’ test became applicable. The code provided:

“5.1 Crown Prosecutors must be satisfied that there is enough evidence to provide a “realistic prospect of conviction” against each defendant on each charge. They must consider what the defence case may be and how that is likely to affect the prosecution case.”

constitutional reforms that focused on that office were inspired more by the need to ensure that the DPP would be able to undertake his mandate in a manner that was not favourable to those in authority or the social elites. Conversely, the reforms were also motivated by the need to protect the vulnerable in the society or those who were not favoured by the political elites (for example human right defenders) from being victimized through the use of criminal justice system or being dragged unnecessarily through phony criminal processes. There are still many structural and policy reforms that the DPP needs to put in place in order to confirm that he appreciates the motivation of constitutional reforms that inspired his office.



# ACCESS TO JUSTICE: THE PARALEGAL APPROACH

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Jedidah Wakonyo Waruhiu  
John Justice Odhiambo Otieno

*“We, the people of Kenya –*

*RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law”*

(Preamble, The Constitution of Kenya, 2010)

## Introduction

Access to justice and the fair administration of justice are hallmarks of the Constitution of Kenya.<sup>1</sup> These provisions represent a major shift from the past. Previously, human rights and human dignity were frequently abused by the executive with no recourse to the judiciary which the executive had captured through the judicial appointments and political patronage. Indeed this judicial capture seriously lowered the judiciary’s institutional profile, public trust and confidence among the court users in its management and judicial pronouncements. Consequently people opted for other remedial actions like mob (in)justice, traditional dispute resolution mechanisms, demonstrations, mass action and paralegal interventions<sup>2</sup> to resolve their disputes.

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<sup>1</sup> See Article 48, “The state shall ensure access to justice for all persons...” and Article 159 on the exercise of judicial authority.

<sup>2</sup> Patricia Kameri Mbote and Migai Akech, *Kenya: Justice Sector and the Rule of Law* (A review by AfriMAP and the Open Society Initiative for Eastern Africa) (Nairobi: Open Society Foundations, 2011)

This fundamental shift in the 2010 Constitution therefore provides a new paradigm shift for the people of Kenya. This is because the people are recognised as sovereign in the nation<sup>3</sup> and judicial authority<sup>4</sup> is anchored in the people. This means that all judicial action must be undertaken in the best interests of the people of Kenya, in line with their aspirations and ensuring the people's participation as the consumers of justice and court users. This means that the access to justice is now a living reality where people can sue the executive or other institutions and/or individuals without fear of subsequent executive intimidation, judicial miscarriage of justice or negligence in both the administration of and access to justice.<sup>5</sup> The people are further protected by the recognition that the state is responsible for the protection of human dignity<sup>6</sup> which is inherent and must therefore be respected at all times. This should therefore be evidently manifested in the judiciary's transformative agenda, functions, daily operations, rulings and judgments.

It is against this background of constitutional reform and the envisaged judicial transformation that this chapter discusses the Paralegal Approach concept that is a key pillar and strategy in this judicial transformation agenda. The chapter is divided into four parts: Part I defines the paralegal approach and training, Part II elaborates the paralegal approach through the paralegal role(s) and their contribution in the administration of justice, Part III highlights the constitutional guarantees that anchor the paralegal approach, and Part IV highlights some judicial opportunities in which the further development of the paralegal approach can enhance access to and the administration of justice nationally.

## **I. Paralegal Definition and Training**

Access to justice should be understood in its broadest sense, which includes: access to fair and equitable laws, access to public education and information, access to the law and related procedures, access to the courts and tribunals, access to alternative dispute resolution mechanism and access to the fair administration of justice. Paralegals are a critical pillar in enhancing access to justice especially in respect to public education and information. Therefore paralegalism or the pa-

<sup>3</sup> Article 1 (1), 'All sovereign power belongs to the people of Kenya...'

<sup>4</sup> Article 159 (1) 'All judicial authority is derived from the people...'

<sup>5</sup> Article 6 (3) 'All national state organs shall ensure reasonable access to its services in all parts of the Republic...'

<sup>6</sup> Ibid1, Article 28 'Every person has inherent dignity and right to have that dignity respected and protected'.



ralegal approach is much more than a profession. It is also a strategy used by civil society agencies in the administration of justice to enhance access to legal services and substantive justice especially among the indigent.<sup>7</sup> This has been through the provision of free legal aid, legal assistance, legal awareness and legal education in the remote and marginalised communities in Kenya.

Paralegals are therefore agents of change as envisaged in the preamble to the 2010 Constitution.<sup>8</sup> The word paralegal is similar to the notion found in the medical or military professions which have a category of workers known as paramedic or paramilitary. Paralegals operated in the legal sector together with lawyers, advocates and judicial officers though their role is not fully articulated and recognised. It is widely agreed that paralegals are not lawyers. However, in Kenya there is no common paralegal definition yet. The draft Legal Aid Bill 2013<sup>9</sup> provides the closest working definition that a paralegal is “a person... who has completed a training course approved by the Kenya School of Law, the [National Legal Aid Service] Service or a training course conducted by a university in Kenya, an accredited body<sup>10</sup> and who provides free legal advice and assistance and legal awareness education under the general supervision of an advocate but is not licensed to practice as an advocate”. On the other hand, civil society organisations that have been instrumental in developing the paralegal concept over the years especially in legal aid matters, have used these definitions and parameters to identify paralegals: a paralegal is a person who has at least completed Form Four (attained the Kenya Certificate of Education) or has commensurate experience, has moral standing and is active in community interest work; a paralegal should comply with Chapter 6 of the Constitution on matters of leadership and integrity due to their public interest service in the community and places of detention (prisons and police stations); a paralegal is someone trained in basic legal theories and practices.

Paralegal training has been undertaken by various institutions especially civil society and private universities or colleges. The training conducted by civil society organisations is for at least six to seven weeks of five days each with a special focus on law, advocacy and community mobilisation skills. The training is combined

<sup>7</sup> See Legal Resources Foundation Trust, *Human Rights in Prison: A Report on the Status of Penal Institutions in Kenya 2003 – 2010*, (Nairobi: LRF, October 2012).

<sup>8</sup> ‘We, the people of Kenya – ADOPT, ENACT and give this Constitution to ourselves and to our future generations’.

<sup>9</sup> Section 2. The draft Bill is available on the website of the Commission on Implementation of the Constitution <http://www.cickenya.org/index.php/legislation/bill-tracker>.

<sup>10</sup> Section 52, ‘Accreditation of legal aid providers’. These are law firms, civil society and faith based institutions.

with practical skills and exposure visits to the community, court, prison and police station for legal aid clinics and civic education. This training is guided by the Paralegal Support Network (PASUNE) curriculum<sup>11</sup> launched in 2002 by civil society agencies. The curriculum is complemented by a handbook<sup>12</sup> and training guide<sup>13</sup> launched in 2006 which may be used for both training and as a paralegal reference guide. This training is people-centred to enable access to courts, relevance and sustainability of paralegal services especially among the vulnerable and marginalised clients in the community and in places of detention (prisons and police stations). Upon completion, a paralegal graduates with a certificate in a ceremony organised by the respective training institution in conjunction with the community or institutional administrators. The graduation takes place within the paralegal trainee's community to build community awareness, ownership and synergy with the community administrators (usually chiefs, community elders and politicians) on the now available paralegal services. The paralegal is also equipped with tools which include: a Paralegal Green Book Volume 1 (which contains basic statutes), T-shirt, paralegal identification badge and jacket, journal (*Jarida La Mawakala wa Kesheria*) for documentation and a carrier bag.<sup>14</sup>

Unlike the civil society organisations, private universities and colleges have developed training curriculums similar to PASUNE but deliberately focus on paralegals to work as clerks in government institutions especially the courts and law firms. These paralegals would graduate with either a certificate or diploma after about 6 months or 1 year. However, it was not until 2003, when a Ministerial Task Force on the Development of Policy Legal Framework and Education in Kenya<sup>15</sup> was established, that a review of legal training was undertaken. The task force recommended, among other things: that the Council for Legal Education (CLE) be delinked from the Kenya School of Law (KSL); CLE should focus on the development and regulation of legal education and training in Kenya; and that the KSL should provide support service training (paralegal) as one of its core courses. Thereafter KSL was restructured and in 2010 established the paralegal training pro-

<sup>11</sup> Paralegal Support Network (PASUNE), *A Curriculum for Community Paralegal Workers* 2002.

<sup>12</sup> Paralegal Support Network (PASUNE), *Handbook for Paralegals*, 2006.

<sup>13</sup> Paralegal Support Network (PASUNE), *Manual for Paralegal Trainers*, 2006.

<sup>14</sup> LRF, International Commission of Jurists (ICJ), Kituo Cha Sheria, Catholic Justice and Peace Commissions (especially Kisii, Homa Bay, Kitale, Muranga), Anglican Church of Kenya (Western and Nyanza), among others.

<sup>15</sup> See *Report of the Ministerial Task Force on the Development of a Policy and Legal Framework for Legal Education in Kenya*, (Nairobi: GoK, August 2005) (Muigai Report).

gramme.<sup>16</sup> The programme is for two years and paralegals are awarded a Diploma in Law (Paralegal Studies). This was the first time that paralegal training in Kenya was being offered by a public institution.

It is therefore apparent that both the definition and training of paralegals still needs to be tightened, streamlined and also geared towards enhancing access to justice which is a constitutional prerequisite. The complementary role of paralegals in the administration of justice despite the training diversity is a critical discussion especially for providers of legal aid. The Council for Legal Education (CLE) should provide this leadership deliberately and recognise the role and contribution of the many paralegals trained by civil society organisations. This will be similar to the legal education revision of the late 1990s and 2000s which introduced human rights and public interest clinics courses, among others, in the training of lawyers at both the Faculties of Law and the KSL. The harmonisation will also inform both the legal service providers' accreditation envisioned by the draft Legal Aid Bill 2013 and also the paralegal training accreditation envisioned by CLE. This is important also because the KSL 2010 curriculum is similar (except for book keeping, accounting, office practice and management) to the Paralegal Support Network (PASUNE) 2000 curriculum. The discussions between the legal fraternity (KSL, CLE and Law Society of Kenya) and legal aid providers especially the civil society are important to enhance the quality of legal aid service delivery<sup>17</sup> and paralegal training generally. The revision and harmonisation will provide a critical benchmark in developing higher standards for service providers in the administration of justice.

## **II. Paralegal Approach and Roles in the Administration of Justice**

The paralegal approach has been developing in Kenya for over twenty years with civil society taking the lead in Africa. A lot of inter-country learning and borrowing within the African continent has occurred especially from South Africa (through the street law project), Malawi (prison and police paralegal project), Rwanda ( through the judicial defenders project), Tanzania ( through the primary courts), Uganda (through the Local District Councils) and Kenya ( through the participatory theatre forums and paralegal training curriculum). This cross learning has been used to develop the paralegal approach strategy in enhancing access to

<sup>16</sup> <http://www.ksl.ac.ke/index.php/academic-programmes-course-offerings/paralegal-studies>.

<sup>17</sup> Sections 52 and 55

justice in the community, in courts,<sup>18</sup> prisons and police stations<sup>19</sup> in both civil and criminal matters.<sup>20</sup> It has also been used to develop training manuals for paralegal education and public awareness materials in the region.

The key purpose of the paralegal approach is to provide unlimited, free and accessible justice through the provision of paralegal services that are relevant to the context and practical in their problem application in the administration of justice especially in remote and marginalised (like slums) areas which have high levels of indigent, ignorant and vulnerable populations. Paralegals have been identified as, or used, various titles, including human rights workers, human rights monitors, human rights educators, human rights defenders, over time based on the nature of their work. Paralegals have therefore been interventionists in situations of inaccessible justice, miscarriage of justice and human rights violations generally. This has been because lawyers who are the primary legal practitioners are few with many located in the urban centres, the law and its procedures are complicated and full of legal jargon, the court houses and police stations are few, and many Kenyans live below the poverty line and therefore cannot access and/or retain legal services nor effectively manage their court cases due to high costs and levels of ignorance and legal illiteracy. Indeed, the Task Force on Judicial Reforms,<sup>21</sup> chaired by Justice William Ouko, noted that access to justice is hampered by systemic problems which include procedural technicalities at the expense of substantive justice, high cost of litigation which is beyond the reach of ordinary Kenyans, uneven distribution of courts between the local population and the distances,<sup>22</sup> limited jurisdiction of the magistrates courts, which impacts negatively especially on succession matters, and lack of advocates and legal service providers in rural areas. In Lodwar County for example, the distance from Lodwar law courts to Todenyang is almost 400 kilometers which is equal to the distance between Migori County and Nairobi City County! In West Pokot County, Nouyapon is over 300kms from Kapenguria law courts a situ-

<sup>18</sup> The Judiciary is charged with the responsibility of dispensing justice for the victims of offence, the accused persons and complainants.

<sup>19</sup> Kenya Prisons Service is charged with the responsibility of containment and rehabilitation of offenders.

<sup>20</sup> *Access to Justice and Legal Aid in East Africa; A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors*, (A report by the Danish Institute for Human Rights, based on a cooperation with the East Africa Law Society) (Copenhagen: Danish Institute for Human Rights, 211) (<http://www.rwi.lu.se/NHRIDB/Europe/Denmark/Access-to-Justice-and-Legal-Aid-in-East-Africa.pdf>).

<sup>21</sup> Government of Kenya, *Final Report of the Task Force on Judicial Reforms* (Ouko Report) July 2010, pp. 86 – 90.

<sup>22</sup> Shermit Lamba, *A Topographical Analysis of the Law Courts of Kenya* (Nairobi: Mazingira Institute, 2011), p. 8.

ation complicated by poor communication, infrastructure, perennial drought and high levels of poverty. This is similar to the distance between Mfangano Island in Homa Bay County which has no court station and complainants or litigants have to cross over by boat at a cost of KShs150 (2 hours one way) to lodge and manage their case in Mbita which is on the mainland! This has rendered justice a challenge to many especially the poor and vulnerable which is compounded by the high levels of illiteracy and legal ignorance.<sup>23</sup>

The task force noted that legal aid and representation remained inefficient and did not include persons who cannot afford them at all because legal aid is only available to those charged with murder at the High Court; persons charged with robbery with violence and children<sup>24</sup> are not provided legal aid although it is a legal guarantee. This has left legal aid services to be provided by civil society organizations and therefore there cannot be a guarantee of quality, consistency and outreach. The Ouko Report (pp. 54-56) recommended a number of judicial changes which included: an increase in the number of court stations, simplified court procedures, dissemination of the Citizens Service Delivery Charter,<sup>25</sup> development of policy on legal aid and public interest guidelines, establishment of Small Claims Courts and Courts of Petty Sessions. A number of these proposals have now been addressed through the *Judiciary Transformation Framework 2012 – 2016*<sup>26</sup> which under Pillar I is people-focused on the delivery of justice. The framework or strategy promises access, expeditious and people-centred justice, promoting public and stakeholder engagement which is critical in the administration of justice. Unfortunately, many of these aspects remain as promises as the reality on the ground is wanting. In the meantime, the paralegals continue to play a ‘stop gap role’ in assisting especially indigent litigants and accused persons to effectively engage with the judiciary and the other actors in the administration of justice.

Due to extreme injustices, community vulnerabilities (especially legal ignorance and poverty) and the huge gap between the administrators of justice, a number of civil society organizations have continued to train paralegals,<sup>27</sup> expand paralegal networks<sup>28</sup> and use them in the administration of justice. These paralegals are usu-

<sup>23</sup> Legal Resources Foundation Trust *Balancing the Scales; A Report on Seeking Access to Justice in Kenya* 2004, pp. 1 – 8.

<sup>24</sup> Section 186(b), Children Act, Cap. 8 of 2001.

<sup>25</sup> See <http://www.judiciary.go.ke/portal/assets/files/Charters/Service%20Delivery%20Charter.pdf>.

<sup>26</sup> (Nairobi: Judiciary, 2012), pp 13 – 15.

<sup>27</sup> Catholic Justice and Peace Commissions (CJPC), Justice Peace and Reconciliation Commissions (JPRC), Lutheran Church, mosques, among others.

<sup>28</sup> Community Based Organisations that have formed paralegal networks e.g. Kinoo, Mbita.

ally based in the community where they work closely with the county administrators especially the chiefs, police, probation officers,<sup>29</sup> children and prison officers and lawyers. The paralegals assist in providing legal awareness, legal advice, accompanying the complainant to the police station or court, drafting of simple court documents,<sup>30</sup> counselling and refer matters to the relevant agencies including lawyers for court action. Their key objective is to both support and empower the individual and community as they engage with the law with both knowledge and skill as ignorance of the law is not a defence in law.<sup>31</sup> The relationship with these agencies is usually cordial, though there are instances of conflict and misunderstanding where the government administrators and lawyers accuse the paralegals of encroaching on their mandate or on integrity.

Paralegals usually provide their services for free. It is only in exceptional circumstances where paralegals are put on a payroll by some civil society agencies who pay them some allowances that range from KShs4,000 to 30,000 (US\$46 to 345) per month which is not always commensurate with the nature of, or the risks at, work. However, paralegals in the private sector like law firms or public sector like court or registry clerks are on payrolls. The inadequate pay or voluntary services have had negative impact in the quality and consistency of paralegal services in the community. Despite these drawbacks, the paralegal approach continues to be appreciated by the community and effective. The administrators like chiefs and/or assistant chiefs have incorporated paralegals in the chiefs' council of elders where disputes are resolved. Later, chiefs have asked to be trained as paralegals and paralegals later employed as chiefs due to their paralegal training.<sup>32</sup> The Probation and Aftercare Department has also included paralegals in the Case Management and Anti-Corruption Committees to assist vulnerable persons in detention or in regard to community reintegration and welfare support. The Kenya Prisons Service (KPS) (now Correctional Services) has since 2003 allowed paralegals to be stationed in prisons and remand homes from Monday to Friday (from 9am to 5pm) and also to be part of the institution's Parole Board. These prison paralegals provide legal

<sup>29</sup> Charged with the responsibility of generating information to courts and penal institutions, and providing community based offenders with rehabilitative services, see Probation of Offenders Act Cap. 64.

<sup>30</sup> See *Paralegal Practice Manual* (Rwanda: Legal Aid Forum, 2007).

<sup>31</sup> *R. v Bailey*, (1800) Russ & Ry 1, 168 ER 651: a sailor was convicted of contravening an Act of Parliament which was passed while he was away at sea. The court stated that every person must be taken to be cognizant of the law as there is no way of knowing to what extent the excuse of ignorance may be carried (to be fair the judges also said he should be pardoned).

<sup>32</sup> Chief Hannah Kihuha, Uthiru Location in Kiambu County and Assistant Chief Clistus Napulo, Juluk Location, Lodwar County.

education for self-representation of the inmates,<sup>33</sup> monitor the human rights situation and restore remandee confidence in the justice system. The paralegals work together with the prison warders, who are referred to as liaison officers, to provide security for the paralegals while in prison and when working with the inmates in their cells. When not in prison, the paralegals link with the nearest police stations to follow-up the prisoner's lost files or case related matters at the respective police and court stations.<sup>34</sup> This ensures that the inmate's case does not get 'lost or forgotten' due to administrative errors or negligence. The paralegals also follow up with the family members or relatives of the inmates mainly for purposes of information sharing on case update, bail opportunity, medical or to re-establish contact with a loved one.

Paralegals have also formed paralegal networks which are registered as community based organizations. These paralegal networks link with various community authorities and actors in the administration of justice, like the chiefs, children and probation departments, and religious institutions, to provide continued public education in public gatherings, follow up clients cases, provide legal aid clinics, assist in ex-offender integration into the community, replicating paralegal training and monitoring human rights and referral to various state and non-state institutions.<sup>35</sup> In some cases some state agencies have identified paralegals to be volunteer probation and children officers<sup>36</sup> who assist in monitoring and assisting especially in child protection matters.

The judiciary has not been left behind in building working relations with paralegals especially those working in the prisons. The judiciary has collaborated with prison paralegals especially during prison court visits where they are given an opportunity to raise issues concerning cases that a particular court is handling. Issues raised included complaints by the inmates and their observation in respect to case management (delay), inmates' right to police statements, nature of bond/bail terms and impact of some court decisions in prisons especially in respect to some crimes like being drunk and disorderly (which usually attract two weeks in prison) and cases related to children (who are sometimes held in the same cell with adults) due to the high congestion levels in prison. In Kisii County, for example the prison

<sup>33</sup> Irene Maina, ed., *The Criminal Trial Process: A Booklet on Self Representation for Persons Remanded in Prison and Children Remand Homes*, (Nairobi: Legal Resources Foundation Trust, 2009); Sarah M.Kinyanjui, *Actualizing Penal Reforms* (above), p. 13.

<sup>34</sup> LRF, *Human Rights in Prison*, p. 9.

<sup>35</sup> National Legal Aid and Awareness Project (NALEAP), FIDA Kenya, Law Society of Kenya (LSK), ICJ Kenya Chapter, etc.

<sup>36</sup> Selina Kigen, Community Paralegal employed by LRF based in Mogotio in Nakuru County.

paralegals were able to improve the human rights observance in prison,<sup>37</sup> analyse the human rights situation both inside the prisons and in the surrounding community, thereby enhancing cohesion and proper case management. This paralegal monitoring has improved the management of sensitive cases and improved the collaboration with the KPS/KCS.

The judiciary have also sought the assistance of the paralegals during judicial marches and judicial open days to facilitate outreach and participation of the general public. A significant engagement has been the magistrates' leadership in the establishment of the Court Users Committees (CUC) which are a key feature of the National Council on the Administration of Justice,<sup>38</sup> though the process of establishing such CUCs was begun in 2007. These CUCs, which are established in many of the district courts, discuss the bottlenecks encountered in the administration of justice. The various agencies, which include the National Police Service, Kenya Prisons Service, Probation and Aftercare Department,<sup>39</sup> Children's Department, Law Society of Kenya, civil society organisations based in the location among others, agree on practical administrative solutions and actions that each justice agency should undertake. This forum enhances communication and builds synergy and public trust in that particular region. The role of the paralegals has been in building awareness, mobilising and at times facilitating the convening of the actors in the administration of justice.<sup>40</sup> The paralegal is able to use this forum to share monitoring observations, feedback on public perceptions and as a whistle blowing base in their work with the various administration of justice agencies. Some of these CUCs have also been able to reach out directly to the community to enhance the case and prisoner management and provide public education.<sup>41</sup> It is due to the vigilance and close engagement of the prison paralegals and the leadership of Kenya Magistrates and Judges Association (KMJA) and the Legal Resources Foundation Trust (LRF) that the 2013 Court User Committee guidelines were shared and approved by the NCAJ. This has for the first time developed clear guidelines on how CUCs should be operated and facilitated by all agencies in the administration of justice.<sup>42</sup>

<sup>37</sup> *RM v. Attorney General & 4 Others*, eKLR 2010 Petition No. 705 of 2007, <http://kenyalaw.org/caselaw/cases/view/72818/>. The court was able to observe and take note of the paralegal allegation that RM had been humiliated and treated inhumanely while in prison custody because he was an intersex. He was awarded KShs 500,000/=.

<sup>38</sup> Section 35 (2) and (3), Judicial Service Act, Cap. 185B, 2011.

<sup>39</sup> See their website at <http://www.probation.go.ke/>.

<sup>40</sup> Kinyanjui, Dr. Sarah M., *Best Practices in the Administration of Criminal Justice; A Case Study of Mombasa Law Courts* (Mombasa: Muslims for Human Rights (MUHURI), April 2012).

<sup>41</sup> Eldama Ravine Court Users Committee.

<sup>42</sup> For a study of the functioning of CUCs see ICJ-Kenya, *Baseline Survey of the State of CUCs: Access*



The judiciary has further acknowledged the role of paralegals by establishing judicial-paralegal customer care desks<sup>43</sup> where the registry staff share with the paralegals. Paralegals, while here, provide advice to court users (witnesses, litigants, accused persons and general public) on the court operations and procedure, and follow up cases with the court registry or advocate as appropriate. This has improved the judiciary-public relations, reduced human traffic of ‘lost’ court users and reduced court registry bureaucracy. It has also reduced the conmen who previously purported to be judicial officers and were soliciting bribes from unsuspecting litigants and court users. Over time, the relationship between the paralegals has continued to improve and been a full of value addition to the administration of justice.

### III. Constitutional Guarantees

The paralegal approach is best understood in light of the 2010 Constitution. Indeed the protection and promotion of the Constitution is both an individual and a state responsibility. Unlike before, it is now an obligation for ‘*every person... to respect, uphold and defend*’ the Constitution, including all state organs (Article 3 (1)), as the supreme law of the Republic of Kenya. This means that other laws are subsidiary to all Constitutional guarantees. Since Kenya is a democratic state,<sup>44</sup> human rights that promote social justice and ensure that all people are able to achieve their full potential<sup>45</sup> have a particular emphasis in the Constitution. It is also worth restating that judicial authority is derived from the people (Article 1(3) (c)) and therefore must be exercised in their best interest. Historically, the judiciary was captured by the executive through the presidency in its judicial functions, procedures and daily operations! However, the Constitution has now, in Chapter 4, specified that human rights and freedoms must be protect and the judiciary plays a critical role in their protection where they are ‘denied, violated or infringed, or threatened’ (Article 22(1)). Seeking judicial action is now open to anyone who is affected or: ‘...a person acting on behalf of another person... member of, or in the interest of a group or class of persons, in the public interest... an association...’

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*to Justice and Public Participation in the Judicial Process: An Analysis of Court User Committees in Kenya* (Nairobi: ICJ-Kenya, 2013).

<sup>43</sup> At Embu (Embu County), Meru (Meru County), Kisii (Kisii County), Makadara (Nairobi City County) Law Courts, Mombasa law Courts (Mombasa County), among others.

<sup>44</sup> Article 19(1) ‘The Bill of Rights is an integral part of Kenya’s democratic state...’.

<sup>45</sup> Article 19 (2) ‘The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings’.

Article 22 (2). The Constitution has further given special protection to ensure equality before the law to the vulnerable population especially minorities (Art. 56), women (Art. 27(3)), children (Art. 53), youth (Art. 55), elderly (Art. 57), persons living with disabilities (Art. 54) and persons in detention (Art. 51).

To ensure practical protection of the law, the Constitution has established an administration of justice mechanism at both the police and court stations to enhance access to justice which provides one of the constitutional anchors for the paralegal approach. At the police station and without being explicit, the paralegal approach concept is inferred in Article 49 (1) (c) which provides that an arrested person has a right 'to communicate with an advocate, and *other persons whose assistance is necessary*'. This right to communicate with the 'other persons' may be exercised immediately one is declared to be under arrest and/or while at the police station but before being produced in court. This is a role that many paralegals have been undertaking at the police stations though amidst a lot of difficulty due to the fact that police officers prefer lawyers. This proviso of 'other persons' is key to enhancing access to justice because many Kenyans who are under arrest and are ignorant of their rights or are intimidated by the security officers and cannot afford or know a lawyer can call up a paralegal immediately. It is evident that most arrested persons have a friend(s) and/or relative(s) or know someone who can assist them immediately. Therefore to reduce incidences of police intimidation,<sup>46</sup> public protests outside police stations and any miscarriage of justice, police officers, paralegals and the general public need to appreciate and utilize this constitutional provision to enhance the administration of justice. Indeed the draft Legal Aid Bill 2013, ss. 29 and 37, envisages a situation where legal aid is provided immediately to persons in either police or prison custody. In such situations, the authorities are obligated (within twenty four hours after arrest) to inform the accused persons of this available free legal aid service which they can utilise. This expanded role of access to paralegal services will complement the overstretched services from lawyers and streamline operations at the police station. In reality, many police stations are far way from law firms and is therefore likely that the paralegal present in that specific community will be the most immediate legal aid provider whom the officers will contact through the County Service Committees and possibly thereafter refer to an advocate.

Secondly, the Constitution in an explicit way provides in Article 50 (7) that 'in the interest of justice, a court may allow an intermediary to assist a complain-

<sup>46</sup> Legal Resources Foundation Trust, *Who is Responsible for my Pain? A Research on the Prevalence of Torture in Kenya Prisons* (Nairobi: Legal Resources Foundation, 2007) pp. 22 – 23.

ant or an accused person to communicate with the court'. This is a critical role that ensures that the court is able to manage a fair hearing through the presence and participation of 'an intermediary' who safeguards the interests and rights of an accused person or complainant. The role of an intermediary is essential because it provides an avenue in both criminal and civil matters where litigants have no legal representation (which is in a majority of cases) or have minimal or no appreciation of the court procedure to have a paralegal support them as an intermediary. This is a role that prison paralegals have been playing though at the mercy or goodwill of the court.<sup>47</sup> The court on its own motion may engage the services of a paralegal in the interest of justice to ensure that any information or issue related to the accused person and/or complainant and critical for the determination of the case is brought to the courts attention. Further, the draft Legal Aid Bill 2013, s.65, also provides explicitly for an accused persons or litigants 'to be advised and assisted' by an intermediary especially in situations where the government legal aid services are not accessible. It however clearly states that such intermediaries should not charge any fee.

This role of an intermediary is essential, but is least spoken about by paralegals and the courts because previously it had no standing in law and would generate undue controversy, except in the Children's Court, which is more friendly and sensitive to the child's best interests and where anyone can make an appearance and be heard. In the children's court, paralegals have had this easy direct right of audience before the court. This provision therefore expands this possibility and opens the court to full participation of all court users. This assistance by the intermediary will definitely build more confidence among the court users especially the accused person and the complainant. It will also enhance the administration of justice and effectively further protect the rights of the most vulnerable as evidenced by this case; in Kisii, a prison paralegal intervened in a High Court case where a 'young man' was charged with robbery with violence. The judge was at a loss when an accused person was unable to communicate with the court. The paralegal who was assigned to monitor and assist inmates at Kisii G.K. prison came across the inmate while in prison, and realized that he was having difficulties communicating with the court and there was a serious risk of a miscarriage of justice. The paralegal intervened and brought to the court's attention that the young man was not only a minor but was also deaf and did not understand sign language. The court immediately made an order for an age assessment, the services of sign language interpreter and also

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<sup>47</sup> Court Paralegals are present in Makadara, Kisii, Kibera, Machakos, Meru, Isiolo, Nakuru, Kisumu, Kapenguria, Embu and Meru Law Courts.

ensured that the trial was conducted in a manner that the child understood and was able to follow the proceedings.<sup>48</sup>

#### **IV. Judicial Opportunities**

The continued role of paralegals and the constitutional guarantees will need to be consolidated and accelerated by a number of administrative and legislative measures. This is because the current paralegal services are not regulated nor recognized, paralegals react to the challenges in legal service delivery and actors in the administration of justice remain uncoordinated and legal aid remains unfunded. It is unfortunate that the paralegal initiatives by civil society agencies are not state funded which has limited the impact, consistency, quality and outreach of the paralegal services.

Firstly, it is therefore timely that the draft Legal Aid and Awareness Policy and the draft Legal Aid Bill 2013, once adopted, will provide the infrastructure in the management of paralegals services and contribute further to the administration of justice among the indigent. Under the draft Legal Aid Bill 2013, paralegals will be among the legal aid providers where they will enhance public participation and provide legal information, awareness and assistance. This will act as a catalyst in enhancing access to justice especially in the most remote areas and among those who are in police or prison custody. Further, it will also accelerate the presence and establishment of paralegals at police stations to provide legal aid and assistance to the arrested persons and witnesses. It is anticipated that these measures will reduce human rights violations, enhance communication and synergy among the criminal justice stakeholders in the dispensation of justice.

Secondly, the Judicial Transformation Framework vision to establish the Courts of Petty Offenders and Small Claims Courts is an opportunity where paralegals can play a role as arbitrators in the administration of justice. Paralegals during the course of their work have been involved in dispute resolution mechanism where they invoke the some elements of the common law and also traditional rules. These paralegals are mainly involved in resolving disputes on small claims or petty criminal matters either individually or with the traditional or chiefs council of elders. These courts are envisaged to be located at the lowest administrative level which is the ward (previously the location) to ensure they are close as possible to the court users. Once the jurisdiction of the courts is agreed, legislated and

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<sup>48</sup> See, John Justice Odhiambo, "Kisii Law Court Paralegal Report" (Nairobi: Legal Resources Foundation Trust, 2010).

established, the paralegals would be an available human resource that would need a refresher training and engaged as arbitrators to resolve these disputes. Paralegals would also be instrumental in appearing in these courts as intermediaries to assist the accused and/or complainant who will not be represented in most cases. This will achieve speedy dispensation of justice at the community level especially in remote areas, reduce case congestion at the magistracy level, reduce the long waiting periods for determination of disputes and avoid litigants abdicating their claims or complaints due to high litigation costs or distances to courts.

Thirdly, the establishment of alternative dispute resolution mechanisms through the establishment of traditional courts<sup>49</sup> will mean that people would have a choice to resort to restorative justice in the determination of their cases. These traditional courts would be used to settle individual, community or inter-community disputes quickly. This has been the practice particularly in northern Kenya among the Borana who use the Gada justice system or the Ameru in eastern Kenya who use the Njuri Ncheke justice system to resolve disputes, including some filed in court, and the use of community declarations like the Modogashi Declaration in north eastern Kenya which includes both traditional elders and the government administrators. The jurisdiction of these courts would need to ensure that communities are able to lodge both civil and criminal matters in these courts and not overlap or compete with the common law courts.<sup>50</sup> It would mean that there would be specialised training for the traditional elders who are already involved in community dispute resolution especially in the principles of human rights, natural justice, non-discrimination and the rule of law.<sup>51</sup> Paralegals would thereby play a role in the traditional courts as elders where eligible, and as trainers and documentation clerks. Paralegals would also monitor the management of these courts and provide legal awareness in the community regarding the jurisdiction of these courts. The establishment and effective management of the traditional courts in various communities would bring justice closer to the people, enhance mediation, conciliation and restoration of community unity, cohesion and accountability.<sup>52</sup>

<sup>49</sup> Ayuko, Bonita & Chopra, Tanja, *The Illusion of Inclusion: Women's Access to Rights in Northern Kenya* (Nairobi: Legal Resources Foundation Trust, 2008) <https://openknowledge.worldbank.org/handle/10986/12787>.

<sup>50</sup> Jedidah Wakonyo Waruhiu, Florence Gachichio and Ezra Rotich "Constitutional Community Justice Systems in Kenya", *Awaaz*, Volume 8, Issue 1, 2011, pp. 36 - 38. [www.awaazmagazine.com](http://www.awaazmagazine.com).

<sup>51</sup> Article 2 (4) "Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency..."

<sup>52</sup> TROCAIRE, *Accelerating the Wheels of Justice; Narratives of Change from the Kenya Governance and Human Rights Programme*, pp. 5 to 8.

## Conclusion

This chapter has attempted to show that the paralegal approach is a critical pillar in the administration of justice and therefore should not be downplayed or underestimated, especially by lawyers and judicial officers. The paralegals are already well established and accepted in the community, particularly among the poor and marginalised.<sup>53</sup> They have also been working closely with a number of legal practitioners especially magistrates and advocates in the remote areas or in response to human rights violations. The paralegal management, refresher training and established role in the administration of justice is key in enhancing access to justice. This will improve the quality and extent of the paralegal services, and also stimulate the effective coordination, communication and synergy of actors in the administration of justice. The National Council on the Administration of Justice (NCAJ) which is chaired by the Chief Justice will need to administratively facilitate and develop creative ways of working with the existing paralegals who are already playing critical roles in the administration of justice in the community, court committees, police and prison stations while awaiting legislation.

These administrative measures coupled with the pending and/or proposed legislation will boost the public confidence in the judiciary and significantly impact on the case management and especially in respect to criminal matters. It is clear from the Judicial Transformation Framework that access to justice is important and should always be protected as enshrined in the Constitution (p. 12). The Chief Justice, Hon. Dr. Willy Mutunga, acknowledges the critical contribution of paralegals in courts in the 2nd *State of the Judiciary Report*<sup>54</sup> where he stated that (p. 3, emphasis added),

The success of judiciary transformation and the justice sector *depends on a constructive collaboration* among the branches of government. It is important that a *harmonious inter-branch relationship* is nurtured and cultivated if all the agencies *work towards the betterment of the society and service of the Kenyan people*. The quest for justice and the administration of *justice stretches beyond the courtrooms*. Every institution, including Parliament, the Executive, Independent Commissions and Offices, *and every member of the public has a duty to serve the cause of justice*.

<sup>53</sup> TROCAIRE, *Demystifying The Judiciary: The Transformation of an Institution*, pp. 19 - 22 on 'Paralegals: Accelerating access to justice at the grassroots', (TROCAIRE East Africa Regional Office in partnership with the Ministry of Justice, National Cohesion and Constitutional Affairs).

<sup>54</sup> *State of the Judiciary and Administration of Justice Report 2012 - 2013*, (Nairobi: Judiciary, 2013): the Chief Justice noted (p. 51) in respect to legal aid and representation that the JTF secretariat partnered with LRF in a pilot to train paralegals to assist court users navigate the courts in Meru, Embu, Makadara and Kisii Courts.

# LEGAL AID IN KENYA: BUILDING A FORT FOR WANJIKU

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Caroline Amondi

## Introduction

Without equal access to the law, the system not only robs the poor of their only protection, but it places in the hands of their oppressors the most powerful and ruthless weapon ever created.<sup>1</sup>

Access to justice is central to the rule of law and the enjoyment of basic human rights. It seeks to promote social inclusion through ensuring equal opportunities for all particularly the disadvantaged, and underpins development in general and poverty reduction in particular. Alexander Hamilton, one of United States of America founding fathers and a great constitutional lawyer, observed that “first duty of society is justice”, words mirrored by Professor Yash Pal Ghai & Jill Cottrell Ghai that the starting point for fairness in any country must be equality.<sup>2</sup> UNDP defines access to justice as “empowering the poor and disadvantaged to seek remedies for injustice, strengthening linkages between formal and informal structures, and countering biases inherent in both systems, to provide access to justice for those who would otherwise be excluded.”<sup>3</sup>

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<sup>1</sup> Reginald Heber Smith, *Justice and the Poor* (New York: The Carnegie Foundation, 1919), p.9.

<sup>2</sup> Yash Pal Ghai & Jill Cottrell Ghai, *Kenya's Constitution: An Instrument for Change* (Nairobi: Katiba Institute, 2011) at p.44. For wider aspects of access to justice, see Ghai and Cottrell, eds., *Marginalized Communities and Access to Justice* (London: Routledge, 2009)

<sup>3</sup> Access to Justice Practice Note, UNDP, September 2004 [http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access\\_to\\_justiceandruleoflaw/access-to-justice-practice-note.html](http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruleoflaw/access-to-justice-practice-note.html)

It is widely recognised that the poor suffer disproportionately from the lack of access to justice. This is particularly true of Kenya where the disparities between the rich and the poor are more marked than in most countries. According to KIP-PRA Economic Report for 2013,<sup>4</sup> 49.8% of Kenyans lived below the poverty line in 2012, while 82% are economically dependent on others for basic needs.<sup>5</sup> To this group of people access to justice, is not just a pipe dream but a myth.

With family and social relations being increasingly mediated through legislation and the economy becoming more interdependent and therefore requiring legal rules for its operation, access to justice is and remains a major issue for the groups who are disadvantaged in all fronts. Just as more of our lives are being regulated by law, the number of poor and disadvantaged people excluded from it has increased, except of course in the criminal law.

Eradication of poverty, as a manifestation of human dignity, is an underlying objective of the Constitution and various government policy documents, but there is little to show for what we have achieved in the promotion of access to justice in the 50 years of independence. Indeed without access to courts, the exploitation of the vulnerable will continue unabated and further deepen the poverty of numerous individual and communities until we empower the poor—the provision of legal aid would mark a significant first step forward.

It is safe to say that to withhold the equal protection of the laws, or to fail to carry out their intent by reason of inadequate machinery, is to undermine the entire structure and threaten it with collapse. For the State to erect or tolerate an uneven, partial administration of justice is to disregard its responsibility, particularly in respect of human rights. Whether the state owes *Wanjiku*<sup>6</sup> a duty to facilitate her access to justice has been resolved in the positive by the Constitution of Kenya that expressly imposes the duty upon the state. This clear in Article 48 which states, “The State shall ensure access to justice for all persons and if any fee is required, it shall be reasonable and shall not impede access to justice”.

This paper seeks to explain the definition and significance of access to justice and legal aid and the government’s commitments at the international, regional and

<sup>4</sup> Kenya Institute for Public Policy Research and Analysis, *Economic Report for 2013* (Nairobi: KIPPRA, 2013) p. 20

<sup>5</sup> P. xxi.

<sup>6</sup> *Wanjiku* means the ordinary person. It was coined by former President Daniel Arap Moi who, in the 1990s, dismissed attempts by CSOs to involve people in constitution-making by rhetorically asking: ‘What does *Wanjiku* know about the Constitution?’ Kenya Human Rights Commission, *Wanjiku’s Journey, Tracing Kenya’s Quest for a New Constitution and Report on the 2010 National Referendum* (Nairobi: KHRM, Nov. 2010). In this paper *Wanjiku* is synonymous with the poor and the marginalized. .



national levels to give effect to Article 48 of the Constitution (a fort for Wanjiku) through the establishment of a legal and institutional framework for legal aid. Government's initiatives for legal aid cannot be divorced from the role that both civil society organisations and development partners have played in building this fort.

### “Access to Justice” and “Legal Aid”

Broadly speaking, access to justice includes the meaningful opportunity, directly or through other persons, to:

- a) assert a claim or defence in order to create, enforce, modify or discharge a legal obligation in any forum;
- b) acquire procedural or other information necessary to (a) above or otherwise improve the likelihood of a just result;
- c) participate in the conduct of proceedings as a witness; and
- d) acquire information on the available means for dispute resolution.<sup>7</sup>

Whereas the concept of access to justice is quite elastic, its dominant structural features rest on the following interdependent pillars of the rule of law: the legal framework geared towards efficiency and social justice, competent, impartial and effective institutions of justice, and an array of efficient and equitable services, including proximity to courts and lawyers, and financial resources to pay for legal services.

Although access to justice is often confused with legal aid, legal aid is a more limited concept. It refers to the system of providing free or inexpensive advice about law and if necessary legal representation, to those who cannot afford them.<sup>8</sup> The poor, because of the many disadvantages they suffer due to poverty, find it unusually hard to understand or cope with the law. They do not know what their rights are and even if they do, how to protect them.

Rooted in criminal law, the concept of legal aid has been extended to civil matters. In *Airey v Ireland*,<sup>9</sup> the European Court of Human Rights ruled that the obligation of states to ensure access to the courts includes a right to free legal assistance in civil matters when the procedure involved is sufficiently complex to

<sup>7</sup> Washington Supreme Court Order No. 25700-B-449 of 2004 on Access to Justice Technology Principles.

<sup>8</sup> *Cambridge Advanced Learner's Dictionary and Thesaurus*.

<sup>9</sup> (1979) 2 European Human Rights Reports 305.

require legal assistance. In that case, Mrs. Airey had sought a decree of judicial separation (divorce was illegal in Ireland) from her husband, but was not able to engage a solicitor for lack of funds. As legal aid was not available in Ireland for any civil matters, her request to be provided with free counsel was declined by the trial court, as was her appeal to the highest court. She moved to the European Court of Human Rights which held that the right to fair trial included access to affordable legal assistance and hence Mrs. Airey had the right to court-appointed counsel. A similar approach has been adopted in India. Its Supreme Court in the “Under trials case”,<sup>10</sup> famous for laying the foundations of “Public Interest Litigation” or “Social Action Litigation”, while addressing the need for legal aid to prevent or remedy denial of the right to speedy trial, reinforced the concept of legal aid as a system of delivery of social justice.

Legal aid has a long history. As long ago as 1495 a Statute of Henry VII provided for fees to be waived for poor litigants in the common law courts and for the courts to appoint lawyers for them.<sup>11</sup> These ideas of legal aid, primitive as they seem, are still part of Kenyan law, as we shall see. Over the years legal aid has evolved from a “poor man’s or poverty law” and “social welfare law” to being a fundamental human right, often linked to development. Access to justice is cross-cutting in most, if not all, development issues including health, education, gender equality, economic growth and environmental sustainability. That increased security of land tenure enhances productive and sustainable use of land and natural resources, while legislative reforms to ensure that healthcare is accessible for all, goes a long way in checking inequalities in the provision of health services and in turn improve maternal health care<sup>12</sup> is testament to this.

Unless this linkage is appreciated and mechanisms put in place to ensure a holistic approach to development issues, it can safely be said that Wanjiku lives outside the benefits of the law and no right, no matter how embedded in the Constitution, offers her any legal safeguards or guarantees. The integration of access to justice into the development agenda of the nation through legal aid is a necessary condition for improving and safeguarding citizens’ socio-economic rights.

In legal systems of many developing countries, people have inadequate access to court and inadequate remedies for civil and criminal wrongs. Legal services are often the only way to gain access to justice and to translate the laws on the books

<sup>10</sup> *Hussainara Khatoon & others v. Home Secretary, State of Bihar* (1980) 1SCC 81

<sup>11</sup> Johnson, Earl “Towards Equal Justice: Where the United States Stands Two Decades Later” (1994) 5 *Maryland Journal of Contemporary Legal Issues* 199, 204

<sup>12</sup> See e.g. <http://www.namati.org/entry/incorporating-justice-in-the-post-2015-development-framework/>.

into laws in action. Legal services, in other words, are a foundational right that supports all other due process rights.<sup>13</sup>

## History of legal aid in Kenya

### *Role of civil society and development partners*

Steps towards the establishment of a national legal aid scheme in Kenya date back to the 1981, when the government and civil society organizations met in Nyeri on modalities of a national legal aid scheme. The first recognized effort at providing systematic legal aid through the actual provision of legal advice and representation was in 1973 when a clinic was set up at Shauri Moyo in Nairobi under the aegis of the Faculty of Law, University of Nairobi and the Law Society of Kenya. Throughout the 1980s, the clinic operated as the Legal Advice Centre and was later renamed Kituo cha Sheria, and remains a premier legal aid institution in Kenya. Later in the 1990s, a number of CSOs such as the International Federation of Women Lawyers (FIDA), Public Law Institute (PLI), among others, also began to offer a range of legal aid services. Others are the Law Society of Kenya, International Commission of Jurists-Kenya section(ICJ-K), Children Legal Action Network, Christian Legal Education And Research, the Independent Medico-Legal Unit, Legal Resources Foundation, Coalition on Violence Against Women, Center for Human Rights and Awareness, The Cradle Foundation, Catholic Justice and Peace Commission and Muslims for Human Rights.<sup>14</sup> Civil society organisations have focused on different pillars of access to justice. An institution like the ICJ-K, operational from 1959, has been at the forefront in the promotion of citizens access to the courts in Kenya and advocacy to establish Small Claims Courts as a means of increasing and diversifying access to justice.<sup>15</sup>

The important role of silent yet crucial players in access to justice like Katiba Institute<sup>16</sup>, Public Law Institute (PLI) and other institutions that undertake research and influence law reform and development must not be overlooked. The emergence

<sup>13</sup> *International Legal Aid and Defender System Development Manual: Designing and Implementing Legal Assistance Programs for the Indigent in Developing Countries* (National Legal Aid and Defender Association, 2010) p.8. [http://www.nlada.org/Defender/Defender\\_Publications/International\\_Manual\\_2010](http://www.nlada.org/Defender/Defender_Publications/International_Manual_2010).

<sup>14</sup> Draft National Legal Aid and Awareness Policy, 2014

<sup>15</sup> <http://www.icj-kenya.org/index.php/icj-programmes/access-to-justice> 6

<sup>16</sup> Mandate of Katiba Institute: [www.katibainstitute.org](http://www.katibainstitute.org) “The institute promotes the understanding and implementation of Kenya’s new Constitution and also endeavours to enhance the implementation and the realization of the objects of the constitution through research, constitutional education, constitutional litigation and encouraging public participation.”

of groups like the Katiba Institute points to a distinction between groups which are primarily concerned with public interest litigation, to establish general principles of law, and others which are more geared to providing service to the poor in what we might call ordinary law cases, more in the line of “access to justice”.

Development partners have also been at the centre of promotion of access to justice through technical and financial support in various sectors of the justice system. Most of the foundation building process by development partners has been laid through partnerships between development partners and civil society organisations and the government, key partners in the latter being the European Union, the Open Society Initiative of Eastern Africa (OSIEA), The Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), UN Women, UNICEF, Department for International Development (DfID) UK, Canadian International Development Agency (CIDA) in collaboration with the Canadian Bar Association among others.

The role of these organisations has been crucial in ensuring that with more Wanjikus being born or made and austerity measures being commonplace the world over, the discourse on access to justice does not falter. However despite these laudable efforts, which require a coordination mechanism to enhance efficiency and its impact, funding remains one of the major obstacles impeding access to justice. Effort must be made to ensure that the government gives life to Article 48 of the Constitution and builds a fort, strong enough to cushion Wanjiku from the vagaries associated with a limited or unpredictable donor funding, crippling barriers to access to justice and pitfalls associated with implementation of a government-funded legal aid scheme.

### *Role of Government*

The Government of Kenya recognizes access to justice as a critical pillar for economic development and poverty reduction through policy initiatives such as the National Poverty Eradication Plan 1999– 2015, Poverty Reduction Strategy Paper (PRSP) of 2001 – 2004 and the Investment Programme for Economic Recovery Strategy for Wealth and Employment Creation (ERS) 2003 – 2007. These policies recommended that access to justice must be responsive, affordable, accessible and speedy in promoting sustainable economic development.<sup>17</sup>

While it is appreciated that these policies recognise the relevance of access to justice in economic development, recognition is one thing and implementation is

<sup>17</sup> Oketch Owiti and Carl Wesslink, *Legal Education and Aid Programme: A Pilot Revised Project Description (Validated Version)* 28th September 2007. (Unpublished, on file with Department of Justice)

another. Despite the early efforts of civil society to establish and promote legal aid, it was only in the 1990s that meaningful efforts towards its realization began. In May 1998 the Attorney General set up the Legal Aid Steering Committee including government departments (Judiciary, State Law Office, Probation and Aftercare, Children's Department, Police and Prisons) the Kenya National Commission on Human Rights and representatives of civil society organizations (ICJ, FIDA, PLI and LSK). The Committee reiterated the urgent need for a national legal aid scheme and proceeded to identify a possible model for Kenya.<sup>18</sup>

That the fort has not been completed 15 years down the line leaves Wanjiku with a lot of doubt as to whether the recognition is backed by political will. This apprehension is further heightened by the fact that recommendations of various reports and studies calling for a fast-tracked processes in the establishment and implementation of a national legal aid scheme, remain just that. In 1999 the said committee commissioned a consultancy to design a pilot programme for testing suitable model(s) for a National Legal Aid Scheme. In its 2001 report (*The Legal Education and Aid Programme: A Pilot*) the consultants proposed a framework for piloting legal aid and awareness in Kenya. However this report, which was never validated, gathered dust at the Attorney General's Office until 2005 when the new government acted upon it.

A taskforce on Judicial Reforms in 2010 recommended the adoption of a policy and legislative framework establishing a national legal aid system as well as public interest litigation guidelines. It recommended the simplification of the pauper procedure in civil litigation and appeals in Orders XXXII and XLIII of the Civil Procedure Rules and incorporating the system into the National Legal Aid (and Awareness) Scheme.<sup>19</sup>

Two years later, another committee set up by the Attorney-General proposed a framework of piloting legal aid and awareness.<sup>20</sup> *A Baseline Survey on Status of Legal Aid in Kenya, 2011*,<sup>21</sup> noted a huge gap in legal aid services justifying the establishment of a structured, accessible and independent legal aid scheme for the

<sup>18</sup> *Ibid.*

<sup>19</sup> Government of Kenya, *Final Report of the Task Force on Judicial Reform*, (Ouko Report) (Nairobi: GoK, 2010), p. 89.

<sup>20</sup> *The Legal Education and Aid Programme: A Pilot (Report, 2001)*.

<sup>21</sup> NALEAP, *Baseline Survey on Status of Legal Aid in Kenya*, (Lead researcher Ruth Aura Odhiambo) Commissioned by the Ministry of Justice National Cohesion and Constitutional Affairs with the Support of GiZ (unpublished, on file with Department of Justice). See also *Base Line Survey on Community-Based Legal Assistance Schemes Partnerships - (LASPS)* (Nairobi: FIDA, 2012), which reported that focus group discussions estimated that only about 20% of women were able to access legal assistance (p. 40).

needy, poor, marginalized and the vulnerable population. Amongst the key recommendations of the report were the creation of an autonomous body to provide legal aid services; expansion of existing legal aid services, promotion of paralegals, incentive to the legal profession to provide pro bono services, legal aid programmes in law schools, and public education and legal literacy campaigns. A consultancy commissioned by the Ministry of Justice National Cohesion and Constitutional Affairs to evaluate the National Legal Aid and Awareness(2009-2013), also recommended that the ministry should prioritize the enactment of the then Legal Aid Bill 2013 and ensure effective service delivery and policy implementation in the area of legal aid.<sup>22</sup> A report entitled *Situational Analysis of Children in the Justice System in Kenya, 2013*,<sup>23</sup> made similar recommendations to offer better opportunities to access justice for children. A key recommendation of the Truth Justice and Reconciliation Commission was the fast-tracking and expansion of the National Legal Aid Programme in various ways.<sup>24</sup> It said (paras. 208-9),

One study noted that among 20 paralegal projects operating in 2005, 15 of them operated within 250 km of Nairobi, leaving a substantial gap in outer lying areas. Moreover, of the multiple non-governmental organisations that provide legal assistance, few have offices outside Nairobi and even fewer have offices in the arid or semi-arid regions of the country. There is lack of expertise and experience in handling the often complex group claims that impact minority and indigenous communities.

The incorporation of the establishment of a legal and institutional framework for legal aid and awareness in two key policy instruments and in performance contracts of government agencies demonstrates the current Government's aspirations on access to justice. Vision 2030 emphasizes various aspects of human rights and the rule of law to ensure good governance and accountability, including increasing access and quality of legal services to the public. The Second Medium Term Plan of the said Vision acknowledges and prioritizes the implementation of policy, legal and institutional reforms on Access to Justice, the Legal Aid Bill and the Small Claims Court Bill.<sup>25</sup>

<sup>22</sup> Jean Kamau and Jean Githinji, *Report on the Evaluation of the National Legal Aid and Awareness Programme (NALEAP)*, May 2013, pp. 61 and 62 (on file with Department of Justice).

<sup>23</sup> Report by Community Law Centre, University of Western Cape, June 2013 Commissioned by the Government of Kenya through the Ministry of Justice National Cohesion and Constitutional Affairs and UNICEF-Kenya, p. 6.

<sup>24</sup> Truth, Justice and Reconciliation Commission, *Report* Vol. 2C (Nairobi: the TJRC, 2013).

<sup>25</sup> *Second Medium Term Plan 2013-2017: Transforming Kenya: Pathway To Devolution, Socio-Economic Development, Equity And National Unity* (Nairobi: GoK, 2013) para. 6.2.4 [www.devolutionplanning.go.ke](http://www.devolutionplanning.go.ke).

It is a proposition of international human rights law that justice, freedom and peace are contingent upon the universal recognition and enforcement of human rights and the rule of law. This truism is articulated in the Preamble to the 1948 Universal Declaration of Human Rights.<sup>26</sup>

The government has also made commitments under various regional and international human rights declarations, standards, guidelines and instruments to enhance access to justice and provide a state funded legal aid scheme.<sup>27</sup> In the international arena there exist a range of laws, norms and standards that establish the right to legal aid and place responsibility upon the state to safeguard it. A notable instrument in this area which Kenya is a signatory to is the International Covenant on Civil and Political Rights (1966), which enshrines the principles of equality before the law and the presumption of innocence, and includes guarantees of freedom from arbitrary arrest and detention and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The UN Basic Principles on Role of Lawyers<sup>28</sup> (1990) require governments to ensure that efficient procedures and responsive mechanisms for equal access to lawyers are provided, including the provision of sufficient funding and other resources for legal services to the poor and other disadvantaged persons. In addition, they entitle lawyers to form and join self-governing professional associations which are required to cooperate with governments in the provision of legal services.

Likewise, at the regional level there are various instruments on access to justice that Kenya is a signatory to, notable being the ACHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, which obligate state parties to ensure that an accused person has a right to legal assistance assigned to him or her in any case where the interest of justice so require, and without payment by the accused if he or she does not have sufficient means to pay for it.<sup>29</sup> The interests of justice in criminal matters are to be determined by considering: (1) the seriousness of the offence; (2) the severity of the sentence. The interests of justice always require legal assistance for an accused in any capital case, including for appeal, executive clemency, commutation of sentence, amnesty or pardon.

<sup>26</sup> At paragraph 1 of the Preamble “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.

<sup>27</sup> Draft National Legal Aid and Awareness Policy, 2014, Kenya.

<sup>28</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 <http://www.unrol.org/doc.aspx?d=2327>.

<sup>29</sup> <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/>.

Again, the Lilongwe Declaration (2004) says,<sup>30</sup>

All governments have the primary responsibility to recognise and support basic human rights, including the provision of and access to legal aid for persons in the criminal justice system. As part of this responsibility, governments are encouraged to adopt measures and allocate funding sufficient to ensure an effective and transparent method of delivering legal aid to the poor and vulnerable, especially women and children, and in so doing empower them to access justice.

### **National Framework for Legal Aid in Kenya**

The enactment of the 2010 Constitution set a fundamental and foundational framework for access to justice in Kenya. It imposes obligations on the government to facilitate access to justice. The Constitution not only guarantees legal aid and access to justice, but also acknowledges the critical importance of the rule of law to the achievements of the objectives of the Constitution: social justice, inclusion, participation, human dignity and basic social and economic needs and show how the access to justice and courts is critical to the achievement of these objectives. A fundamental constitutional value is social justice which is impossible to achieve without an impartial judiciary and access to it.

The most explicit and general reference to access to justice is Article 48, “The State shall ensure access to justice for all persons....” Article 50 (1) is also very general, “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body”.

It is in the area of criminal law that the right of access to justice is most specifically stated. Article 49 describes the rights of arrested persons; these include informing the arrested person of the reason for the arrest and to be allowed to communicate with an advocate or “other persons whose assistance is necessary”. An arrested person must be brought before a court not later than 24 hours after arrest. Article 50 guarantees a fair trial to every accused person, which includes the presumption of innocence, information about charges and the evidence to be brought against the accused, adequate time and facilities to prepare a defence, a public trial, and several procedural rules about the trial. Article 50(7) says, “In the interest of justice, a court

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<sup>30</sup> *The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa* adopted at Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers in Africa Lilongwe, Malawi November 22-24, 2004 (<http://www.penalreform.org/wp-content/uploads/2013/06/rep-2004-lilongwe-declaration-en.pdf>) para. 1.



may allow an intermediary to assist a complainant or an accused person to communicate with the court". This is different from the right to counsel under Article 50 (2) (g) "to choose, and be represented by, an advocate, and to be informed of this right promptly", and (h) "to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly". The first refers to the right to choose, and pay for, one's own lawyer, the second to the legal aid issue. Article 50(7) has yet to be fully considered in the Kenyan courts, but in *Francis Ogoti Otundo v R*<sup>31</sup> the judge said "I believe that if the complainant or accused person is unable to articulate or explain herself well, then an intermediary can be allowed to do so".

Article 159(2) expounds the principles by which the judicial authority is to be exercised, that justice shall be done to all irrespective of status and not be delayed. It also recognises that the purposes and principles of the Constitution must be protected and promoted. Though the use of traditional dispute settling mechanisms is encouraged, it is also provided that mechanisms which contravene the Bill of Rights is repugnant to justice cannot be used (Art. 159(3)). The independence of the judiciary is guaranteed (Art. 160)—an important point for access to justice for if the judiciary is corrupt, incompetent or susceptible to extra-judicial pressures or direction, justice is constantly threatened. Article 159 upholds another principle of justice (of great benefit to people without knowledge of law or access to legal advice) that "justice shall be administered without regard to procedural technicalities".

The Fifth Schedule read with Article 261 provides the timeframe for the enactment of various legislations aimed at implementing the constitution. Under this Schedule, legislation to give effect to Article 50 or the right to fair hearing ought to be passed with four years from the date of promulgation. These two provisions are protection against disregard of important principles of justice.

However it is to be appreciated that prior to the enactment of the said Constitution, the judiciary offered the first form of government intervention in the provision of legal aid through the pauper brief system where an accused charged with murder is provided with a counsel at the expense of the state. This system has not been successful in attracting senior or experienced lawyers to take up such cases, majorly due to low pay. The Task Force on Judicial Reforms, while noting that the said system had not been efficiently managed, recommended that the said system be incorporating the system into the National Legal Aid (and Awareness) Scheme.<sup>32</sup>

<sup>31</sup> Revision Case 397 of 2012 2012 eKLR <http://kenyalaw.org/caselaw/cases/view/85722>.

<sup>32</sup> *Report of the Task Force on Judicial Reform, July 2010*, Commissioned by the Government of Kenya, Chapter Viii, Pg. 85 and 89.

### Legislative provisions for legal aid

Provisions to facilitate access to justice are also found in the following pieces of legislation. Order 33 of the Civil Procedure Rules (Chapter 21, Laws of Kenya) provides for the institution of suit *in forma pauperis* for people without financial means. However, this does not provide free or subsidized legal representation; it only waives fees for court-filing.

The Children Act 2001 gives the court powers, when a child appearing before it in proceedings under the Act or any other written law is unrepresented, to order that the child be granted legal representation and the expenses defrayed out of monies provided by Parliament. The section (77) contemplates situations where a child is in conflict with the law, as in the case of a child offender.

The Persons with Disabilities Act 2009 s. 38 requires the Attorney-General, in consultation with the National Council for Persons Living with Disabilities and the Law Society of Kenya, to make regulations providing for free legal services for persons with disabilities in: (a) matters affecting the violation of the rights of persons with disabilities or the deprivation of their property; (b) cases involving capital punishment of persons with disabilities; and (c) such matters and cases as maybe prescribed in those regulations, and the Chief Justice to make rules providing for the exemption, for persons with disabilities, from the payment of fees in relation to the above matters. Although these are mandatory provisions, no such regulations appear to have been made.

These provisions are not limited to Kenyan citizens (as nor are the rights recognised under Articles 48, 49 and 50 of the Constitution, which apply to “all persons”, “every accused person” etc.). Under Section 16 (1) of the Refugee Act 2006, every recognized refugee and every member of his family in Kenya are entitled to the rights and are subject to all laws in force in Kenya and the obligations contained in the international conventions to which Kenya is party.

The Criminal Procedure Code, Cap. 75, recognizes the right of an accused person during plea taking and trial to be represented by a legal representative of his own choice: “where necessary” have the court appoint a legal representative under sections 137F 1(a)(vi) and under s. 193 “may of right be defended by an advocate”. While this may be a right under the said law it remains only real to those charged with the offence of murder.

Access to justice without discrimination is recognised under Section 9(2) of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act 2012, as part of the durable solution to be offered to inter-

nally displaced persons (IDPs). The Act gives effect to various regional and international principles on internally displaced persons by which state parties recognize that IDPs enjoy in full equality the same rights and freedoms under international and domestic law as other persons in their country.

One of the objects for which the Law Society of Kenya is established is to facilitate the acquisition of legal knowledge by members of the legal profession and others, and to protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law respectively.<sup>33</sup>

### **The judicial approach to access to justice**

There are various decisions of the court touching on access to justice and the right to fair trial and hearing, of which two are notable. In *David Njoroge Macharia v. Republic*,<sup>34</sup> the Court of Appeal looked at the right to free legal counsel at state's expense for the first time in Kenya and expounded the principle of "substantial injustice". The appellant argued that the court erred in law in confirming the conviction and sentence in violation of his constitutional and fundamental rights to be afforded a fair trial, imperative in an adversarial court system. While acknowledging that the right to legal representation is a universal fundamental right and the critical role of a counsel at the trial stage is most vital because of the counsel's knowledge of law and procedure and the ability to understand complex evidence, the court ruled that legal representation is not mandatory in all cases, the exceptions being where "substantial injustice would otherwise result or where the death penalty applies". However, the court noted that the rights under Article 50 do not apply retrospectively.

The court also remarked that major policy and financial implications for the executive branch of the government were involved in providing legal services. It thus directed that a copy of the judgment be served upon the Attorney General, the Minister of Justice and Constitutional Affairs, the Commission for Implementation of the Constitution and the Law Reform Commission for their records and necessary appropriate action.

The then Ministry of Justice and Constitutional Affairs, now Department of Justice having been merged with the Office of the Attorney General under Executive Order No.1 and 2 both of 2013 on the organisation and functions of govern-

<sup>33</sup> Section 4(b) and (e) Law Society of Kenya Act.

<sup>34</sup> [2011] eKLR Cr. A. No. Appeal No. 497 of 2007 <http://kenyalaw.org/caselaw/cases/view/74661/>.

ment, piloted 6 pilot projects on different thematic areas between 2009 and 2013 and through a consultative stakeholder (including the Law Reform Commission) collaboration developed the Draft Legal Aid Bill, 2014 and the Draft National Legal Aid and Awareness Policy, 2013. The Commission on the Implementation of the Constitution on the other hand has seen to it that the Draft Legal Aid Bill is fast-tracked and early this year handed it over to the Attorney General's office.

In *John Swaka v The Director of Public Prosecutions & 2 others*,<sup>35</sup> the petitioner, a human rights lawyer, sought orders, on a public interest basis, stopping all prosecutions that carried a death penalty until the state implemented the provisions of Article 50(2)(h) of the Constitution and provided defence counsel for such offenders. The basis of the petition was that the Court of Appeal, in the case of *David Njoroge Macharia v. Republic* had ruled that in situations where substantial injustice may result namely, persons accused of capital offences where the penalty is loss of life, have the right to legal representation at state expense.

While commending the petitioner for taking up the matter which is of great public interest and recommending that the state must move with expedition to put in place a legislative and institutional framework, including requisite resources, to provide legal representation to indigent persons charged with the offence of robbery with violence, the court disallowed the petition on the grounds that the government had taken steps to put in place measures required to provide legal representation as required under the Constitution through the drafting of a National Legal Aid and Awareness Policy, 2013 and a Draft Legal Aid Bill, 2014 together with the rolling out of pilot projects for provision of legal representation in various parts of the country.

The court also observed that the petition was not ripe as the State's obligation under the timeframe set under Article 256(1) and the Fifth Schedule had not expired. With the August 2014 deadline for the enactment of the legislation here with us now and no budgetary provision having been made for the proposed scheme, immediate operationalisation and implementation of the Scheme might not be realised in the short term. The Court in this case ought to have issued a directive rather than a recommendation that the requisite resources, especially financial that is a key determinant on the effectiveness of legal aid, be also put in place by August 2014.

<sup>35</sup> [2013] eKLR, Constitutional Petition 318 of 2011 <http://kenyalaw.org/caselaw/cases/view/86212/>.

## Building the Fort

After the 2002 general elections and with a new government and a ministry (MoJNCCA) mandated *inter alia* to give policy direction in the area of access to justice, more specifically Legal Aid and Advisory services, the former Ministry of Justice, National Reconciliation and Constitutional Affairs (MoJNCCA) in 2005 engaged consultants to review the initial report. The design was revised and validated in 2006 and presented to the ministry in 2007. In 2007 the Government established the National Steering Committee for the National Legal Aid (and Awareness) Programme (NALEAP) with the mandate *inter alia* to oversee, coordinate and monitor the overall implementation of the programme.<sup>36</sup> The members of the committee were drawn from key stakeholders in the justice sector.<sup>37</sup>

In September 2008 the MoJNCCA launched the NALEAP, with the Secretariat in Nairobi and later in 2009 launched six pilot projects on six thematic areas. The six thematic pilot projects were the Nairobi High Court Family Division; the Moi University Law Clinic in Eldoret; the Nairobi Children's Court; the Nakuru Juvenile Justice project; the Paralegal Advice Office in Kisumu and the Mombasa Capital Offences project. The six pilots adopted an inter-agency/collaborative approach to the provision of legal aid services with established civil society organisations, public universities, judiciary and the Law Society of Kenya, as facilitating organisations for the pilot projects.

The Government successfully piloted the said projects between the year 2009-2013, during which period the programme employed a combination of strategies to lay a foundation for a sustainable and responsive legal aid system. The broad strategic objective of the programme during the said period has been to create an enabling environment for access to justice through the establishment of a national legal aid scheme.

With the promulgation of the Constitution of Kenya in August 2010, Articles 48, 50 and the Fifth Schedule provided the necessary impetus for the establishment of a legal and institutional framework for legal aid in Kenya.

<sup>36</sup> Gazette Notice No.11598 of 30th November 2007.

<sup>37</sup> Membership of the Committee is drawn from the Office of the Attorney General, Ministry of Justice and Constitutional Affairs, Judiciary, Departments of Police, Children Services, Probation and Aftercare and Prisons, International Commission of Jurists-Kenya Section, Law Society of Kenya, Federation of Women Lawyers-Kenya, Paralegal Associations, public universities (Nairobi and Moi) Faculties of Law and the National Coordinator-NALEAP.

### **Establishment of legal framework for establishment of a Legal Aid Scheme**

The process of developing the Draft National Legal Aid and Awareness Policy, 2014 and the Draft Legal Aid Bill, 2014 has been through a broad stakeholder consultative process between 2009 and 2013, funded by the government and development partners. The gestation of the Draft Legal Aid Bill, 2014 has been unduly long, commencing with the Nyeri meeting of 1981, and not devoid of challenges.

The Draft Legal Aid Bill 2014 proposes to establish a legal and institutional framework for a National Legal Aid scheme. The 2014 Draft Bill defines legal aid to include: legal advice, legal representation, and assistance with resolving disputes other than by legal proceedings; drafting relevant documents, and effecting service incidental to any legal proceedings. It aims to give effect to Articles 19(2), 48, 50 (2),(g) and (h) of the Constitution to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid, and for the funding of legal aid and for connected purposes. It would establish the National Legal Aid Service, a body corporate, as a semi-autonomous body functionally independent but reporting to Parliament through the Cabinet Secretary for matters relating to legal aid. It would establish a representative Board comprised of key justice stakeholders, chaired by a Judge of the High Court nominated by the Chief Justice, as the policy making organ.

The Bill would establish a Legal Aid Fund comprising national government funds, and fees, contributions, loans, grants or donations. It sets out persons to whom and matters for which legal aid will be provided. It proposes to decentralize the legal aid services to counties.

It introduces a regulatory framework for legal aid services through a process of accreditation of legal aid providers eligible to be contracted to provide legal aid by the Service for purposes of standardization and quality assurance. The persons or institutions to be accredited to provide legal aid services include an advocate operating under the *pro bono* programme of the Law Society of Kenya or any other civil society organization or a paralegal, a law firm or faith based organization; a university or other institution operating legal aid clinics, and a government agency involved in the justice system.

For effective implementation, the Service must develop a legal aid guide setting out the provisions of the Act in simple language, other relevant legislations and regulations, Service-location, access etc. It must also develop regulations, including criteria for eligibility for assistance.

It is worth noting that under the proposed scheme there will be eligibility criteria pegged on merits of the applicant's case ("a probability of success"), their means, that the matter "is of public interest", that costs will not be excessive, and that there are "there are other reasonable grounds".

In this respect we can say that State's responsibility to grant legal aid is qualified and the right under Article 48 should be balanced against the Government's duty to use public funds responsibly and against the recognition that disputing parties bear some responsibility for resolving their differences themselves whenever possible. It is important that the eligibility regime is fair, transparent, and simple to administer. It is also expected that in certain instances those granted legal aid should contribute to costs. This expectation encourages people to act prudently and to resolve their differences out of court. It seeks to preserve the legal aid system from "the tragedy of the commons" – a "common resource plundered by all, valued by none".<sup>38</sup> Consideration therefore, will also be given to the willingness of Wanjiku to pay for such services, congestions in the court system, the incentives of the judiciary and the law enforcement agencies to provide speedy justice and the efficacy of informal and alternative dispute resolution mechanisms.<sup>39</sup>

It has been said that financial resources, political will, and the method of delivery determine the effectiveness of legal aid.<sup>40</sup> This, by coupled with the fact of financial cuts across the justice system then the proponents of the principle of parity and equality of arms ought to raise a red flag. The disparity in government funding for justice sector institutions, particularly the small allocation for NALEAP, presents a challenge in the achievement of the overall objective of the sector if the budgetary trends for some justice institutions indicated below is anything to go by:

<sup>38</sup> New Zealand Ministry of Justice, *Improving the Legal Aid System: A public discussion paper* (Legal Aid Review) (Wellington: the Ministry, 2009) para. 53.

<sup>39</sup> UN General Assembly, *Legal empowerment of the poor and eradication of poverty : report of the Secretary-General*, 13 July 2009, A/64/133, paragraph 24 on access to justice, available at: <http://www.refworld.org/docid/4a9e2c150.html>.

<sup>40</sup> David McQuoid-Mason, *Statement at Kyiv Conference on Protection and Promotion of Human Rights through Legal Services, Best Practices from Africa, Asia and Eastern Europe, 27<sup>th</sup>-30<sup>th</sup> March, 2007*. Note: a report of the conference is available at <http://www.redress.org/downloads/publications/Kiyv%20Conference.pdf>.

Institutions		Recurrent		Development		Total	
		Gross Exp 2012/13	Gross Est 2013/2014	Gross Exp 2012/2013	Gross Est 2013/2014	Gross Exp 2012/2013	Gross Est 2013/2014
	Judiciary	12,500.0	16, 100.0	2860.0	-	15, 360.0	16, 100.0
	DPP	1,007.8	1,111.8	80.0	148.0	1,087.8	1259.8
	KNHCR	263.6	253.2	-	-	263.6	253.2
	WPA	235.0	196.8	-	-235.0	196.8	
	CAJ	350.0	298.5	-	-	350.0	298.5
	NGEC	239.5	210.6	-	-	239.5	210.6
NA	NALEAP	54.7	53	16	2		

Source: *Institute of Economic Affairs*.

Best practices from developed legal aid systems apply the fundamental principle of parity, that is, proportionality with amounts spent for prosecution to that for legal aid.<sup>41</sup> This principle derives from the fact that indigent defence/legal aid workload is driven by external factors, including the prosecution's policies and capacities to initiate cases. Thus there should be parity in terms of funding of the prosecution and the defence/legal aid with adjustments made upwards or down depending on other factors that may increase or decrease either side's functions and budget. There is therefore need to at least fund legal aid on the same scale as the closest sister institution, DPP, to ensure equality of arms in the judicial process or even at a higher scale considering the fact that legal aid is not limited to criminal cases but covers both indigent defence and civil cases.

An effective legal aid system should target resources according to need, give the right people timely and appropriate access to legal services, balance universal and targeted services, have an eligibility regime that is fair, transparent, and simple to administer, and create incentives for early resolution and discourage unnecessary litigation.

While civil society organisations have earned their place in the history of Wanjiku's fort by laying the foundation stone, the enactment and implementation

<sup>41</sup> See American Bar Association, ABA Standing Committee On Legal Aid And Indigent Defendants, *Ten Principles of a Public Defense Delivery System* (ABA, 2002) ([http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf)), and Institute for Law and Justice, *Compendium of Standards for Indigent Defense Systems: A Resource Guide for Practitioners and Policymakers* (CD-ROM) (Washington: U.S Department of Justice, 2000). See [http://www.nlada.org/Defender/Defender\\_Standards/Defender\\_Standards\\_Comp](http://www.nlada.org/Defender/Defender_Standards/Defender_Standards_Comp).



of the Draft Legal Aid Bill, 2014 would reinforce governments' commitment to access to justice. That lobbying and advocacy around the draft Legal Aid Bill has been championed by civil society organisations is all too evident. In the international area, civil society organisations have called for the passage of the Legal Aid Bill to facilitate provision of legal aid and awareness to Wanjiku. Civil society organisations must maintain the momentum they have created in the discourse on access to justice. It is safe to say that for law and development to be situational and meaningful, national and civil society grassroots movements and organisations must be mobilized. It is also true a legal service agenda not built on collaborations and partnerships (between the Government, Civil Society organisations, faith-based institutions and development partners) is a recipe for failure.<sup>42</sup> It is through such framework anchored on real government commitment that the dream of a fort for Wanjiku can be realised.

Once Wanjiku's Fort is complete, and the bolts securing each of its pillars are in place through the enactment and implementation of the Draft Legal Aid Bill, then we shall be able to talk of justice within justice and echo Article 40 of the Magna Carta:

*"To no one will we sell, to no one will we refuse or delay, right or justice".*

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<sup>42</sup> *International Legal Aid and Defender System Development Manual* p.11.



# JUSTICE WITHOUT LAWYERS: JURIDICAL STRUCTURES AND PRACTICES OF LAW IN KOROGOCHO SLUMS

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Steve Akoth Ouma

## Introduction

S ometime in June 1999, there was a major announcement during the 1 o'clock news bulletin by the state owned Kenya Broadcasting Corporation (KBC): "The District Commissioner of Kasarani, has banned an NGO, Kituo cha Sheria, from operating in Korogocho". The item went on, "...this ban is part of the government's efforts to promote peace and security for all Kenyans". I was at the city centre as the news spread nationally. KBC enjoyed the widest coverage and 1 o'clock news was famous for relaying important government stories, including government appointments and dismissals from plum state employments. Then there were no cell phones and it was not until evening when I got a full brief of what happened. However, back in Korogocho settlement, that evening, there was not much official information on why the DC had taken such a drastic step. There were numerous versions of rumours going round. In many parts of Korogocho, rumours retain a quality of being part of "news" irrespective of source or whether or not the information presented could be corroborated.

Two major strands of rumours stood out that evening about the announcement. One strand suggested that the government had got wind of attempts by Kituo Cha Sheria to organize the Korogocho residents in order to conduct elections for village elders who worked with the dictatorial provincial administration. The second was to the effect that the government was unhappy with the efforts by Kituo cha Sheria

to develop a model of legal representation for the residents of Korogocho. But the plot of the story was not that “dry” considering the stories that went round that evening in Korogocho. Some of the friends I spoke to claimed that the Kituo cha Sheria director had been arrested and was locked up in the nearby police post. Some sources said that the police had planned a major operation that evening to arrest all those who were associated with Kituo cha Sheria and had attempted to create legal awareness in Korogocho. Others suggested that Kituo cha Sheria wanted to form a political party to oppose the ruling Kenya National Africa Union (KANU).

At the time, Kituo cha Sheria had been working with the Catholic Church in Korogocho to train a cohort of paralegals who occasionally organized legal clinics and also referred cases to lawyers at the Kituo cha Sheria office. Due to this fact, there had long been a “culture of suspicion” between the government and the residents of Korogocho and agencies such as Kituo cha Sheria. Scholars who have studied rumours as form of communication state that this “culture of suspicion” is a feature common to marginalized communities who find themselves in client roles vis-a-vis bureaucrats.<sup>1</sup>

For the people of Korogocho, both strands of rumours were fairly acceptable representations of their everyday contestations and powerlessness. On one hand, because of the illegal nature of their land tenure regime, they experienced some sort of “over rule” from the provincial administration which neither represented the interests of the residents nor provided any mechanism to hold them (provincial administration) accountable to the law, or to the citizens. Moreover, the high costs of law and the bourgeoisie-centred notions of law as practised in Kenya marginalized the poor residents of Korogocho. Therefore, the paralegal programme was going to be an important entry route for the poor residents to claim their rights.

The DC’s fury and issuance of a fiery statement against Kituo cha Sheria are indications that although the urban poor of Korogocho are meek and powerless, they are not voiceless. Where as in Korogocho dwellers lacked rights, resources and legal literacy, rumours become important. As noted by researchers who have conducted field work among other marginalized groups, rumours are often connected with identified characters, a story and an evaluation of conduct. Overall, however, rumours and the “culture of suspicion” that have operated in Korogocho and many informal settlement over the years are functions of a broader “Geography

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<sup>1</sup> See Max Gluckman, “Gossip and Scandal” (1961) 4 (3) *Current Anthropology* pp. 307-316 and Jean-Noel Kapferer, *Rumours: Uses, Interpretations, and Images* (New Brunswick: Transaction Publishers, 1990).

of power”<sup>2</sup> that tend to exclude and marginalize those who are “far away” from the site of state functions - mainly capital cities. The notion of geography of power was developed by a professor of human geography, Richard Peet, to describe concentration of power in a few spaces that control a world in order to distance others. While Peet was looking at the geography of power at global level, his notion is useful in understanding how institutions and mechanisms of influence govern, and how postcolonial states organize themselves. Moreover, this low presence of the state in terms of law enforcement in the slums actually goes alongside with the neoliberal idea of the withdrawal of the state. Law, within this discourse of “geography of power”, operates as one of the tools of differentiation used by the state to serve capitalistic interests. As such the actions of the state through the DC to ban Kituo cha Sheria from Korogocho can be seen from a wider perspective as a strategy to break the connections of the group of social actors in Korogocho, as well as penetrate their spaces. Kituo cha Sheria must be seen as a spatial refuge,<sup>3</sup> within which its actors were to assert their right to the city.

In Kenya, this deliberate “thin presence” of any accountable state works in three ways. First there are the geographical regions located away from the capital city and seen to be of little political value (because the human population is not a significant vote bank) or economic value (with no minerals, agricultural potential or economic sense as defined through the British colonial railways routes). Second are areas that are seen to be either physically illegal, such as squatter and slum settlements like Korogocho, or those that make political choices that subvert dominant political interest. The latter are often marginalized under the rhetoric that was common under the KANU dictatorship of “*siasa mbaya, maisha mbaya*” (bad politics, bad life). Third, the geography of power works through the elite who distrust the state and therefore choose to claim “exit rights”.<sup>4</sup> They would rather provide their own security, form gated communities and define other centres of influence through which they either keep the state away or engage it in their own terms.

<sup>2</sup> Richard Peet, *Geography of Power: The Making of Global Economic Policy* (London: Zed Press, 2007).

<sup>3</sup> Following my analysis of geography of power above, one does realize that the urban poor in Kenya are often at the margin of the formal legal regime and therefore tend to operate either around the protection of NGOs like Kituo cha Sheria or informal justice systems that I shall discuss later. It is these spaces away from the conventional sites of legal claim making that I call spatial refuge.

<sup>4</sup> These are approaches exhibited by citizens preferring either to keep away entirely from claiming rights – see Ambreena Manji, *The Politics of Land Reforms in Africa: From Communal Tenure to Free Markets* (London and New York: Zed Press, 2006) or just making their own arrangements to attain rights that one would ordinarily claim from the state.

For the urban poor like the residents of Korogocho, the geography of power worked in multiple ways. First, they were perceived as “illegal residents” and for long were treated by practitioners of the law as people with no legal rights. Thus, they have an ongoing struggle to be considered as Nairobians.<sup>5</sup> This view is perhaps supported by the legal philosophy of vagrancy. Vagrancy laws are unique in that while most crimes are defined by actions, vagrancy laws make no specific action or inaction illegal. The Vagrancy laws criminalised begging and homelessness.<sup>6</sup> Rather the laws are based on personal condition, state of being, and social and economic status. Individuals merely need to exhibit the characteristics or stereotypes of vagrants for authorities to make an arrest. Therefore, although the Vagrancy Act was scrapped in Kenya in 1988, legal training and the model of legal practice in Kenya still tend to criminalize poverty. The attitudinal structure of most lawyers and advocates in Kenya has kept them away from places like Korogocho and made paralegal and legal clinics, such as those proposed by Kituo cha Sheria since the 1990s, the only option for justice. Indeed, it was because of the similar attitude that perceives the poor as vagabonds that the government never even thought of starting a state funded legal aid programme.

Given the background above, the residents of settlements like Korogocho have developed an “unofficial” system of protecting their rights and obtaining justice that is often more responsive to their reality. This is often anchored in numerous normative systems that vary from the law enforcement systems that developed from KANU youth wingers era to re-imagination of “traditional or customary” law and provincial administration bureaucrats like chiefs and District Officers who tend to appropriate and perform quasi-judicial functions.

This chapter explores how people have established their own legal order that is more responsive to their reality than the formal system would be, based on a different conception of property and entitlements. It explores Korogocho as a “community” and its life where there has been little access to legal services/lawyers and engages questions like: How does the community deal with internal and external matters where some legal intervention would normally be expected? Is there an informal system which performs the functions that are usually associated with a

<sup>5</sup> This category of Nairobians is not homogeneous either as women, children living in the streets and those whose indignity is contested like the Nubians have often faced multiple exclusion.

<sup>6</sup> Before the repeal of Kenya Vagrancy Act in 1998, children in the streets and the unemployed were often arrested and charged with the crime of vagrancy. Repeal of the Vagrancy Act, however, has not diminished the frequency of arrests of children in the street and the unemployed, who continue to be arrested and simply charged with other offences.

formal legal system? What are the overall effects of the lack of access to lawyers and other institutions of formal justice? While not romanticizing the kind of legal and normative systems observed in the informal settlements, I would suggest that contemporary legal practices and attitudes in Kenya must engage the social life of the law as well as historical and contextual manifestations that have a bearing on the idea and practice of law. Ultimately, this chapter aims to trigger debate on need for reforms in legal pedagogy and attitudinal structure that still tend to adhere to the bourgeois philosophy such as manifest in the Vagrancy Act and traditions of legal practice that marginalize the poor. Although the discussion in the chapter develops a narrative alongside Kenya's history and its colonial and postcolonial past, the author is aware that the case stories discussed here are closely related to development of capitalism and the class struggles that accompany it.

### **The Struggle for Nairobi**

The struggle for Nairobi has been about dignity, rights, equality, the promise of *uhuru*, employment and numerous other aspects of citizenship. For many years, access to Nairobi and indeed recognition as a Nairobiian (symbolized through access to employment, decent housing, education, healthcare, culture, movies and theatre) have become important components of belonging to the wider state of Kenya. Ever since its establishment in 1899 as a supply station for the expansion of the Kenya–Uganda Railway by the Imperial British East Africa Company, Nairobi grew as a city of racial inequality during the colonial era. Nairobi's land use plan was largely based on functional city planning with designated racially profiled residential areas, as in Cape Town during the apartheid era. It had restrictions on the black population's access to the city as well on where they could live. The areas that were known as 'native locations'<sup>7</sup> often lacked the amenities available to those in the more opulent areas. It is in this context that one can read the emergence of unplanned poor urban settlements that surged in the decades after independence (1963- 1973).

In what can be explained through the formulation by the thesis of the Ugandan political thinker, Mahmood Mamdani, of "citizens" and "subjects",<sup>8</sup> the city of Nai-

<sup>7</sup> Whatever the origin of this word (a person born in a particular place) in colonial terminology it referred only to black person whose communities were indigenous, and, like "Negro", came to have connotations of backwardness. Like many other colonies, Kenya had "native administration" (later "provincial administration"), "native councils", "native courts" even "native police".

<sup>8</sup> See Mamdani Mahmood, *Citizens and Subjects: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press, 1996).

robi was designed for citizens – mostly immigrants white settlers and Asians who mainly worked along the railways. The Africans, described by the derogatory term of Natives, in Mamdani’s words, subjects whose “natural” habitation ought to have been their ethnic homelands, suffered blatant discrimination. Divisions between categories of Nairobi residents resulted in long lasting uncertainty that Terry Hirst and Davinder Lamba have described as “The Struggle for Nairobi”.<sup>9</sup> In 1922, the colonial regime established Pumwani, its first planned ‘native location’ within Nairobi, and later built several more in the same decade (see Hirst and Lamba).

While the “credit” for such unplanned poor urban settlements is assigned to Korogocho – thanks to state narrative in the 10’clock news in June, 1999, the latest research conducted by Pamoja Trust,<sup>10</sup> a non-governmental organization working for social justice in Kenya, suggests that by 2010 there were about 200 unplanned poor urban settlements in Nairobi. Just like the colonial “native locations”, these unplanned poor urban settlements commonly known as “slums”<sup>11</sup> are characterised by the absence of essentials such as water and sanitation. Research by Pamoja Trust suggests that about 2.65 million people live in over 200 slums in different parts of Nairobi, the biggest in population densities being Mukuru, Kibera and Mathare.<sup>12</sup>

### What is Korogocho?

Korogocho is one such slum that developed in the context of “The Struggle for Nairobi”. Established in 1973, the settlement got its name from a Kikuyu word *Kurugucu* meaning waste/garbage/scrap, or something that is useless. The first recorded settlement in Korogocho was established in 1964 when a mzee Kamau Kiare built a well and settlements mushroomed around it. Mzee Kamau Kiare was a security guard (with a common derogatory name, watchman) at an Indian ballasting company owned by Jiwa Shamji. Kiare referred to his poverty through the sound of a near empty match box ‘ko ro go cho’. The subsequent growth of Korogocho

<sup>9</sup> Terry Hirst and Davinda Lamba, *The Struggle for Nairobi* (Nairobi: Mazingira Institute, 1994).

<sup>10</sup> See: [www.Pamojatrust.org](http://www.Pamojatrust.org).

<sup>11</sup> A historical review of the terms slums in the *Dictionary of British Social History* suggest that the term deriving in the 1820s from “the old word ‘slump’ meaning ‘marshy place’”, further making the connection that industries at the time were in low lying areas, near canals, adding that “the working class houses built there endured terrible problems of sanitation.” However, the term seems to have gained acceptance among residents of most unplanned poor urban settlements and policy makers in Kenya. See Marie Huchzermeyer, *Tenement Cities: From 19th century Berlin to 21st century Nairobi*, (Trenton, N.J.: Africa World Press, 2011).

<sup>12</sup> Pamoja Trust, *Nairobi Informal Settlements* (Nairobi: Pamoja, 2008).



is associated with the inability of the prescribed colonial “native locations” to accommodate the large number of “natives” who came to Nairobi and many other urban areas after *uhuru* (independence). It was not uncommon for these “native” immigrants to establish makeshift houses in areas near their working places or on the fringes of industrial areas where they walked every morning in search of elusive employment. Soon settlements referred to as “native locations” proliferated, without the sanction of the city authorities.

Today, most informal settlements in Nairobi are built on public land, which was either held directly by the Kenyan government or by the municipal authorities, such as the Nairobi City Council, whose successors hold the land in trust for the public (Constitution Article 62). Plots were allocated to individuals by means of either a Temporary Occupancy Licence from the local administration, or a letter from the area Chief.<sup>13</sup> The individual then had (and has) the right to erect a temporary structure, though no tenure rights in the property. Whereas local governments allocated temporary rights in these lands to individuals, from 1964-1970, the official government policy favoured the demolition of informal settlements.<sup>14</sup> In practice some settlements were allocated land and protected where it was politically expedient for the authorities, while others were demolished.<sup>15</sup>

In 1972, therefore the central government and the City Council of Nairobi undertook a major operation of “Creative Destruction”<sup>16</sup> almost similar to Robert Mugabe’s Operation *Murambatsvina* (clean up) in 2005. Like in Mugabe’s operation, the urban poor who could not “fit” in the former colonial “native locations” were treated as a nuisance and “garbage”. They were “uprooted” and dumped outside the city centre. The 1973 Operation in Nairobi mopped out unplanned urban poor settlements in Highridge, Gitathuru and Grogan and drove them towards the east of Nairobi. They ended up in Korogocho. The urban poor were treated as garbage and when they settled in Korogocho, the Nairobi City Council then started dumping solid waste from industrial, hospitals and hospitality industry in Nairobi

<sup>13</sup> Matrix Development Consultants, *An Overview of Informal Settlements in Nairobi. An Inventory* (USAID: Office of Housing and Development Programmes, 1993) p. 4. In the case of privately held land, land owners commonly give permission to build and charge rents, *Ibid*.

<sup>14</sup> Jane Weru, “Community Federations and City Upgrading: the Work of Pamoja Trust and Muungano in Kenya”, in Yves Cabannes *Participatory Governance* (London: International Institute for Environment and Development, 2004) p. 48.

<sup>15</sup> Nairobi Situation Analysis: Interview with Jane Weru, Pamoja Trust, August 14<sup>th</sup> 2007

<sup>16</sup> This is inherent to the relationship between cities and capitalism as similar examples of deprivation can be found in the entire story of capitalism. In France for example, with the renovation of Paris by Haussmann in the 1860’s the idea was also to clean up the areas of alleged undesirables, vagabonds etc., as was done in Zimbabwe and Kenya.

in the same location . Korogocho is, therefore, both a metaphor (of how its residents are denied symbol of citizenship and legal rights) as well as practical manifestation of how the urban poor in Kenya are denied dignity. The most intriguing thing is that residents of informal settlements in 21<sup>st</sup> century Nairobi constitute a category of “illegal” urban residents.

### *Enforcing law in urban settlements*

The above situation leaves us with the question: How do we enforce the law in the unplanned urban poor settlements? How does the community deal with internal and external matters where some sort of legal intervention is expected? Is there an informal system which performs the functions that are usually associated with a formal legal system? What are the overall effects of lack of access to lawyers and other institutions of formal justice?

I have already noted the lack of access to legal services by residents of Korogocho and other slums and the emergence of an informal system of property and residence rights, using the distinction between “owners” (of structures) and tenants, and how it works. In the next part, I would like to discuss how disputes in general were/are resolved within the urban poor settlements so as to emphasise the separation of the formal and informal legal orders (with examples of the lack of application of the formal land law) and discuss the contemporary situation. There are new kinds of pressures on the residents and attempts to bring the slums within the formal legal system on land and property. I conclude by looking into the future of the formalisation of property and relationships around land and discussing the social history of human rights and the factors that make their realisation difficult.

### *Korogocho and Poverty: Claiming Human Rights*

Between 1990 and 2003, Fr. Alex Zanotelli, an Italian priest under whose guidance I grew up in Korogocho, settled in there. His life there was a quest for both spirituality and meaning through missionary work in the world of the unequal. He argued that “...the city of Nairobi is built on a mortal sin. That sin is the reason why 55 % of the residents of this city squat on only 1% of the total land area and 6% of the total residential area of the city”.<sup>17</sup> He captures well the inherent contradictions between the Bill of Rights and the existence of settlements like Korogocho.

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<sup>17</sup> S. Pierelli and Yago Abeledo, eds., *Slums: A Challenge to Evangelization* (Nairobi: Paulines Publications, 2003)

On this one square kilometre parcel of land (about 10 hectares) reside close to 300,000 people, of whom youth are about sixty percent. The settlement is a reflection of not just economic poverty but all other components of poverty which sap mental and physical resources and makes them vulnerable to exploitation by external forces. The common dominator of these forces (whether government policies or fundamentalist market pressure) is an attempt to make oppression appear natural. In the middle of such a contradictory environment, the poor have sometimes forced to claim poor rights, as a racial group, just as in the independence struggles. From indecent housing where grown-up children overhear their parents during their intimate moments, to absence of water, schools, roads, security and all basic elements of life, informal settlements are an unmatched affront to human dignity.<sup>18</sup>

This state of Korogocho, like other informal settlements, is scandalous in the face of the Bill of Rights in Chapter Four of the Constitution, especially Article 43 (rights to housing, health, food and water, education and social security). The practice of historical discrimination and urban planning continues to “illegalize” the poor. Fr. Alex, a theologian, started by engaging Korogocho as a “mortal sin”, working in partnership with Kituo cha Sheria to train church leaders as paralegals. The agreement included partnering with Kituo cha Sheria to offer legal aid to residents through regular legal clinics and representation in court. For legal scholars and practitioners, the starting point must, therefore, be holding to account, not the people of Korogocho for residing in Korogocho and indeed other slums without title deeds, but those who through complicity, greed or abdication of duty have “produced” Korogocho. The lawyers should therefore not be dealing with an illegal people but rather an illegal situation.

It is an illegal situation because it is not just about economic or financial deprivation. Rather, as a leading Kenyan legal scholar, Yash Pal Ghai noted that:

Poverty is about exclusion, physical and economic insecurity, fear of the future and, a constant sense of vulnerability. It is the lack of qualities that facilitate a good life, defined in terms of access to the conditions that support a reasonable physical existence that enable individuals and communities to realize their spiritual and cultural potential—opportunities for reflection, artistic creativity, development of and discourse on morality, and contribution to and participation in the political, social and economic life of the community.<sup>19</sup>

<sup>18</sup> See Steve Ouma Akoth, “Introduction: Because my Parents Spoke Dholuo” in Pamoja Trust et.al. *Coming to Life: History and Memory of Korogocho Youths* (Nairobi: Pamoja Trust, 2013).

<sup>19</sup> See Wiliam Twining, ed., *Human Rights, Southern Voices: Francis Deng, Abdullahi An-Naim, Yash Ghai and Upendra Baxi* (Cambridge: Cambridge UP, 2009) p.144.

In this context, the practice of law starts not by asking whether people have *locus standi* to make claims but rather by revisiting why their *locus standi* is contested, eroded or hollowed. This is a major challenge to legal reasoning. It requires a look at, not just what the law says, but rather on what the law is expected to achieve.

### **Emergence of informal system of property and residence rights**

As illustrated above, the development of slum settlements like Korogocho is associated with a myriad of factors, some historical and many other associated with contemporary modernity options. This phenomenon explains Sean Fox's conclusion that slum settlements are products of "disjointed modernization", by which he refers to the struggle of slums dwellers to be part of the city as well as a general pattern of progress that develops basic infrastructure like water, roads, electricity and land tenure on some parts of the city while neglecting others.<sup>20</sup> The struggle of the slum dwellers has produced a legal order more responsive to their reality than the formal system, based on a different conception of property and entitlements.

While the settlement patterns and the larger struggle for Nairobi may suggest that the settlements in the slums areas are rather organic, the evidence is otherwise. Informal settlements exhibit layered interests from within and outside. From within, there are numerous mechanisms for providing basic facilities that are absent due to the disjointed modernization. Studies by Pamoja Trust suggest that there is an elaborate network of residents who control water supply. These groups, that often work in cohort with water company employees, have created illegal water connections commonly known as "spaghetti networks" of pipes.<sup>21</sup> On several occasions these kinds of "illegal practices" have triggered violence in Korogocho.

Another key area of contestation is the land tenure options. Often they tend to pit "structure owners" and "tenants" against each other. But the categories are not simple, nor are all of them in a category commonly known as the "urban poor". Rather, they represent underlying interests of established business communities and government bureaucrats, most of who do not reside in Korogocho. A study conducted and published by the UN Habitat in a Report on *Rapid Economic Ap-*

<sup>20</sup> Sean Fox, 'The Political Economy of Slums: Theory and Evidence from Sub-Saharan Africa', (2013) 54 *World Development*, p. 191.

<sup>21</sup> See e.g. Centre on Housing Rights and Evictions (COHRE) and Hakijamii Trust, *Submission to the United Nations Committee on Economic, Social and Cultural Rights On the Occasion of Pre-Sessional Working Group Discussion Kenya Right to Housing and Water (Article 11(1))* (2007) p. 34. <http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/cohrekenya39.pdf>.

*praisal of Rents in Slums and Informal Settlements* (2001) observed that 57 per cent of all structure owners in the slums were ministers, civil servants, and government officials or politically connected business people—biggest beneficiaries of the existence of slums.<sup>22</sup> Pamoja Trust research in 2008 established that 67 per cent of all the housing in Nairobi comprises single 10' x 10' shacks that attract an average monthly rent of shillings 2, 000. With over 1 million slum dwellers paying Sh2,000 monthly, the total rent collected is Shs. 2 billion per month and over Shs. 24 billion per annum.

There is also the issue of equity, which tends to be the major factor triggering constant conflicts and disputes in Korogocho. According to Pamoja Trust's data, about 2.65 million people live in over 200 slums in different parts of Nairobi, the highest population densities being in Mukuru, Kibera and Mathare. The most glaring contradiction, however, is that while 1.62 per cent of the land in Nairobi currently has very high density habitations (slums), 1.72 per cent of Nairobi land is used for recreational areas such as parks/gardens, golf courses, play grounds & race courses (most of this not open to public access). The attempt of the DC to ban Kituo cha Sheria from Korogocho was driven by the need to protect the interests of the well off. With an informal system of property and residence rights dispute resolution and access to justice have followed a rather informal path. Prior to 1999, when Kituo cha Sheria trained paralegals and they started working in Korogocho, most of the disputes, which often pitted structure owners against tenants, were resolved by the provincial administration. The most active were the village chief and the District Officers who had for long exploited the ambivalent administrative guidelines that allowed them to provide Temporary Occupation Licences (TOL) to residents. It is often rumoured that the various chiefs who served in Korogocho and the DC who served in the larger Kasarani acquired large parcels of land. Inevitably, these members of provincial administration have intervened in a manner that protects their interests.

### **Claiming “Precarious” Rights**

The practices of urban planning in colonial as well as postcolonial Kenya and its effects of “disjointed modernization” alongside legal education and practices

<sup>22</sup> Paul Syagga, Winnie Mitullah, and Sarah Karirah-Gitau. *Draft Nairobi Situation Analysis Supplementary Study: A Rapid Economic Appraisal of Rents in Slums and Informal Settlements*. Nairobi: Prepared for the Government of Kenya and the United Nations Settlements Program under the Collaborative Nairobi Slum Upgrading Initiative (2002).

that demean the poor, have declared the poor “illegal” and eroded their rights. Even though without registered rights to land for instance, Korogocho residents have over time grounded themselves as legitimate claimants to occupancy rights. As I have argued elsewhere,<sup>23</sup> occupancy right is a notion based on history and the legitimate expectations of the urban poor for secure land tenure. In this framework, the urban poor tend to make use of the notion ‘right to the city’ as coined by the French sociologist philosopher Henri Lefebvre in the late 1960s.<sup>24</sup> This ‘right to the city’ gives currency to occupancy rights, whereby the urban poor have, in collusion with the provincial administration and the numerous informal groups in the settlements, developed mechanism for making and protecting these claims. Kituo cha Sheria was not only a theatre and refuge of the struggle for Nairobi, but it also gave meaning to Lefebvre’s idea of the right to the city through appropriation. Kituo cha Sheria had appropriated a space of which the state was determined to dispossess them.

The urban poor have developed mechanisms to deliver justice. These work by making distinctions that are often glossed over by the courts. The courts tend to lump together the practice of law as a normative framework in which the courts play a crucial role, while the justice systems in Korogocho have developed useful distinctions between juridical structures and practice of law. Juridical structure refers to arrangements and representations of power, e.g. the law courts, the council of elders, the chief’s *Baraza* etc. while the legal framework is the system of rules, sanctions and normative content and other instructions of performance. The statement in Article 159 of the Constitution, which asks for development of Alternative Dispute Resolution (ADR) mechanism, is about the juridical framework. During numerous field visits to Korogocho, I have observed that the residents of Korogocho have developed an “unofficial” system of rights and justice that they consider more responsive to their reality than the formal system of justice, based on a different conception of property and entitlements. Table 1 presents some of the methods used to access justice between structure owners and tenants in Korogocho.

<sup>23</sup> See Steve Ouma in [http://www.standardmedia.co.ke/?articleID=2000084120&story\\_title=Kenya-there-s-more-to-evictions-than-law](http://www.standardmedia.co.ke/?articleID=2000084120&story_title=Kenya-there-s-more-to-evictions-than-law).

<sup>24</sup> Lefebvre, H., *Writings on the City*. Translated and edited by Kofman, E. and Lebas, E., (Oxford: Blackwell, (1996)

*Table I: Access to Justice in Structure owners vs Tenants disputes in Korogocho*

	Rent Tribunals	Chiefs	Gangs	NGOs	Paralegals	Village Elders
Predictability	2	2	3	3	2	1
Accessibility	2	3	2	2	3	3
Equity	3	1	1	3	3	1
Effectiveness	1	2	3	2	1	2
Restraint	3	2	1	3	3	1
Summation	11	10	10	13	12	8

*Source: Field study by Steve Ouma Akoth, 2013*

It is apparent from the table above that the state (here seen through provincial administration) and judiciary (seen through rent tribunal) are not the most trusted juridical structures for the purpose of resolving disputes between structure owners and tenants. Similar findings have been arrived at by Sandra Joireman and Rachel Sweet Vanderpoel in their study in Kibera<sup>25</sup> and my own study in the same region in 2013.<sup>26</sup> “Real abstraction” of the urban poor seems to accommodate paradoxes experienced by both structure owners and tenants leading to choice of systems of justice that may look “illegal” on the surface, but meet the need of justice. As Margaret Gruter suggests “When people do not recognize or believe in these potential benefits, laws are often disregarded or disobeyed”.<sup>27</sup> It is possible to read the various mechanisms that have been developed or preferred by the Korogocho dwellers in the category of ADR. In its common understanding, ADR refers to voluntary techniques for preventing and resolving conflict with the help of neutral third parties. It is broadly understood to include, but not be limited to, negotiation, arbitration, mediation, conciliation, mini-trials, or early neutral evaluations. In plain terms it is an alternative to the formal legal system, and is often underscored in the context of the shortcomings of the formal legal system. Some of the advantages

<sup>25</sup> “Property Rights Enforcement in Kibera Settlement, Kenya” (2010) <http://siteresources.worldbank.org/EXTARD/Resources/336681-1236436879081/5893311-1271205116054/Joireman.pdf>

<sup>26</sup> Steve Ouma Akoth, *Cultural Refugee: The case of women and culture in Kibera Slums, Nairobi*. A seminar paper (UP) (2013.)

<sup>27</sup> In *Law and the Mind: Biological Origins of Human Behavior* (Newbury Park, Calif.: Sage Publications, 1991) p. 62, quoted in Hernando de Soto, *Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books and London: Bantam Press/Random House, 2000), p. 175

of ADR are: speeding up procedures; eliminating unnecessary costs; simplicity; facilitating rather than stalling business growth; improving better compliance with settled disputes; and preserving and sustaining relationships.

What we see in Korogocho, and indeed, in other urban poor settlements is something different: multi-layered and complex. The residents have developed a model for access to justice and dispute resolution that works in their context and acts beyond merely resolving disputes. This “mangled” idea of justice takes on board what is otherwise known as an informal system, formal laws and customary law. In this large milieu it tends to generate something much greater than ADR and the formal judicial system. It is a model that does not look at law and justice as an isolated system, but rather as a kind of dispute resolution and justice system developed and pursued by the urban poor. And it tends to look at the entire gamut of life, political economy and everyday encounters in Korogocho. This means that even in dealing with the rather fluid issue of legality and illegality of some of the strategies, these justice systems tend to transcend both the narrow legal orthodoxy and the practice that label the poor as vagabonds. Kenyan lawyers hope to make a lot of money (an issue addressed in some other papers in the volume). The law student studies mostly subjects that are expected to achieve that end. The 16 core subjects include the traditional elements of a law degree. Although law school often stress “ethics” in their optional courses, one looks in vain for much explicit engagement with issues of poverty and gross inequality.

### **Contemporary situation in Korogocho**

A slum like Korogocho with about 65% of structure owners being absentee is more of “entrepreneurial slum”. In departure from the 1980s, there is no doubt that residents of Korogocho do have some sort of a right to occupancy. As a result, the various authorities have provided, even if in a token form, water, electricity and basic services.

Strictly speaking, it is very difficult to imagine this distinction between the tenants and structure owners, as neither group can claim legal proof of tenure in Korogocho. But it is along the lines of these two classes that there is a long standing legal tussle in Korogocho, dating back to 2005. It all started when the Government of Kenya (through the then City Council of Nairobi), which owns the land on which Korogocho is located, entered into an debt swap agreement with the Italian government in 2006 under the broader programme of debt repudiation. Word had gone round in 2002 that Fr. Alex, who had been a consistent anti- debt campaigner, had



proposed to the Italian Government for Korogocho to be considered as part of debt swap for development. By 2003, there were already plans to form the Kenya-Italy Debt for Development Programme (KIDDP) to convert the bilateral debt owed by the Kenyan Government to the Italian Government to financial resources to implement development projects aimed at reducing poverty.

The structure owners in Korogocho soon organized themselves and registered a society named Korogocho Owners Association (KOWA). KOWA made ruthless claims of their right to property and argued that any actions of the Kenya-Italy Debt for Development Programme (KIDDP) that would recognize tenants in Korogocho as possible beneficiaries in an upgrading initiative would be trespassing on and violating their right to property. Here is a case where, all of a sudden, a group of people who were broadly referred to in the developmentalist description of “urban poor” or the popular discourse of “slum dwellers” now organized around categories likely to create new modes of exclusion. KOWA would soon take a case to court in 2005 claiming that they deserved to be declared land owners and be granted title deeds.

In the first case filed by KOWA in the High Court of Kenya *Paul Mungai Kimani v Attorney General*<sup>28</sup> the applicants, who presented themselves as representatives of structure owners in Korogocho, sought that the Government be ordered to issue them with title deeds for the plots they occupy. The orders and declarations sought in this matter were declined. Justice Wendoh stated that:

...the applicants have not placed before this court any evidence to prove that the land on which they live in Korogocho slums was allocated to them by the provincial administration, or the City Council of Nairobi, or Government officials....

She added that

... Korogocho is a vast slum with thousands of people living there, any attempt to allocate it to a few of them in Korogocho would be futile. All those residents are landless people. If the 21 applicants are issued with title deeds for their plots, what happens to the rest of the slum dwellers?

KOWA and its applicants appealed this decision to the Court of Appeal.<sup>29</sup> On December 11, 2012 the Court of Appeal issued an injunction restraining the government and its agents from interfering with the applicants’ quiet occupation of their plots and structures pending the determination of the appeal.<sup>30</sup> While the appeal is

<sup>28</sup> Civil Miscellaneous Application 1366 of 2005 (in the High Court).

<sup>29</sup> Civil Appl. No. 202 of 2010, <http://kenyalaw.org/caselaw/cases/view/67785/>.

<sup>30</sup> <http://kenyalaw.org/caselaw/cases/view/78606/>.

yet to be heard, the arguments presented by the appellants raised a plea worth noting (presented by one Sylvester Yonam Owiti). He had averred that the defendant had demolished part of the property of a KOWA member (Jane Njeri Migwi), and asked the Court to issue a permanent injunction restraining the defendants from interfering with the activities, affairs, plots and structures belonging to the plaintiffs and other members of KOWA and for damages.

Respondents in the case, mainly tenants, made their submission in December 2012 arguing that, while they had never participated in any demolitions, they are aware that a structure belonging to one Jane Njeri Migwi was brought down under the direction and supervision of the provincial administration in Korogocho to make way for a road. The road construction was part of the wider slums upgrading initiative under the auspices of Kenya-Italy Debt for Development Programme (KIDDP). They further alleged that Ms. Migwi was not a resident of Korogocho, and had constructed the said structure not out of desperation (as is the case of most Korogocho dwellers) or desire for housing. But she was an absentee structure owner who was using public land to wring profits from the urban poor. It was their further submission that by their action and quest to “own” Korogocho, KOWA had obstructed the construction of other public infrastructures like schools and hospitals, denying the residents their constitutional rights. They argued that the appellants are only opposed to the slum upgrading programme as it has potential to benefit all residents and reverse the current state of impoverishment.

Similar issues arose in Mathare<sup>31</sup> and Kibera<sup>32</sup> during the slum upgrading process. It seems that at the heart of this contestation, is not “ownership”, but rather the fluid nature of property rights regime for the urban poor. However, there is no doubt that the plaintiffs in the court cases filed in relation to both Kibera and Mathare are motivated by exclusionary claims which have potential to marginalize the poor residents of these informal settlements, to property rights which is why they have gone to the lengths of raising legal fees for their respective cases.

<sup>31</sup> Mathare 4A Development Programme: Socio-Economic Monitoring and Evaluation Survey in June 2000 Final Report. Nairobi, March (for a summary see Andrew Reback, “Slum Upgrading Case Study: Nairobi’s Mathare 4A” at <http://www.design.upenn.edu/new/cplan/minisite/casestudies/matharecase.pdf>). Also Deyssi Rodrigues-Torres, “Public authorities and urban upgrading policies in Eastlands: The example of ‘Mathare 4A Slum Upgrading Project’” in Hélène Charton-Bigot and Deyssi Rodrigues-Torres, *Nairobi Today: The Paradox of a Fragmented City* (Dar es Salaam and Nairobi: Mkuki na Nyota Publishers and French Institute for Research in Africa, 2010) p. 61ff.

<sup>32</sup> In the midst of various interventions to “upgrade” Kibera, the most outstanding intervention has been the Kenya Slum Upgrading Programme (KENSUP) that is often blamed for its tokenism of participation by communities. That reason of community participation and the contested claim of property rights between the structure owners and tenants alongside the standing disputed over indigeneity of the Nubians in Kibera has resulted in numerous court cases.

## **Legal access for the poor in the context of the Constitution**

It is apparent from the above discussion that the urban poor in Kenya are not satisfactorily protected by law or institutions established to govern them. The poor in Kenya have for long been in a particularly helpless position in the context of asymmetrical power relationships as visualised in the relationship between structure owners and tenants and that between the provincial administration and the larger community of Korogocho residents. The barriers for the urban poor in accessing law constitute, therefore, not just a legal crisis, but rather a political, economic and moral question. In any case, the drafters of Constitution of Kenya 2010 (Constitution) realized that this problem cannot be resolved successfully unless law is used wisely to restore balance to the economic structures and remove the causes of economic inequality.

The Constitution has attempted to respond to this situation by proposing mechanisms that can support access to justice, fair hearing, fair administrative actions, and ensuring rule of law is upheld as well as equal rights between the rich and the poor. To this extent the Constitution requires the state to ensure access to justice for all persons, and any fee required should be reasonable, not impeding justice (Article 48). In addition, the Bill of Rights seeks to ensure that there are equal rights for all regardless of social and economic status (Article 27).

The Constitution recognises the need to move beyond the formal idea of justice. This holistic perspective is what seems evident in non-judicial justice systems. The non-judicial justice systems generally adopt a holistic philosophy guided by communities' world view, customary laws, traditional practices learnt primarily through examples, or moral teachings. They are often more accessible to the poor and disadvantaged people, and have the potential to provide quick, cheap and culturally relevant remedies. The application of culture, religion and/or customary beliefs and practices results in decisions that communities can live with and enforce. The case of Korogocho demonstrates that in situations of poverty and exclusion the urban poor have not remained helpless victims, but rather, they have formulated methods of discussing and resolving differences.

The third perspective that requires our attention is the subject of fair administrative action. The Constitution requires that the judicial action should be expeditious, efficient, lawful, reasonable, and procedural (Article 47(1)). This is one impetus behind reforms in the judiciary and legal aid.<sup>33</sup> Legal aid is generally un-

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<sup>33</sup> Amondi's chapter in this volume.

derstood to be the provision of free or subsidised legal services to the poor and the vulnerable in order to strengthen their access to justice.

When organizations like Kituo cha Sheria and Pamoja Trust started to work with paralegals in Korogocho, it was in appreciation that economic solutions by themselves cannot entirely tackle the problems of poverty, or deal effectively with issues of deprivation, insecurity, exclusion, and voicelessness. Therefore, more efforts must be made towards legal empowerment of the urban poor, dismantling the category of vagabonds by recognizing that everyone has rights and respect for those rights. Legal empowerment strengthens the civil society and capacitates the poor to defend their rights.

In taking forward the ideas on the Constitution there is need to establish a legal aid programme. Working for justice, legal and human rights in Korogocho must take into account what Richard Wilson (1997) has called ‘life scripts’.<sup>34</sup> I see ‘life script(s)’ from the various traditions of rights as what mediates the social process and political struggles through which people resist and or accommodate asymmetrical power relations. Because these kinds of human and legal rights reasoning are highly marginalized, the language has not yet been developed adequately to describe and analyse them and determine their scope and value. Most actors tend to suggest that the notion of Alternative Dispute Resolution (ADR) would capture the creative practices of legal and human rights practices documented here. But ADR maintains the irregular hierarchy that tends to privilege Euro-centred jurisprudence. The work shown here therefore tends to develop the life-world of the urban poor rather than the bourgeois ideal “reason” as mechanism for understanding justice, legal and human rights.

There is need for further dialogue between the various options for accessing justice used by the urban poor and the criteria stated in the Constitution, bearing in mind the distinction between legalist and empowerment approaches. It is necessary to engage with the various ADR mechanism used by the urban poor, to assess which of them have potential for further use and development. Mechanisms – such as the use of gangs – that tend to promote asymmetry and violence would have to change just as the eurocentric practice of law and jurisprudence changes. For lawyers and legal scholars this is a call to rethink about the purposes of legal education.. A question that needs to be engaged is whether developing informal systems

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<sup>34</sup> These are the social and political relations and process through which human rights production acquires and constructs social meanings. It is a perspective where various modernisms of human rights puts pressure on each other and engages in negotiations and conversations. See Richard A. Wilson, *Human Rights, Culture and Context: Anthropological Perspective* (London: Pluto Press, 1997).

for law enforcement as envisaged in Article 159 of the Constitution, is a way of bridging the gap between the unconventional and conventional systems, or rather a reinforcement of the distances observed in my analysis of ‘geography of power’.

## Conclusion

The common trend where informal settlements and their inhabitants are deprived of legal representation can be understood among others as a consequence of “illegalization of the poor” and legal pedagogy and practice that exclude the poor. In essence, advocates do not bother with what goes on in the slums since there is no money to be realised there and the slums are “illegal” anyway. Given the absence of state funded legal aid, the people are completely excluded from the system of formal state justice. It is such circumstances that have contributed to “unofficial” system of rights and justice. Drawing on case stories from Korogocho, I have demonstrated that the struggle for Nairobi or the urbanization process and development of legal pedagogy and philosophy of practice represent a critical situation.

The colonial legal legacy that produced asymmetrical categories such as “citizens”, “subjects” and vagabonds, so that even after the repeal of the Vagrancy Act in 1988 the imprint of inequality among the citizens remained. The postcolonial Kenya state was consequently ill prepared to usher in a legal regime that promotes equality. This has been aggravated by ill-prepared advocates trained in a pedagogy that promotes asymmetries and treats the economically urban poor as lesser citizens.

In the midst of this exclusion, the informal settlements have provided an opportunity for the cultivation of an “unofficial” system of rights and justice that emanates from numerous modules of justice. The residents of informal settlements like Korogocho have shown signs of developing these “alternative systems of justice” in a manner that transcends the mini-trials that are often referred to as alternative dispute resolution systems.

In the context of the Constitution there is need to expand dialogue between the various justice systems in a manner that provides the urban poor with the opportunity to graduate from the various “official” and “unofficial systems” of accessing justice which includes formal law, customary law, everyday life world and normative systems. Feedback received from these mechanisms also suggest that there is need to develop the framework for legitimizing the informal justice systems to ensure that there are in resonance with the Bill of Rights and other public policies.

I have also presented evidence that the urban poor are not unaware of the formal laws' legal discourse or practices. It is evident that KOWA's exclusionary claims to secure land tenure speak of the potential of the "official law" and its notions of right to property to promote same asymmetries that create and promote poverty. While not romanticizing alternative systems of justice, I have shown how long and divisive the court case of Korogocho has been.

# THE BAR: CHALLENGES AND OPPORTUNITIES

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Apollo Mboya

**A**fter the independence of Kenya in 1963, the evolution of the legal profession has been fuelled by the significant legal reforms implemented over the years. The loud protestations of the Law Society of Kenya (LSK) leadership not only spurred the constitutional journey culminating in the Constitution of Kenya 2010 but also the dramatic ripple effect in the judiciary including the vetting exercise in response to public demand for integrity, transparency, independence and competence in the Judiciary. The new Constitution unleashed the enactment of new laws to implement the new governance structures of devolution, which required the participation and vigilance of the Bar.

The infectious Constitution of Kenya also caught up with Bar when it abandoned the postal ballot system of conducting its increasingly competitive elections and adopted secret ballot under the management of the Independent Boundaries and Electoral Commission (IEBC). The 1949 governing legislation<sup>1</sup> has been reviewed and the Law Society of Kenya Bill, 2014 is awaiting enactment. The institution of Senior Counsel<sup>2</sup> emerged as the *crème de la crème* gaining recognition either as former Bar leaders or contribution to the development of jurisprudence, legal education and the profession at large. From being a small Bar composed of pioneer British and Indian lawyers to a ten thousand strong membership with a changing demography of more young lawyers, the Law Society of Kenya gained

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<sup>1</sup> Law Society of Kenya Act Chapter 18 of the Laws of Kenya.

<sup>2</sup> Section 7 of the Advocates Act Chapter 16 and the Advocates (Senior Counsel Conferment and Privileges) Rules, 2011 as amended in May 2012.

two constitutional seats in the membership of the Judicial Service Commission influencing the appointment of judicial officers, in addition to representation in a number of institutions performing quasi-judicial functions.

### Changing landscape of legal practice

The legal profession is in the midst of a dramatic transformation, due to many factors, which calls for an understanding of the forces that are changing the foundations of the profession. The top challenges include economic turbulence due to societal and economic changes; adaption to new technology; compliance and ethical issues; and continuing professional development. Clients continue to demand efficiency and responsiveness from their lawyers for less cost. *Clients expect their lawyers to focus more on the outcome and less on time spent on a legal matter.*

These require the Bar and the legal profession to keep abreast of the changes so that they are prepared to assist, counsel, and advise their clients. Lawyers also must be aware of these challenges so that they can take advantage of the opportunities for those prepared for what lies ahead. The legal profession faces unprecedented economic pressures. It faces competitive pressures from accountants, realtors, financial advisors, and others – and the Internet is making it easier for them to compete. And there is competition from global legal service providers, as the doors to transnational practice by lawyers widen by the World Trade Organization's General Agreement on Trade in Services (GATS)<sup>3</sup> and regional integration.<sup>4</sup>

To reposition themselves, many legal professionals are adapting to Multi-disciplinary Practices (MDP) requiring that they take up training and courses that complement their formal legal education. The Bar must participate in the regulation of legal services delivered by lawyers in MDPs to assure that clients receive the levels of professionalism and protection as clients of lawyers who are not in MDPs. As rightly observed by David Foot,<sup>5</sup> demographics explain “two-thirds of everything”. As the trail blazers and pioneers of the legal profession get older, there is

<sup>3</sup> You can download the International Bar Association's *Revised handbook about the GATS* (by Laurel Terry) (Washington: IBA, 2013) from the IBA website [www.ibanet.com](http://www.ibanet.com) (search for GATS).

<sup>4</sup> See Art. 104 of the Treaty Establishing the East African Community, and the EAC Common Market Protocol. In January 2014 the East African Legislative Assembly gave the East African Community Cross Border Legal Practice Bill its first reading see <http://www.eala.org/media-centre/press-releases/615-four-new-bills-introduced-as-eala-session-continues.html>.

<sup>5</sup> D.K. Foot, *Boom Bust & Echo: How to Profit from the Coming Demographic Shift* (Toronto: MacFarlane Walter & Ross, 1996) p. 1.



the emergence of a large group of young professionals in the age group of between 20 to 35 years who now form the majority of the members of the Law Society of Kenya. While the young professionals have brought with them vibrancy, the accompanying unethical conduct of some with respect to the traditional tenets of the profession has led to dramatic erosion of professional standards.

In 2014, out of the 10,675 on the Roll of Advocates, 7,059 took out their practicing certificate. The Bar has been slowly making great strides to bridge the gender gap which now stands at 4,305 Female Advocates in comparison with 6,944 Male Advocates on the Roll as at September 2014.

### **Competition by the global law firms**

Most legal professionals in Kenya are yet to appreciate that while the law is a calling, law firms are businesses. All businesses exist to create wealth for the owners by providing value to clients through legal services sustained through sound business practices in an efficient business environment that meets or exceeds the expectations of the client. This requires the owners of the business to work closely with owners to develop, facilitate, monitor and sustain business practices. Consequently, a re-examination of the traditional law firm structures is taking place. The traditional structure in the large law firms currently operates as follows: Partners ('Finders') sell services or create demand (new business) and claim part of the profits of the firm or equity, Associates ('Mindors') manage the work, salaried and looking for promotion and finally, Assistants ('Grinders') who are told what to do, how to do it and perform the bulk of legal work and research.<sup>6</sup>

Competition by global law firms requires a reconsideration of traditional organisational structures of law firms, ethical rules and regulation mechanisms for the legal profession and restructuring of how legal services are delivered. In order for the profession to stay relevant and thrive, lawyers must examine who can invest in firms, models for publicly traded firms, and lawyer partnerships with other professionals.<sup>7</sup> It is estimated that 80-90% of legal fees spent on matters related to Africa are spent outside of Africa. These include big-ticket litigation and arbitration, project finance work, private equity work. To overcome the barriers to cross

<sup>6</sup> The trio of roles is attributed to David H. Maister, *Managing The Professional Service Firm* (New York: Free Press, 1993).

<sup>7</sup> Ari Kaplan, in *The Evolution of the Legal Profession: A Conversation with the Legal Community's Thought Leaders on the Front Lines of an Industry in Transition* <http://www.arikaplanadvisors.com/wp-content/uploads/2014/03/DiscoverReadyFINAL2011.pdf>.

border practice in Africa, networks and alliances of law firms such as SNR Denton, Miranda Alliance, Lex Africa, Africa Legal Network and DLA Piper Group have emerged. Alliances and formal networks are a very effective way of projecting reach into markets where such a collaborative arrangement is adequate to meet the strategic objectives of the law firms concerned, or where cross-jurisdictional office openings are impossible. Further, in order to compete with the global law firms, the enactment of the Limited Liability Partnership (LLP) Act, 2011 has seen an avalanche of applications to the Bar by law firms seeking to practice as LLPs rather than in the names of the current or former partners as provided in the current advocate practice rules.<sup>8</sup>

The traditional large firm partnership model is facing internal and external pressure mainly due to competition requiring new human resource and management strategies to improve efficiency and economy. To survive the competition, medium and large law firms will have to build capacity in specialized areas through collaboration or mergers. Internally, the increased tension between income and equity partners and salaried associates may well lead to fragmentation of the large law firms resulting in the breakaways giving stiff competition.

However, medium size law firms and sole practitioners will still remain the pillars for improving access to justice for walk-in clients and the disadvantaged and vulnerable.

### **Mentoring and legal education**

Mentoring still remains one of the top concerns for the Bar. With fewer clerkships and internships, with large numbers of new law graduates and difficulties of access to mentors, many are joining the Bar with less experience often without having acquired practice basics such as requirements for running a successful law practice. The responsibility for creation of mentoring opportunities between experienced and new lawyers as a means of developing the next generation falls on the shoulders of the Senior Counsel, senior advocates and the Bar.

It should also be noted that the Legal Education Act, 2012 repealed section 32 of the Advocates Act that provided that notwithstanding issuance of a practising

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<sup>8</sup> The Limited Liability Partnership Act, 2011, Cap. 30A, provides that partnerships are liable for acts of the partners but the financial liability of the partnership is limited to the partnership property, and the partners are not liable personally for any other partner, though their individual liability for their own behaviour in respect of any person outside the partnership cannot be excluded (s. 10).

certificate, an advocate shall not engage in practice on their own behalf either in full-time or part time unless they have practised in Kenya continuously on a full-time basis for a period of not less than two years after obtaining the first practising certificate.

Three areas of knowledge, understanding and skill necessary for the practice of law are *cognitive or intellectual* which is basically knowledge of the law or legal rules, *skills* which is the ability to apply legal knowledge and *values* required of the legal profession. Curriculums for law school should balance the three essentials.<sup>9</sup>

Our law school curriculums have been criticized for over-emphasizing the acquisition of legal knowledge and not giving enough attention to the skills necessary for the effective application of that knowledge in the service of real life clients' or the ethical values expected of members of the legal profession in applying their legal knowledge to solve problems.

With such questions being raised, the time has come for us to ask what the purpose of legal education is or better still what should law schools teach the future members of the Law Society of Kenya to equip them with the skills needed to survive in the legal world. This in turn has direct implications for curriculum content and modes of delivery. Although the training of lawyers is supposed to be a shared enterprise between law schools and the legal profession, there seems to be a growing expectation that law schools will play a much more prominent role in educating lawyers. This raises the question whether law schools are well equipped to undertake this responsibility.

Law schools in their curriculum should also take into account the changing dynamics in the legal world and design a curriculum that equips the future lawyers to deal with the changes. With the numbers of lawyers being released into the market increasing every year, students need to be informed on the importance of specialization in one field and mergers. Students should also be taught about the importance of diversity and multi-disciplinary training so as to remain relevant in the profession. Not every career path is the same and students need to know that they can do many different things with their law degree.

When we look at legal education for future members of our society, we cannot avoid the issue of the impact of globalization for the future Kenyan lawyer. The question that remains is what is the impact of globalization on legal education and

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<sup>9</sup> Elizabeth Adjin-Tetty: "Reflections on Law School Curriculum" International Association of Law Schools Conference, Buenos Aires, Argentina (2011) <http://www.ialsnet.org/meetings/teaching/papers/Adjin-Tetty.pdf>.

the practice of law. While the primary focus of law schools must remain preparing lay people to become lawyers, in a globalized world, law schools must teach new kinds of legal skills to law students. Legal skills not only include applied skills of logic and reasoning, but also necessary skills of weighing or balancing various interests. However, it should not be forgotten that the key to success for lawyers practicing globally is to set a solid foundation by first mastering their own substantive area of law.

Legal education in Kenya still involves rigid distinction between academics (moot courts, seminars, judicial attachments, clinical, pupillage) and continuing stages of training. The legal education must be geared towards ensuring that the future system of legal training and knowledge is effective and efficient in preparing legal services providers to meet the needs of the consumers. Some of these missing skills include *ethics and professionalism, business acumen, leadership and management, client service and relations, financial analysis and business development*.

At the point of admission as an advocate of the High Court of Kenya, a lawyer is expected to possess some of the very basic skills required in the legal profession. First such a person should possess the core knowledge and understanding of the applicable laws. This means that the students should have proper knowledge of the jurisdiction authority and procedures of our courts and tribunals. Such a student is also expected to have proper understanding of the laws that govern different areas of laws.

Secondly, the modern legal practitioner should have good intellectual, analytical and problem solving skills. This requires the lawyers to have the ability to review and apply the knowledge gained in identifying clients' problems and obtaining relevant information from such clients. The lawyers should be able to evaluate information, arguments, assumptions and concepts and come up with a range of solutions, articulately communicate information, ideas, problems and solutions to the clients, colleagues and other professionals.

Thirdly, the lawyer should possess legal, professional and client relationship skills. This means that at the time of joining the profession, one should be able to conduct research and communicate effectively both orally and in writing with clients, colleagues and other professionals. The lawyer is expected to recognize client's financial and financial priorities, constraints and act appropriately if a client is dissatisfied with the advice or services given.

Fourthly, one should have good personal development and work management skills. The lawyer should be able to recognize personal and professional strengths

and weaknesses and identify the limits of personal knowledge and skills. One should also manage the workload and work effectively as a team member.

Lastly, the lawyer should exhibit professional values, behaviour, attitudes and ethics. In this regards, the lawyer should possess knowledge of the values and principals upon which the rules of professional conduct are based and resolve ethical dilemmas that may arise. Therefore any teaching curriculum for future members of the Law Society must incorporate all those essentials to enable future lawyers serve the public well.

After entering the profession, as part of their professional development, advocates are required to have annually a minimum of 5 Continuing Professional Development (CPD) units earned through seminars, workshops, lectures, conferences, discussion groups, symposia, colloquia, multi-media-based programmes, research and journal articles. *Pro bono* legal work for purposes of legal aid programme is also recognised for the purposes of CPD.<sup>10</sup>

### **Remuneration and competitive advantage**

One of the biggest differences is how lawyers will practice in the future-how lawyers value and price what they sell. The first step will be to implore members of the Bar to transition away from the traditional billable time and services system to alternative billing strategies by understanding that apart from “legal services” and “time”, lawyers are also selling knowledge.<sup>11</sup> These may include fixed, results based, hourly, graduated, or any such combination.

To survive in the emerging legal market, lawyers and firms must look for competitive advantages. Lawyers and firms are turning to law firm managers and legal information managers to examine trends and identify competitive advantages. To increase economic stability, the Bar can play an important role in identifying, analysing, and communicating these trends to members to enable them understand where the competitive pressures are coming from including leveraging the work already done by others. Added competition is coming from the fact that an advocate qualified in Uganda, Tanzania, Rwanda, Burundi and the Commonwealth is qualified to practice in Kenya.<sup>12</sup>

<sup>10</sup> The Advocates (Continuing Professional Development) Rules, LN 43 of 2014.

<sup>11</sup> Jay Shepherd, “Quantum Leap: How You Will Practice Law in 2019.” *Ignite Law 2011*, LexThink and InsideLegal, presentation, <http://www.youtube.com/watch?v=2xjxxjrpZ4>.

<sup>12</sup> Sections 12(a) and 13(1) of the Advocates Act.

As information becomes more and more available, and as technology allows individual or small groups of advocates to “expand” their practice, it is likely companies will create or expand in-house legal departments for the efficiency of the service, and to save costs. While this may create opportunities for individual lawyers, it will most certainly create competition concerns for the lawyers or firms now representing those companies. These concerns will only serve to magnify the need for lawyers and firms to examine trends, restructure as necessary, and attempt to remain competitive in the marketplace.<sup>13</sup> A significant amendment, opposed by the Council of the Law Society of Kenya, was effected to the law allowing the Chief Justice, on the recommendation of the Council of the Society, to prescribe the standards of work that may be performed by a person employed as an in-house advocate; and the criteria for determining the remuneration payable to an in-house counsel by an employer.<sup>14</sup>

While lawyers are trained to look at the past for precedent to see the future,<sup>15</sup> they must learn where to look for opportunities, by significantly broadening and organizing what they see, and be particular where they look for these opportunities. For example, lawyers must follow science and technology developments if they want to predict opportunities in substantive areas of practice. New substantive areas that lawyers can pursue and offer as a niche to innovative clients include renewable energy, atomic energy, global health, and emerging economies.

Along with lawyer accountability comes rising expectations of clients. Today, clients expect their lawyers to proactively look for ways to be efficient and offer options in terms of workflow and results.<sup>16</sup> Law firms must be prepared to provide client service plans that contain provisions relating to technology interfaces, billing (including alternative billing options), workflow, and accountability.

Within law firms, working conditions—salaries, compensation and work hours for the legal professionals—remains an area of abusive labour practices. For individual legal professionals, options will remain whether to compensate for every piecework (general), commission (fees), performance pay (targets), skill/knowledge (learning), competences or merit pay. As for groups or teams of legal professionals within a department of the law firm, options for compensation will include team bonus (targets), gain sharing, profit sharing or share ownership.

<sup>13</sup> Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford: Oxford UP, 2008).

<sup>14</sup> Sections 32B of the Advocates Act.

<sup>15</sup> Stuart Forsyth, “Perspectives from a Legal Futurist: Challenges to the Courts and the Legal Community,” (2010) 51 *South Texas Law Review* 913-933.

<sup>16</sup> Ari Kaplan, in *The Evolution of the Legal Profession*, above.

## Law and technology

The impact of technology cannot also be ignored when talking of legal education for future members of the Law Society of Kenya. Technology is first taking over our desk and in the near future one need to be techno-legal savvy to survive in the legal world. Soon many matters will be conducted through video-conferences. Agreements and exchange of documents will be done online. Therefore in preparing future members of the Law Society of Kenya, law schools need to take into account of technology needs of the students.

Every law firm – solo, small, medium, or large – is affected by technological change. Yet, solo practitioners and small firms are not disadvantaged by technology which is a great leveller. Small firms have a distinct advantage over large firms in the area of contract-based and flat-fee services. Individual practitioners and small firms can also band together to handle complex issues or large litigation matters. Small-firm lawyers may be more flexible, expeditious, and inexpensive in terms of providing legal services than their counterparts in large firms. Large law firms also have the advantages of entrepreneurial spirit as well as personnel and monetary resources to invest in technologies.<sup>17</sup>

## Legal Marketing & Advertising

On 29<sup>th</sup> March 2012 the High Court of Kenya, held that Rule 2 of the Advocates (Practice) Rules against direct or indirect touting and advertising of legal services was unconstitutional in so far as it constituted a complete ban on advertising.<sup>18</sup> The Council, in compliance with the court's decision, formulated the Advocates' (Marketing and Advertising) Rules 2014.<sup>19</sup> Legal marketing now requires law firms to educate consumers on their firm's legal and business activities that

<sup>17</sup> Richard E. Susskind, *Future of Law*, above.

<sup>18</sup> *Okenyo Omwansa George & Marclus Ndegwa Njiru v Attorney General, Law Society of Kenya & Council of Legal Education* [2012] eKLR, Petition No. 126 of 2011 <http://kenyalaw.org/caselaw/cases/view/78721/>.

<sup>19</sup> These rules permit advertising to contain only:

“(a) the identity of the advocate; (b) the identity of the advocate's firm; (c) the date on which the advocate was admitted to the Roll of Advocates; (d) the address and other contact information of the advocate or the advocate's firm; (e) the hours of business of the advocate or the advocate's firm; (f) the language of business used by the advocate or the advocate's firm; (g) the academic or professional qualifications of the advocate; or (h) any contribution that the advocate or the advocate's firm may have made to the preparation of a published legal article or a legislative Bill, or any contribution made by the advocate or the advocate's firm to legal education” (Rule 5(1)).

The place and manner of advertising is also restricted.

they use to deliver quality and ethical legal services. The challenge will be for legal practitioners to distinguish advertising which entails an express objective claim intended to influence consumer's decision from legal marketing which is a broader term encompassing advertising and other practices, such as client relations and public relations. Another challenge will be ensuring that any form of marketing and advertising is true, dignified, respectful of the professional ethics; and does not denigrate or disparage professional colleagues.

Whereas large law firms compete for a finite number of large corporate clients, the markets for consumer legal services are constantly shifting, with some markets contracting (e.g. bankruptcy) while other markets are expanding (e.g. immigration). This requires constant monitoring of consumer markets which can be segmented not only by practice area but also by client demographics.

### **New Challenges**

The Kenyan economy is expanding rapidly and has created new areas of law where there is a gap as far as legal practitioners are concerned. It is acknowledged that legal education in the universities and law schools in Kenya currently encompass as part of their curriculum areas of emerging legal practice such as on oil and gas, derivatives, transfer pricing and infrastructure law to mention a few. But it is difficult to find local expertise in certain categories of legal practice. Building capacity locally will take time and require a concerted effort by the Law Society of Kenya, law firms and Universities. In order to rapidly bridge the gap, local law firms intending to provide services to clients where local expertise is scarce will have to engage legal professionals with the knowledge and skill set from other jurisdictions. Where a particular skill required is demonstrated to be lacking among the members of the Law Society, arrangements, pursuant to which skill and knowledge would be transferred from the foreign lawyers to the Kenyan lawyers ought to be encouraged.

### **Cross border legal practice**

Although the Advocates Act restricts foreign lawyers from establishing offices in Kenya, some local law firms have found a loophole by incorporating their firms with business consulting companies and openly offer services to businesses in Kenya. Besides, many international law firms are affiliated with Kenyan firms to facilitate them to do business in Kenya. A number of overseas law firms have



deliberately employed Kenyans as a means to tap into the Kenyan legal market. Many foreign lawyers simply provide services to their Kenya clients, when needed by flying into Kenya using business or tourist visas to practice law sometimes embedding themselves within the local law firms. This trend brings to fore a number of issues including how to handle professional misconduct of the lawyers away from their domiciled jurisdiction and the need to re-examine the regulatory framework.

### **Use of Alternative Dispute Resolution**

The Constitution of Kenya 2010 encourages alternative forms of dispute resolutions including reconciliation, mediation, arbitration and traditional disputes resolution. These include the use of the traditional dispute resolution mechanism so long as they are not repugnant to justice and morality or contravene the Constitution.<sup>20</sup>

While alternative dispute resolution (ADR) is being slowly recognised as a viable way to settle disputes, the legal profession is still grappling with designing viable ADR initiatives and programmes because of the varying degrees of support from the legal community.

In the year 2013, the leadership of the Law Society of Kenya took a bold decision to construct an Arbitration Centre which was adopted by the Annual General Meeting. However, the initiative has witnessed opposition from a section of young lawyers mainly on account of bar politics. It is becoming increasingly evident that the success of ADR initiatives will depend upon assessing and addressing the legal community's attitudes toward ADR, as well as ADR users' attitudes towards the formal legal establishment.

The uptake of ADR within the judiciary has been appalling despite legal frameworks requiring judicial officers to use ADR as part of the case management strategy. What will remain a challenge is the outer limits of the use of ADR in criminal cases especially among communities that have embraced the same in serious criminal cases including capital offences as part of restorative justice.<sup>21</sup>

<sup>20</sup> Article 159 (2)(c) & (3) of the Constitution of Kenya 2010.

<sup>21</sup> See, e.g., *Republic v Mohamed Abdo Mohamed* [2013]eKLR Criminal Case 86 of 2011, High Court, Nairobi, <http://kenyalaw.org/caselaw/cases/view/88396/>.

## Conclusion

These are terrifying times for those having difficulty accepting and dealing with change. “In a fast-paced, discontinuous change environment, bar associations, law schools and law firms are lost.”<sup>22</sup>

Going forward the focus areas for the Bar will be: *law firm structure and billing, law firm marketing, work-life balance and technology vis-à-vis the practice of law, cross border legal practice, educating and training new adaptable lawyers*. This will require the Bar to continue to identify and analyse developing trends affecting the law practice, and communicate to members their impact on the practice of law in Kenya and the region. This must of necessity involve accreditation of training in the content or skills necessary to effectively practice law, even if such content or skills are not directly related to substantive law or ethical obligations. The era of the general practitioner is diminished as early specialization takes centre stage in the legal market place, mainly due to demands of the client and the competition for cutting edge practice.

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<sup>22</sup> Charlie Robinson (Florida Bar) *The Future of Professional Practice* ([www.charlie-robinson.com/](http://www.charlie-robinson.com/)).

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