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The Paralegal's Handbook

Paralegal Support Network

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Chapter 1

How to Use This Handbook

Why the Handbook?

This handbook has been developed by the Paralegal Support Network (PASUNE). The handbook was developed in fulfillment of the mandate of PASUNE. PASUNE as a network of leading human rights organizations involved in paralegal training has been working towards standardizing the content and methods of training paralegals in Kenya. As part of that process in the year 2003 it developed a curriculum for community paralegal workers. The curriculum has been very useful in ensuring that all organizations involved in paralegal training cover an agreed set of issues in the process of training and that the eventual trainees are of a certain quality.

The curriculum however only highlights the areas to be covered. The substance is to be filled during the actual training. The paralegals who are members of the PASUNE network were supplied with this curriculum. They found it very useful. However they also requested for a handbook with basic information on the issues covered by the curriculum. The development of this manual is partly in response to that request.

The manual has also been developed for several other reasons. The whole purpose of paralegal training is to equip the paralegals with basic legal skills to be able to help the communities they live in solve their basic legal problems. The trainings are done over a period of time. It is hoped that the paralegals will use the skills they have received to train others and also solve problems that arise within the communities they live in. This handbook has been developed to aid that process. The book will act as a source of reference for the paralegals as they carry out their work. They can also use it to share the knowledge in it with other members of the community and thus enlighten them on the law. Before the development of the handbook several of the organizations carrying out paralegal training had written several manuals and booklets on many of the aspects covered in this handbook. The handbook is however the first of its kind in Kenya. It is the first attempt to cover all the aspects of a paralegal training in one comprehensive publication. Secondly it seeks to harmonize the contents that paralegals need to know into one comprehensive text so that a paralegal can consult it for common legal information. It is also written in plain text to make it easy to understand for the paralegal

Who Should use it?

This handbook is intended primarily for the use of paralegals. It is also to be used by trainers' together with the curriculum and trainer's guide also developed by PASUNE. It should be noted that paralegalism aims at providing legal knowledge to members of society. The book has therefore been written in very plain and easy to understand manner. It can therefore be used by all categories of people in society. Anyone interested in having basic knowledge about law and legal issues in society will find this handbook very useful. At all times those who use the handbook should realize that the handbook is not a substitute for example for the official laws made by parliament. It has sought to explain the law yes but one should also remember that the official source of the law also exists. The handbook though comprehensive is not the only available material that one

needs to read. There are several other materials some appearing in the Bibliography to this handbook that one should read for further knowledge on the law.

Structure of the handbook

The handbook is divided into twenty three distinct chapters, each covering a separate area of the law. Following this introductory chapter on how to use this handbook, the rest of the book deals with the following areas:

- The Role of the Paralegal Worker
- Law and Society
- Institutions for the Implementation of the Law
- The Constitution
- Human Rights
- Democracy
- Elections
- Governance
- Gender
- Gender-based Violence
- Employment and Labour Relations
- Claims Arising from Injuries
- Business Relations and Contracts
- Land Law
- Family Relations and Succession
- Crimes and Security
- Court Procedures
- Dispute Resolution and Conflict Management
- Community Mobilization
- Children and the Law
- Environment and Natural Resource Management
- Human Rights Institution Building

In each of the chapters the handbook discusses the law and institutions for the implementation of the law. The chapters also highlight the key issues in each area of the law that it covers. The handbook also uses practical examples to explain the legal issues. An effort has been made to avoid legal and technical jargon and where it was necessary to include certain terms, these have been explained. The chapters have also tried to contemplate the kind of problems paralegals are likely to face in the community and sought to give suggestions as to how those issues could be addressed. One should remember that what is contained here is just a guide. It is not the solution to all legal problems possible.

How to Use the handbook

This handbook should be used as a basic reference material for paralegals and their trainers during training. Paralegals should always consult in when carrying out their duties in the community and they are not sure of what the law provides in a particular situation or how to go about solving a particular problem.

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The handbook is wide in its coverage. It is not possible therefore nor is it intended to be read continuously from cover to cover. One should read it chapter by chapter and seek to understand what each chapter provides. It has been written in such a way that although the issues covered in the chapters are related one can read one chapter at a time and still get comprehensive information on that particular area of the law.

The handbook should be used together with other materials on the law and on paralegal education. The law continuously changes so one should keep in mind that the issues covered in this manual will periodically change as the laws get amended or repealed. While efforts will be made to update the handbook, users of this handbook are advised to also consult the recent legal text like laws of parliament and the constitution so as to be up do date on the legal information. Consulting other materials is also useful so as to complement the information in this handbook.

Chapter 2

Paralegals and Access to Justice

Introduction

Laws regulate all aspects of an individual's life. Some have even aptly stated that law governs one's life from birth to death. For this reason it is important that all are aware of the law since it is not something for a select group of people. Secondly the law even makes it compulsory for everybody to be aware of it. This is because ignorance of law is no defense. A person cannot say that their failure to abide by a specific legal requirement was their lack of knowledge of the existence of that rule. The law requires for example that everybody who has an income must file their tax returns. One cannot fail to file their income tax returns and plead that they did not know it was a requirement in law. Despite this legal requirement the reality is such that majority of Kenyans are not aware of the existence of several laws that govern their lives and regulate their conduct.

Due to the above realities several people are denied access to justice. The law is also normally expressed in legal and technical language making it difficult for most people to understand. This coupled with the fact that accessing legal services, even the very basic ones, normally involves consulting a lawyer who must be paid professional fees for services rendered makes the ordinary citizen not to access justice. If one has to go to court, in addition to paying lawyers, there is also the issue of court fees to be paid and the reality that courts are normally few and far between thus the issues of transport costs also comes to bear. To redress this anomaly, the concept of paralegalism emerged.

Who is a Paralegal?

Paralegalism involves the process of training and equipping non-lawyers with basic legal knowledge of the law and legal procedures to enable them enlighten members of their community of their legal rights. A paralegal worker is community based individual, who is not a lawyer but who has basic legal knowledge and skills. Paralegal workers are therefore development workers and community members who educate people about the law or offer basic legal services. Paralegals can refer to persons who are part of the legal process like court prosecutors, court clerks, and probation and children officers. These persons although not lawyers offer essential legal services as part of their work. The second category is those members of the local community who render legal services on a voluntary basis and outside or in addition to their normal work. Reference in this manual is largely to this second category.

Role of a Paralegal

The role of a paralegal worker is generally to enlighten members of their community on their legal rights and assist them solve legal problems. Specifically their duties of paralegal include, amongst others:

- Provide basic legal services in the community;
- Provide a link between the community and other persons or institutions interested in the general welfare and development of the community;

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- Provide an avenue for alternative dispute resolution and negotiation on behalf of members of the local community and, where necessary, consult and liaise with professional lawyers and legal aid organizations
- Assist the community to identify, prioritize and if possible satisfy its needs;
- Preparing basic legal documents for members of the community;
- Monitoring human rights violations;
- Conducting preliminary investigations in cases which eventually get referred to a lawyer;
- Referring those with problems with to appropriate organizations; and
- Lobby for law reform.

Qualities of a Paralegal

For one to be a successful a paralegal it is necessary that they possess certain qualities. Some of these qualities include:

- Basic literacy knowledge. It is essential that a paralegal have knowledge of the local language of the community they are operating in and also have a working knowledge of Kiswahili and English;
- Ability to communicate effectively and simply;
- A willingness and ability to volunteer as the very basis of paralegalism is the lack of payment for the services rendered by the paralegals;
- Knowledge of the culture and practices of the local community;
- Have an objective and analytical mind;
- Be trustworthy and have integrity;
- Be a patient and a good listener;
- Be gender sensitive and adhere to basic human rights principles like non-discrimination;
- Background experience in and/or dedication for community service; and
- Be self-confident yet humble.

Conclusion

Paralegals are very important members of society. They assist the community members to access legal services. However in the performance of their duties they should cultivate good working relationships with other institutions that are key in the process of legal service delivery. These include courts, lawyers, police offices and government officials like chiefs. They should also explain to the members of their community the limits of what they can do and refer cases, which are beyond their competence to qualified professionals. Thus when one approaches you as a paralegal with a document that requires a lawyer's signature you should not assume the role of a lawyer and sign the documents. Instead you should refer them to a lawyer who can sign the documents on their behalf.

Performing the duties of a paralegal requires a lot of commitment, discipline and resourcefulness. Paralegals should therefore seek to collaborate and network with other community workers and organizations that perform similar or complementary task in the community so as to ensure the success and sustainability of their efforts.

Chapter 3

Law and Society

Introduction

We live in a society where our every action affects the other person one way or another. Due to this there is need to regulate our conduct so that its effects on other members of society is controlled. This justifies the existence of rules there are different types of rules in society each called by a different name.

For our purposes, we categories the rules that exist in society into two. First category comprises those rules that have the force of law, also referred to as legal rules. The second category do not have force of law and are called non-legal rules. Legal rules are backed by the state's enforcement mechanisms. It is these legal rules that are referred to as law. The non-legal rules might include norms ad morals.

What is Law?

Law is therefore a set of rules and customs that regulate orderly conduct of affairs in society. When we hear of laws some of us think it is a complex and mysterious thing only accessible and known to lawyers and judges. Others see law only in the context of the police, courts and prisons. These views do not represent the complete picture. Firstly law is not mysterious and affects all of us. A child who has just been born requires a birth certificate to evidence their birth. The issuance of that birth certificate is regulated by the law. The villager who intends to sell her land does that according to the law. Secondly law is not just about the police, the courts and prisons. These are only the coercive aspects of law. Law performs several roles in society. Law exists to guarantee and defend the rights of the people. Thus when one's rights are violated, for example the villager who is selling land, if the seller fails or refuses to pay the whole sale price even after she has sold the land, then she can have redress through the law. Law is also a stabilizing factor in society. It ensures the existence of peace and liberty. By regulating the conduct of human affairs and providing the limits to those action law ensures that each of us exist in harmony with another without oppressing them or violating their interests and rights.

Law is not just about rules to ensure order only. It also a way of life, a social institution. Although enforced by the state machinery, law is essentially an expression of the will of the people. Law therefore exists to serve the people in society and not something to be imposed on people by force.

Classification of Law

Law can be classified into several categories. The various classifications which exists include:

Municipal law versus **international law**

Public versus **private law**

Civil versus **criminal law**

Statutory versus **non-statutory law**

Principal versus **subsidiary** law (legislation)

Substantive versus **procedural laws**

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Laws made in one country and which regulate conduct in that country is referred to as **municipal or domestic law**. Since a country is sovereign within its borders such laws apply to those within its boundaries, both citizens and foreigners. Laws made by Kenya are that applicable within Kenya. Such laws are distinguished from **international law**. This refers to laws developed by the general body of nations and which is applicable in two or more countries. Traditionally such laws could only be made by and apply to states and not individuals. Most international law is developed under the umbrella of the United Nations.

Law can also be categorized into Public and Private Law. Public law comprises those rules that concern themselves with regulating public aspects of life. It therefore refers to law whose concern is the operations of the state and states relations with its citizens. A typical example is constitutional law. Private law on the other hand deals with regulating the relationship between private individuals. Examples would include laws dealing with contract and business relations.

Municipal law can also be divided into substantive and procedural law. Substantive law consists of major areas of law which confer rights and obligations to people, for example the law of marriage which confers rights and obligations on a married couple. Procedural law on the other hand refers to laws that enable substantive law to be enforced in courts and other tribunals. Examples of procedural law include the law of evidence, civil procedure and criminal procedure.

Law can also be categorized into civil and criminal law. Criminal law deals with definition and punishment of crimes. A crime is an offense against the state and the society in general. When criminal law is violated, it is the duty of the state to arrest and prosecute the offender. The victim is just a complainant and witness in the case. The offender if found guilty is punished by the state in accordance with criminal law. Typical crimes dealt with by criminal law include rape, theft, assault and murder. Civil laws regulate disputes between individuals which are of a non-criminal nature. The affected parties refer the matters to court and the party which violated the law is normally required to compensate the other. The state is not usually involved in civil cases. The laws that regulate these aspects are referred to as civil law. Examples include contract law and the law of civil wrongs or torts.

Sources of Law in Kenya

The existence of law is evidenced by several things. In Kenya the existence will be discerned from a catalogue of sources. The sources of law are stated in a law made by parliament called the Judicature Act. The Judicature Act lists the sources of law as:

- the constitution
- written statute law
- common law
- doctrines of equity
- statutes of general application
- customary law

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- Islamic and Hindu law
- judge-made law.

To be sure discussions on the sources of law should not assume that laws came with the advent of colonialism and the white man. Our societies even before the colonialism had their own rules, which governed their activities and ensures social, economic and political cohesion and development. However with the imposition of colonial rule, there was introduced a system of rules and regulations to help perpetuate the colonial powers. This is at the genesis for the provisions in the Judicature Act, which includes as sources of law English Common Law.

The imposition of colonial laws and disregard for our rules were at the heart of the struggle for independence. Unfortunately even after independence nothing was done to the over dependence on the colonial laws as the source of rules to regulate societal conduct in Kenya. So much so that the bulk of the sources of law currently have their origins in England through colonialism.

The Judicature act which lists the sources of law creates a hierarchy. This is to say that the laws are listed in order of importance with the most important source, being the constitution being listed first. The constitution is the supreme law of the land and other laws which conflict with it have to be disregarded. It is the most superior. Following the Constitution are written laws. These basically are laws passed by parliament. Their characteristic is that they are written. Every law passed by parliament is called an act of Parliament and each has a different name and number to distinguish it from the other. We for example have a law governing the authority of chiefs. It is called the Chiefs authority Act and has been given a number as Chapter (CAP)?

Following statutory laws are the Common Law of England and what are referred to as the Statutes of General Application. These basically refer to rules and regulations that were applicable in England and their application extended to Kenya through the act of colonialism. These continue to apply in Kenya and according to the hierarchy take precedence over customary law.

Before the coming of Europeans into Kenya, each community was governed by its customs and traditions. These traditions had been developed and practiced since time immemorial and were passed down from generation to generation orally. These customs and traditions pronounced what was acceptable behaviour and what was not. Elders were responsible for enforcing the rules and traditions. Although modernity has interfered to some extent with this, customary laws are still applied by communities.

However in the hierarchy customary rules are inferior to not only the constitution and written laws but also to the imported foreign laws in the form of the Common laws of England and the Statue of General application. Secondly the application of customary laws is limited in certain respects. In the first instance they do not apply to criminal cases. Further it is provided that they only apply in instances when they are not repugnant to justice and morality. A customary rule can thus be departed from or

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disobeyed if it is seen as offending justice or morality. Since it is not clear what the standard of justice or morality is this limitation is controversial.

Next is Islamic and Hindu law. These only apply in limited circumstances specifically in instances where both parties profess the Islamic or Hindu faith and only in domestic law matters such as inheritance, marriage, divorce and custody of children.

The other source of laws is referred to as judge-made law. Under strict sense, the function of judges is to interpret the law and decide disputes in accordance with the law. They are not supposed to make laws. In fact judges are normally quick to point out that their duty is not to make laws. However the reality is that in the process of interpreting existing statutes and other laws, judges sometimes make laws. There also certain circumstances where there is no specific law governing a situation. When judges pronounce judgment in such case that is taken as the law. In essence judges will have made law. This source of law, that is the power of judges to make law is restricted. However it exists. Indeed there is even an expression which describes this power. That the law is what the judges say it is.

The Law-making Process

According to the theory of governance, government performs the task of governing on behalf of the people. There exist three arms of government which perform distinct but supportive functions. Parliament or the legislature in this arrangement has the powers to make laws. The laws made by parliament are referred to as statute. Laws are made from policy and other proposals by the government, individual members of parliament and civil society.

Parliament has the supreme power to make laws. This power is provided for in the constitution and is due to the fact that parliament is composed of representatives of the people directly elected and given the mandate to make laws on behalf of the people. This justifies parliament's supreme law-making powers. There is a formal process for making laws through parliament.

The parliamentary process of making laws is undertaken through passage of Bills. This is a proposal for a new law or an amendment of an existing law. The first process in the law making process is for the drafting of the Bill. Most Bills are brought to parliament by the government through relevant ministers depending on the issue. Thus a Bill on health will be brought to parliament by the minister of health or the assistant minister in that ministry. These Bills are drafted by the Attorney General's office. However the law also allows a private member of parliament to draft a Bill. The difference in procedure is that a private member who intends to bring a Bill to parliament must first move a motion seeking the leave of parliament to bring the motion. It is only when the motion has been approved that the private member can bring his/her Bill to parliament for debate. Examples of Bills that have become law after having been drafted and brought by private members include the Hire Purchase Act and more recently the Constituency Development Fund (CDF) Act. The law however indicates that a Money Bill, that is a Bill

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to raise money for the government or to authorize the government to spend money already raised can only be presented by the Government.

Once drafted whether it is a Government Bill or a private member's Bill, the stages it must pass in parliament are the same.

The first stage is usually the **first reading**. During this stage the mover of the Bill whether the private member or the relevant minister reads out the title of Bill in the House. The next stage is that of the **second reading**. This can be on a different day but sometimes it can even be on the same day as the first reading. The Bill at this stage is read to the house a second time. The person introducing the Bill before the house also explains the rationale and purpose of the Bill and also the salient highlights. After this explanation, the other members discuss the Bill in detail.

The next stage is usually the **committee stage**. During this stage the whole house converts itself into a committee of the whole house and examines the Bill in detail, paragraph by paragraph. The Bill can be amended at this stage. The next stage is then the **Third reading**. The Bill is then read one last time and at this stage members of parliament will vote to either pass or reject the Bill. If the Bill receives the support of parliament it is then passed and ready to become law. A Bill that has been passed by members of parliament can however not become law until it has gone through the last stage. This stage is when the Bill is transmitted to the president for his assent or signature. When the president agrees to the Bill by signing it, it becomes law. However if he does not sign the law it will be referred back to parliament with a memorandum explaining the reason why he/she does not want to sign the Bill. President Kibaki for example on reliance on this provision referred the Wildlife Amendment Bill back to parliament. When the Bill goes back to parliament on reference of the President, the members of parliament can either accept the president's proposals and make changes or reject the president's proposals and pass the Bill as it is. If they do so the president has no choice but to sign the re-passed Bill.

Bills that have been passed by parliament have to be published in the official gazette of the Kenyan government, called the **Kenyan Gazette**. The Kenyan gazette is normally published once a week unless special circumstances dictate then a special issue of the gazette can be published. Bills are also published before being taken to parliament for the first reading.

In practice, after the first reading Bills are normally submitted to the relevant departmental house committee for discussions and recommendations by the committee in the first instance.

In ending this chapter it is important to emphasize that laws play a very important role in the regulation of society and its affairs. Further it is mandatory that everybody be aware of the law. The reality however is that most people do not know about laws hence the importance of the roles performed by those like paralegals whose task it is to enlighten other members of their community on the law.

Chapter 4

Institutions for the Implementation of the Law

Introduction

In any civilized society, there is need for a mechanism of ensuring that those who are wronged by anyone have an avenue to peacefully settle the dispute arising from that wrong and that they can have access to justice. Although courts of law are often perceived as the only place where justice can be obtained, there are a number of bodies which exercise administrative power that also deliver justice to citizens and public administrators whose decisions and orders may also secure justice for citizens, especially poor citizens who may not be able to access the courts of law. The machinery of administration of justice is therefore important in maintaining peace and harmony in the country.

Structure and Jurisdiction of the Courts in Kenya

In the same way that Kenya adopted a system of law from its colonial masters, it also adopted a court structure. The structure, which has been changing over the years, operates at various levels. A court may only be able to listen to disputes of a certain nature or in a certain geographical area, which is referred to as the court's jurisdiction. This jurisdiction may also vary depending on whether the court is hearing a criminal case or a civil case. The structure and jurisdiction of Kenyan courts is established by the Constitution, the Judicature Act, the Magistrates' Courts Act, the Armed Forces Act and the Kadhis' Courts Act. In addition to these, there are a number of other tribunals with powers similar to those of the courts, known *quasi-judicial* powers, which are established under various laws.

District Magistrates' Courts

Established by the Magistrates' Courts Act, these are the lowest courts in the court structure. They may be of the first or second class. All magistrates are appointed by the Judicial Service Commission and usually hear cases alone, either in open court or in their offices, known as *chambers*. The jurisdiction of District Magistrates' Courts in criminal cases is limited to certain geographical areas which are announced by the Chief Justice from time to time in the Kenya Gazette, the official government publication for legal and other notices. With respect to civil cases, a District Magistrate's Court can hear a case concerning a claim under customary law or where the subject matter is of such an amount as is announced from time to time by the Chief Justice in the Kenya Gazette. Anyone who is dissatisfied with the decision of a Magistrate's Court can appeal in a criminal or civil case may appeal to the High Court and, if not satisfied with the decision of the High Court, the Court of Appeal.

Resident Magistrates' Courts

Also established by the Magistrates' Courts Act, Resident Magistrates' Courts are the second lowest courts in the court structure. A Resident Magistrate's Court may be presided over by a Resident Magistrate, a Senior Resident Magistrate, a Principal Magistrate or a Chief Magistrate appointed by the Judicial Service Commission. They hear cases alone in their chambers or in open court. Their geographical jurisdiction is

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unlimited in both criminal and civil cases. They hear all criminal cases except for murder and treason and civil cases where the subject matter of the case is of such an amount as will be announced from time to time by the Chief Justice in the Kenya Gazette. Anyone who is dissatisfied with the decision of a Resident Magistrate's Court can appeal in a criminal or civil case may appeal to the High Court and, if not satisfied with the decision of the High Court, the Court of Appeal.

High Court

Established by the Constitution of Kenya, the High Court has jurisdiction to hear criminal and civil cases in the first instance, known as *original* jurisdiction, as well as appeals from magistrates' Courts and Resident Magistrates' Courts, known as *appellate* jurisdiction. It consists of the Chief Justice and a number of judges appointed by the President on the advice of the Judicial Service Commission. Once appointed, a judge of the High Court cannot be dismissed from office except for failure to perform the functions of his or her office. Even then, a special procedure, which involves a hearing by a tribunal appointed by the president specifically for that purpose, must determine that such a judge is unfit to hold office before the judge is dismissed. This special protection from removal is known as *security of tenure*. The High Court sits in Nairobi, but there are Resident Judges in other major towns in Kenya such as Mombasa, Kisumu, Nakuru, Eldoret, Kakamega, Kisii, Nyeri and Machakos. High Court Judges normally hear cases alone but in civil cases the Chief Justice may direct that the appeal be heard by two or more judges. Criminal appeals are heard by two judges unless the Chief Justice directs that an appeal be heard by one judge. If they disagree, the appeal is reheard before three judges. The High Court also hears election petitions, which are special proceedings to challenge the election of a person as a Member of Parliament or President. If a person is dissatisfied with the decision of the High Court, he or she may appeal to the Court of Appeal.

Court of Appeal

Established by the Constitution of Kenya, the Court of Appeal only has appellate jurisdiction. It consists of the Chief Justice and a number of judges appointed by the President on the advice of the Judicial Service Commission. Judges of the Court of Appeal also have security of tenure. The Court of Appeal sits in Nairobi, although the Court of Appeal judges regularly travel to major towns to hear appeals filed within the geographical areas covered by these towns. Every appeal is heard by three judges. There can be no further appeal from the Court of Appeal, which is the highest court in Kenya.

Kadhis' Courts

Established under the Kadhis' Courts Act, the Kadhis' Courts are presided over either by the Chief Kadhi and a number of Kadhis, appointed by the Judicial Service Commission. These courts hear civil cases regarding personal status, marriage, divorce or inheritance in which all the parties profess the Muslim religion. The rules of evidence applicable in these courts are based on Muslim law. If anyone is dissatisfied with a decision of the Kadhi's Court, he or she can appeal to the High Court and, if still dissatisfied, to the Court of Appeal.

Courts Martial

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Established under the Armed Forces Act, Courts Martial hear criminal cases against members of the armed forces, that is the army, navy and the air force. They are presided over by a Judge-Advocate appointed by the Chief of General Staff. Anyone who is dissatisfied with the decision of a Court Martial can appeal to the High Court and, if still dissatisfied, to the Court of Appeal.

Industrial Court

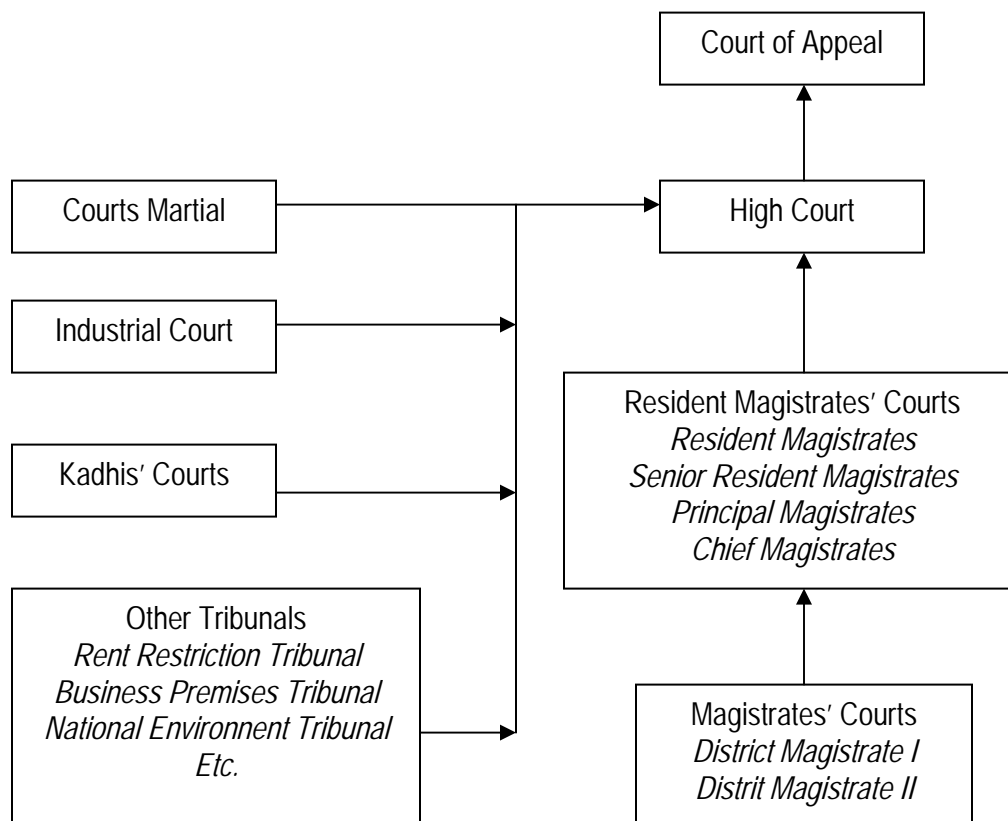
Established under the Trade Disputes Act, the Industrial Court consists of judges appointed by the President on the advice of the Judicial Service Commission. The Industrial Court was established to hear civil cases on matters involving employers and employees. Industrial Court judges hear cases alone and their decisions are final.

Other Tribunals

Besides the regular and special courts above, there are a number of other tribunals with quasi-judicial powers. These include the following:

- ♣ the Rent Restriction Tribunal (established under the Rent Restriction Act)
- ♣ the Business Premises Tribunal (established under the Business Premises (Shops and Catering Establishments Act)
- ♣ the National Environment Tribunal (established under the Environmental Management and Conservation Act)
- ♣ the Public Procurement Complaints, Appeals and Review Board (established under the Public Procurement Act)

Structure of the Courts in Kenya



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The decisions of these bodies are final and no appeals can be filed either to the High Court or to the Court of Appeal.

It is important to remember that although a decision of a tribunal is said to be final, this does not mean that one cannot file a case to the High Court concerning the manner in which the tribunal conducted itself. If, for example, the tribunal did not give a citizen the opportunity to be heard before reaching its decision, or if in reaching its decision it took into account irrelevant considerations (such as the citizen's tribe), it is possible for the citizen in question to go to the High Court and seek orders to stop the proceedings of the tribunal or to have its decision declared a nullity for being against the law. These special proceedings against tribunals and other public bodies are known as *judicial review*.

The Role of Lawyers

Lawyers are professionals trained in the substance of the law. The majority of these work in private practice, as advocates. Some are employed by the State in the Office of the Attorney-General and as counsels in various ministries and parastatals. Some are also found in the local government as clerks of local authorities, while others work in the private sector as legal officers and company secretaries.

Sometimes, due to the complexity of a matter and other reasons, it may be necessary to seek the services of an advocate. All advocates are members of the Law Society of Kenya (LSK). The LSK issues them with practicing certificates every year and also regulates the practice of law. It is also implementing continuing legal education for advocates. It is important for people consulting advocates in private practice to remember that such must have a valid practicing certificate for the year in which they are practicing. There are many cases that have been dismissed by the courts merely because the advocate of one party to a case did not have a valid practicing certificate.

Another aspect of interaction with lawyers is their discipline for professional misconduct. There is a Disciplinary Committee established under the Law Society of Kenya Act. It deals with complaints made against advocates and other aspects of self-regulation for the legal profession. When a complaint is filed against an advocate, the Disciplinary Committee may, after hearing the complaint and receiving any evidence on the matter in question, and if in its opinion a case of professional misconduct has been proved, order:

- that such an advocate be admonished; or
- that such an advocate be suspended from practice for a specified period not exceeding five years; or
- that the name of such advocate be struck off the Roll of Advocates; or
- that such an advocate pay a fine not exceeding fifty thousand shillings; or
- that the advocate be subject to such combination of the above orders as the Committee deems fit.

Any advocate aggrieved by the decision of the Disciplinary Committee may appeal to the High Court and, if unsatisfied with the decision of the High Court, to the Court of Appeal.

In addition to the Disciplinary Committee, there is the Advocates Complaints Committee, which is a Department of the Attorney-General's office. Clients who are aggrieved by their

advocates' conduct can also file complaints with the Advocates Complaints Committee, which after enquiring into the substance of the complaints, may dismiss such complaints, refer others to Disciplinary Committee of the LSK or make such orders as the law allows it to make.

There is another kind of lawyers that are important for the work of human rights organizations. These are found either in private practice or working for organizations such as Kituo cha Sheria and the Federation of Women Lawyers-Kenya (FIDA-Kenya) who provide legal assistance to poor litigants. Others can be found in many human rights organizations like the Kenyan Section of the International Commission of Jurists, the Legal Resources Foundation, Education Centre for Women in Democracy and Children's Rights Advisory Centre, who conducting research and advocacy work on human rights and other issues. Linkages with these public-spirited lawyers can be useful for young human rights organizations at the community level.

Legal Aid

It is possible for people who cannot afford the high cost of hiring a lawyer and filing cases in court to receive legal aid. Kituo cha Sheria, the oldest legal aid organization in Kenya, still provides legal assistance to indigent clients, though they have since narrowed their focus to certain aspects of public interest litigation. There are other organizations, such as FIDA-Kenya and the Centre for the Rehabilitation of Abused Women (CREAW), which offer assistance to women, and the Litigation Fund Against Torture (LIFAT) which provides assistance to torture survivors, and the Law Society of Kenya (LSK). The only public-funded legal aid scheme is for offenders charged with crimes such as murder and treason. Over the years, there have been calls for the Government to set up a more robust legal aid scheme, based on the constitutional right to legal representation, but these are yet to bear fruit.

Local and Other Administrators

The traditional view of justice is that it is only obtained from the courts of law. At the community level, these institutions are often far removed from people due to cost and even distance. It is therefore important for communities to be empowered to demand justice from the only decision-makers they know: local and other administrators.

At the local level, village elders, assistant chiefs, chiefs, district officers, district commissioners and provincial commissioners have more impact on the lives of people than the courts. Amongst the services they render, they also provide informal dispute settlement machinery. Because of the historical risk of bias and other factors that contribute to denial of justice in these settings, such as bias and corruption, it is important for citizens to know that they are entitled to services, including informal dispute settlement, as of right rather than as a favour.

Police

The police force is also another important institution in the administration of justice. It is the police who investigate crimes and arrest offenders. The police are also responsible for maintaining law and order. At the community level, the work of the police also impacts directly on ordinary citizens. Human rights workers will at one time or other have

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to interact with them: either to intervene on behalf of someone who has been wrongfully arrested or kept in custody for too long before being taken to court or to demand that the perpetrator of a heinous crime, such as child molestation, be arrested and arraigned in court.

Prisons

Prisons are institutions established for the purpose of taking custody and care of people who have been convicted of offences by courts of law. There are two categories of prisoners: those who are on remand pending hearing of their cases and those who have been convicted. However, prisoners too have rights and it is possible for organizations to monitor how these rights are respected, especially in view of the manner in which prisons have opened themselves up to public scrutiny in recent times.

Chapter 5

The Constitution

Introduction

In the chapter on Law and Society we stated that the constitution is one of the sources of law in society. Indeed it is the most important source. The constitution is the basic law of the land. It is essential that everybody knows what the constitution provides as its provisions governs the conduct of affairs in a state. The Kenyan constitution was adopted in 1963 and formed the basis for independence. It has governed the country since independence undergoing several amendments in the process.

In 1991 Kenya re-introduced multi-party politics after several years of agitation. The agitation for multi-party politics was accompanied by clamour for constitutional change. The rationale was that the constitution that was existing could no longer serve the interests of the country and moreover the amendments it had undergone had served only to dilute it making one institution of government, the executive and especially the presidency too powerful at the expense of the legislature, judiciary and the citizenry.

This chapter discusses Kenya's constitutional history, defining in the process what a constitution is and its importance for a country like Kenya. The independence constitution and its essential features are then highlighted before discussing the amendments to this constitution from independence to date. The current constitution, the 1992(8) edition is then briefly discussed. We highlight the essential features of this constitution.

The process of constitutional reform has preoccupied Kenyans for over a decade now. A discussion of the constitution would not be complete without it. We therefore discuss the road that Kenyans have traveled in efforts at reviewing its constitution briefly highlighting some of the key features of the proposed constitution. We will also discuss the prospects for a new constitution and what it will mean for the governance of the country

Meaning, nature and functions of a constitution

Meaning of a Constitution

A constitution can be defined as a basic set of agreed-upon rules and values, which governs the relationship within a group of people. It sets out the principles, rules and structures of governance for the group. A constitution can be made within a family, for a social group like a community, for a church for a private organization like a football club and also for a country.

For a country, a constitution is the most important document in any country. It lays down the basic organs of governance. It provides for how the country is to be governed. It sets out the framework of a country and creates its principal organs namely the Judiciary the Executive and the Legislature. It lays down the powers and limitations of the principal organs of the state and creates checks and balances amongst them.

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Often, a Constitution includes basic human rights that the citizens are entitled to. It may also contain ideological and philosophical principles by which the State is to be guided or to which it ought to aspire. Since a Constitution is the basic framework that creates the governance process, it is fundamental that the framework be based on a firm and strong foundation.

A constitution can be written or unwritten. The Kenya constitution is written while that of Britain is not. The purpose and force of a Constitution remains the same whether written or not.

The social contract nature of the constitution

Historians say there was a time when the world was divided into small units or "villages." Each village was occupied by a few people. Because of the small numbers involved, it was possible for all in the village, especially adults, to participate in the decision-making process of their villages.

However, as societies developed, it became more difficult for everybody to take part in the decision-making process. The people agreed to give a small group of elected representatives the power to govern. Those elected representatives became the governors. Thus emerged two groups of people, the governed and the governors. The governors ruled on behalf of the people who had given them power to rule. They had to respect the rights of the people, as a group and as individuals. Governance that endangered or threatened the rights of people was not acceptable. The rights of the citizens had to be respected all times. They were expected to exercise their powers in a way that they not only realized their own interests but also ensured and guaranteed the economic, political and general well being of the citizens.

The governors were trustees on behalf of the citizens. The citizens had a right to criticize and censure them for any wrong done and even replace them, either as individual leaders or the whole group, in case of poor leadership. Leadership was by consent. This relationship between the governors and the governed, then and the ruled is called the social contract theory.

The social contract has four basic terms:

- Citizens agree to give up some of their rights to collective governance.
- A small elected group is given the responsibility, power and privilege to rule over the majority.
- The rulers have to respect rights of citizens, agreed to beforehand, such as their right to elect their leaders, assemble and associate with others.
- If the rulers violate the rights of citizens, their right to rule is withdrawn, hence their powers and privileges are lost.

In democratic countries, the social contract theory is accepted and followed. Those who govern are closely controlled by citizens. Though the social contract theory was put together by European writers one finds it in pre-colonial African societies. African scholars record that citizens had a say in the way they were governed.

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The social contract theory requires that when rulers violate the rights of citizens, the contract is broken and the citizens can remove them. Meanwhile, citizens can participate in civil disobedience campaigns to show their displeasure and anger against the rulers. Civil disobedience is a process in which citizens peacefully withdraw their obedience to the Government to pressurize it to do or stop doing certain things. Civil disobedience may sometimes involve the refusal to obey unjust laws.

Kenyans' struggle for independence has many examples of civil disobedience campaigns. For example, at one time, Africans refused to carry their kipandes (Identification Cards) though the law required them to do so. And even after independence, Kenyans have taken action against oppressive legislation and policies imposed upon them by the government.

In South Africa, during the struggle against apartheid, Africans burnt their kipandes in protest against the laws that required they carry their kipandes all the time (whites and coloureds were not required to carry them). At other times, Africans stormed into "whites only" beaches in contravention of apartheid laws that created "African" and "White" beaches. And in the United States of America, Martin Luther King Jr. led thousands of African-Americans in a boycott of commuter buses in protest of a legislation that required them to vacate seats in the said buses for European-Americans.

For a civil disobedience campaign to succeed, there must be a broad agreement between the citizens and their leaders on what is to be achieved by the civil disobedience campaign. It is the responsibility of leaders to educate the citizens why the civil disobedience is necessary and what it seeks to achieve. The leaders themselves must be mature and fully share in the objectives sought to be accomplished. Civil disobedience is not violent disobedience

Civil disobedience campaigns should not be platforms for political leaders to push their own agendas, but platforms in which they must have the courage and the conviction to pursue the common agenda. The campaigns should be peaceful. The responsibility to ensure that they remain peaceful rests with the campaign leaders, participants and the Government. An otherwise peaceful campaign might turn violent if the leaders make inflammatory statements (hence the need for mature leaders); undisciplined participants (hence the need for effective campaign marshals to spot, isolate, and control such elements); and the security forces if they overreact (hence the need for a government able to bear and accept criticism and security forces that can act responsibly even in the face of provocation).

The supremacy of the constitution

A Constitution is the highest law and the source of all legitimate authority in society. Since it is the highest law, it is superior to other laws. If any other law contradicts the Constitution, that law is null and void (invalid). Usually the constitution of a country states that any law which contradicts it is illegal or void. In the case of Kenya, the supremacy of the constitution is stated in section 3 of the current constitution.

While some Constitutions have entrenched (unalterable) sections, a usual requirement in most countries is that for the Constitution to be amended, there has to be a specific

majority. In Kenya, though Parliament can amend other laws with a simple quorum of thirty members of parliament, the Constitution can only be amended by a two-thirds majority.

Another reason why a Constitution is regarded as supreme is because it is a statement of the people's agreement with the rulers. In a Constitution, citizens give Parliament the power to make laws to govern them but such laws are subordinate to what the people have already said in the Constitution.

o **Types of national constitutions**

A constitution can be categorised in several ways. Firstly a constitution can either be written or unwritten. Most modern constitutions for a country are in writing. The advantage of this is it makes it easier to refer to. However it is not a must that a constitution be in writing. There exists unwritten constitutions. In a family set up, their constitution that regulates conduct within the family is invariably oral. Even some nation states like Britain do not have a written constitution. Despite this it is known and understood by the people of that country.

A constitution can also be defined according to the main features it contains. We therefore hear of a constitution being either unitary or federal. This is in reference to the structure of government in the country as stipulated by the constitution. A federal constitution is one that recognizes and provides for a federal system of government while a unitary one provides for a unitary system of government.

A constitution can also be either rigid or flexible. A rigid constitution is one which is very difficult to change while a flexible one provides for flexible mechanisms of changing its provisions.

o *Structure and functions of a constitution*

- (i) **Identity:** A constitution states who the constitution governs and what their goals are. Some national constitutions include what is known as national objectives and directive principles. These are the goals of the country and explain the broad direction in which the country wants to develop.
- (ii) **Legitimacy:** the constitution makes it legal for the state to exercise power over citizens. This is due to the fact that citizens have participated in the process of making the constitution and ceding the sovereign authority to govern themselves to their leaders. It is also important that the citizens know the content of the constitution and demand that the rules in the constitution be properly applied.
- (iii) **Institutional Framework for governance:** a constitution sets out the guidelines for establishing the government and the structures that will be created for this purpose. It also sets out the structures and mechanisms to ensure good relations between the citizens.
- (iv) **Membership:** a constitution describes who is covered by the constitution and what guarantees this gives to the members of that social group. The constitution therefore discusses who is a citizen and how does one become a citizen

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- (v) Rights and responsibilities of members/citizens: a constitution sets out the rights that citizens are entitled to. These will be called human rights and freedoms. In addition to rights the constitution will also set down the duties and responsibilities each member has to the other members and to the social entity covered by the constitution.
- (vi) Resources and resource allocation: a constitution also says how resources will be found and how they will be used. It therefore states how the state shall raise funds and how accurate records can be kept of these funds as they are used.
- (vii) Conflict Resolution: a constitution also caters for the possibility of conflicts between members, or between the leadership and members. A constitution provides for these conflicts to be resolved.
- (viii) Amendments and Dissolution: another task of a constitution is to provide mechanisms by which the constitution will be amended and also a way of closing down the society should it become necessary. The rules for amending a constitution are normally more restrictive than the rules for changing ordinary laws.

Historical origins of Kenya's constitution

Pre-colonial Kenya consisted of several communities, each of which had its own set of rules based on its own tradition which functioned as the constitution of that community. These rules, or the constitution, ensured that the social and economic welfare of men, women, the young and the old were guaranteed. At the same time the standards of governance were affected by the society's beliefs and taboos.

The History of Kenya's constitution is rooted both in the introduction of colonial rule in the country and also the agitation for and the eventual grant of independence. As such the starting point is normally the Berlin conference of 1885 and the Scramble for Africa. It is at this conference when European powers set in motion mechanisms to divide Africa and thus acquire territorial control and occupation.

As part of the colonial process, In 1887 the Sultan of Zanzibar gave the British East African Association control over the East African Coast. This Association was followed by the Imperial British East Africa Company (IBEAC), **which** had an instruction from Britain to run East Africa as an area in which Britain controlled what was done.

In 1895, Britain declared the area which later became Kenya a protectorate called the East Africa Protectorate.

In practice, the East Africa Protectorate was at first limited to the 10-mile coastal strip, which was under the Sultan. Britain then proceeded both by law and through conquest to extend its control throughout what later became British Somalia, Kenya, and part of Uganda.

Military might and law were used in the British conquest of East Africa.

The constitutional framework and the general legal structure of the colony took root during the first 20 years of the 20th century. Key laws were introduced to keep the

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British rulers in a strong position. Virtually all the laws instituted at that time remained part of Kenya's heritage even after its independence.

Initially the Commissioner, who was appointed and answerable to Britain, could make laws and carry them out. In 1904, a Governor replaced the Commissioner and an Executive Council and Legislative Council were introduced.

Later in 1907 the representatives on the Legislative Council were elected on the basis of communal rolls. Africans were only represented on the Council by a missionary or retired civil servant appointed by the Governor.

The Governor was also the President of the Executive Council (Cabinet) and Legislative Council (Parliament) and could introduce new laws to the Legislative Council, cancel proposed laws, dissolve or prorogue the Legislative Council as well as suspend members of this Council. This means that there was no separation of powers as power was concentrated fully in the Executive.

Kenya was declared a British colony in 1920. Between 1920-1939 the colony continued to use two legal and policy frameworks, with Europeans on one hand and Africans and other races like Asians, on the other. The judiciary interpreted laws in support of the colonial effort.

After World War II the political conditions changed in Kenya. This was due to various factors:

- The rise of African nationalism.
- African soldiers who had taken part in the war returned to Kenya
- only to see their European fellow soldiers being rewarded while they were not.
- Land was in short supply in the African reserves.
- Labour conditions on settler farms were bad.
- There was very little representation of Africans in politics. . The colonial system was oppressive.
- Educated Africans resented discrimination.
- Africans demanded to be allowed to grow cash crops and to market their produce.

African unhappiness, particularly around land issues, caused the Public Order Ordinance (presently the Public Order Act) to be introduced. This set out to control the conduct of public meetings as well as those organisations which might interfere with police operations.

When trouble continued and particularly as a result of the Mau Mau uprising, a state of emergency was declared in 1952. Under the Emergency Powers Order in Council (presently the Preservation of Public Security Act), the Governor had wide-ranging law-making powers. The British government used these legal means as well as military force to fight the Mau Mau. People were killed and property destroyed in the process.

The colonial government however realized that the resistance was sustained and that sooner or later they would have to give in to the African demands. They began to make political concessions to Africans through a Constitution.

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The Lyttleton Constitution was introduced in 1954. It sought to bring the various races closer in matters of governance. This Constitution introduced a Council of Ministers to replace the Executive Council. The Council of Ministers was made up of the Governor, Deputy Governor, six official members, six unofficial members and two nominated members.

Of the unofficial members, three represented the Europeans, two represented the Asians while one unofficial member represented Africans. Eight Africans were elected to the Legislative Council under this constitution in 1957.

Next came the Lennox Boyd Constitution in 1958. Under it, the number of elected Africans in the Legislative Council was increased to fourteen in order to equal the number of elected Europeans. Twelve members were to be specially elected by the whole Legislative Council to spread across community lines.

A Council of State comprising eight Europeans, four Africans and four Asians, was created to protect communities from discriminatory legislation. The Council of Ministers was enlarged to sixteen, including eight Ministers from the Legislative Council. Africans, however, were still dissatisfied with this Constitution and demanded a Constitutional Conference that would bring in more favourable reforms for them.

The Ian McLeod Constitution of 1960 provided for sixty-five members in the Legislative Council. Fifty-three of these seats would be elected using a common roll, of which twenty seats would be reserved on the basis of ten for Europeans, eight for Asians and two for Arabs. The fifty-three common roll representatives would elect the balance of twelve seats. It would be made up of four Africans, four Europeans, three Asians and one Arab. The Constitution also provided for a Council of Ministers comprising four government officials, three Europeans, four Africans and one Asian.

Finally, the Independence Constitution was negotiated in the Lancaster House conferences of 1960 and 1962. In these conferences, the special interests of many groups had to be addressed. Some negotiating parties wanted to protect certain interests at all costs, but other negotiators simply wanted to bring about independence for Kenya as soon as possible. Many important issues were overlooked in the discussions which followed. What is important is that the majority of Kenyans were not given the opportunity to decide the values which should be at the heart of their constitution.

Several difficult issues were addressed in the negotiations:

Africans from the relatively smaller ethnic groups preferred a regional, federal (or majimbo) system of governance rather than a centralised (or unitary) system. They thought that a regional system would suit their small numbers better and safeguard their land interests against take-over by bigger ethnic groups. The settlers also felt that their political well-being would be better served in a regional state.

Inhabitants of the 10-mile coastal strip, which had been leased from the Sultan of Zanzibar in 1895, demanded protection of their way of life.

The Kenya African National Union (KANU) preferred a unitary system of government. The Kenya African Democratic Union (KADU), on the other hand, preferred a system of regional governments. KANU eventually agreed to the regional position in order to

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conclude the negotiations. The country ascended to independence with regional governments. This was, however, reconsidered after independence.

Regarding the 10-mile coastal strip, it was agreed that specific safeguards would be written into the Independence Constitution on religious freedoms. The rights of minorities would also be guaranteed.

The settlers were keen to make sure that their property would be protected under a new constitution. On their part, Africans wanted the future government to undertake land reform. This issue was resolved in favour of the settlers through clear constitutional provisions requiring that full and prompt compensation should be made for any land taken for redistribution.

These negotiations led to a compromise document known as the Independence Constitution.

Essential features of the independence constitution

The independence constitution had certain key elements. These included

- (i) Governor-led government; It provided for a Governor-General, who was the Head of State on behalf of the Queen of England. The Governor's powers included agreeing to laws passed by Parliament, taking part in the steps for choosing members of the judiciary and dissolving parliament. The Head of Government was a Prime Minister. Following the elections, the Governor invited KANU, which had won those elections to form a government and thus Jomo Kenyatta became the prime minister.
- (ii) Multipartism; The Independence constitution created a multi-party democracy by allowing for the existence of more than one political party.
- (iii) Bicameral legislature; there were two chambers of parliament, the House of Representatives as the Lower House and the senate as the Upper House. The Senate's members represented administrative districts while the House of Representatives consisted of one hundred and seventeen elected members (one per constituency and twelve specially elected members).
- (iv) Independent Civil Service and Judiciary; the civil service was regulated by an independent Public Service Commission and protected from political interference. Only the Public Service Commission could dismiss or discipline civil servants. The president could not. The Judiciary was regulated by a judicial service commission which was truly independent and judges had security of tenure and independence to and authority to interpret laws and render judgments without any interference whatsoever.
- (v) Bill of Rights; The independence constitution contained a detailed Bill of rights.
- (vi) *Majimbo*; It divide the country into eight regional units or jimbo and provide for Regional Governments and judiciaries. Powers of Regional Governments included control of land, education, health and police.
- (vii) *Separation of Powers*; the independence constitution provided for clear separation of powers amongst the three arms of government, the executive, legislature and judiciary.

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- (viii) Certain provisions were entrenched in the Constitution. The entrenched provisions included the rules of citizenship, fundamental rights, amendment procedure and the tenure of judges. A special majority (75% vote from the House of Representatives and a 90% vote from the Senate) was necessary before these provisions could be amended. Other non-entrenched provisions required a vote of 75% of members in both Houses.

Key Constitutional Amendments 1963-2002

Immediately after independence, there were a number of important constitutional amendments which fundamentally altered the Independence constitution. Over the years the independence constitution has undergone many more amendments some of which have substantially changed the content of the constitution. The major thrust of most amendments have been to over-strengthen the executive and presidency at the expense of the other arms of government.

The key constitutional amendments include:

- (i) From Uhuru to Jamhuri; the first constitutional reform happened in December 1964, turning Kenya into a Republic headed by the President. The hold of the Queen was severed. The prime Minister became the executive president.
- (ii) The collapse of Majimbo; in 1965, the constitution was amended to abolish a Majimbo system of government and making the country one centralized unit
- (iii) In 1966 the two chambers of parliament were merged into one through the abolition of the upper house or senate
- (iv) Further, in 1966, the constitution was amended to give the president control over civil servants. Henceforth they held office at the pleasure of the president. This seriously weakened the independence of the civil service
- (v) The Ngei Amendment; one of the most self-serving and opportunistic amendments to the constitution was made in 1975. This amendment is referred to derogatively as the *Ngei Amendment* because it was targeted at benefiting Paul Ngei, a minister in government and a former freedom fighter who had also been detained together with President Kenyatta. Ngei had been found guilty of an election offence by a court of law and thus was to lose his parliamentary seat. He was also barred from contesting the ensuing by-election or any election for the next five years. The president ordered for an amendment of his constitutional powers of mercy or clemency to include persons found guilty of committing election offences and proceeded to pardon Ngei. Ngei then contested and won the by-election.
- (vi) Creation of *de-jure* one party state: although the country was since independence a multi-party state, following the crossing the floor of the members of KADU in 1964 to join KANU, the country remained a de-facto single party till 1966, when following the formation of Kenya People's Union a little general election was held. In 1969 KPU was proscribed and the country by fact remained a one-party state. However, after the attempted coup of 1982, the constitution was amended to outlaw the existence of more than one political party, KANU. This was through the introduction of the infamous section 2A.
- (vii) In 1986, the constitution was amended to remove the security of tenure granted to judges and in 1988 that for the Attorney General too was removed. Following

- outcry these were re-introduced.
- (viii) In 1988, the constitution was amended to make it lawful to detain one charged with a capital offence for a maximum of fourteen days up from the initial twenty-four hours before being charged in as court of law.
 - (ix) In 1991 the constitution was amended to remove section 2A of the constitution and re-introduce muliti-party democracy. Since then several other changes have occurred to give meaning to multi-party democracy. The most outstaying of these were the minimum inter-party parliamentary group (IPPG) brokered reforms which occurred in 1997 just before the elections. The highlights included amending the constitution to increase the number of the Electoral Commissioners to no more than 21 and thereafter the president appointed 10 more commissioners all from the recommendations of opposition parties, the constitution was amended to allow for a coalition government, the provision for nominated members was amended to require regard to be had to parliamentary strength in parliament and gender considerations. Section 1A of the constitution was also introduced which provided that Kenya shall be a multi-party state.
 - (x) In 2000, an amendment was made to the constitution which created a parliamentary Service Commission which would control parliament.

Features of the Current Constitution

The Constitution of Kenya consists of eleven chapters.

The first chapter of the Constitution deals with the Republic of Kenya. It describes the society that makes up the Kenyan State to which the Constitution belongs and addresses. It declares Kenya to be an independent and self-governing (sovereign) Republic. Section 1 A states that Kenya shall be a multi-party democratic state. This is an amendment which was introduced into the Constitution as part of the Inter Parties Parliamentary Group (IPPG) package of 1997. It is a constitutional guarantee that Kenya will not go back to being a country with only one official political party.

Chapter Two deals with the Executive arm of government. This chapter sets up and describes the job, the powers and functions of the State's Executive. The executive consists of the President, Vice President, Ministers, Assistant Ministers and Attorney General. The powers of the president as provided in the constitution are expansive. The executive authority of the Government of Kenya vested in him or her. The President can exercise this power or delegate it to another official.

Chapter three deals with parliament also referred to as the legislature. Parliament consists of the President and the National Assembly. The National Assembly comprises the elected members from each constituency, nominated members (nominated by political parties in proportion to their parliamentary strength) and members who are present because of their jobs (ex officio members), such as the Speaker of the House and the Attorney General, but who have no voting powers. The chapter provides the procedure by which the National Assembly is to be made up. It also sets out the role and functions of the Electoral Commission. The Commission is to be made up of not less than four and not more than twenty-one members appointed by the President.

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This chapter also sets up the Parliamentary Service Commission. This Commission consists of the Speaker of the National Assembly, the Leader of Government Business, the leader of the opposition party with the highest number of seats and four members of parliament from the governing party and three from opposition parties. The Commission's powers include to create and close offices in the parliamentary service; and to provide services and facilities so that the National Assembly may function effectively.

Chapter four provides for the establishment, composition and functions of the Judiciary. It establishes the High Court as the highest court (the superior court of record). The High Court has unlimited original authority in civil and criminal matters. This means it can hear any case for the first time, even if it has not been heard in other courts. Judges of the High Court include the Chief Justice and at least eleven judges of the High Court. The President appoints the Chief Justice. The President takes advice from the Judicial Service Commission in appointing the judges.

A judge of the High Court may be removed from office only if she or he is unable to do her or his work or for misbehaviour. A procedure for removing such a judge is set out. The Court of Appeal is established with power to hear appeals from the High Court. Judges of the Court of Appeal are the Chief Justice and at least two Judges of Appeal. Other courts which the Constitution establishes are courts-martial; Kadhis' courts; and other lower courts established under the law. The chapter also deals with the establishment and functions of the Judicial Service Commission

Chapter five deals with protection of fundamental rights and freedoms of individuals. It is also frequently referred to as the Bill of Rights. At the outset, the chapter makes the general statement that all individuals are entitled to basic rights and freedoms, regardless of their race, tribe, place of origin, residence or other local connection, political opinion, religion, colour or creed. However, individual's rights must not interfere with other individuals' rights or the whole society's enjoyment of rights. The chapter it should be noted only guarantees civil and political rights.

Chapter six relates to citizens and citizenship. It describes ways by which a person is or can become a citizen of Kenya.

Chapter seven deals with financial issues. It establishes the Consolidated Fund into which all revenues or other monies raised or received by the government are paid. Money may be paid out of the Consolidated Fund only if allowed by the Constitution or authorized by an Act of Parliament. The Constitution sets the rules to be followed before the National Assembly may allow funds to be spent from the Fund. The government must prepare estimates of income (revenues) as well as its expenditure for the following financial year. The government presents these estimates to the National Assembly in a Bill (known as the Appropriations Bill) which looks at each request for spending before approving the expenditure.

The government may also ask parliament for further monies (known as supplementary estimates) where either of two situations arise: the amount of money which was given is

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insufficient or an unbudgeted need has arisen; or more money than was given for a particular purpose has been spent, or money has been spent on something for which there was no budget.

The Constitution lists a number of jobs in respect of which salaries are to be taken directly out of the Consolidated Fund. These are the jobs of the Judges of the High Court, Judges of the Court of Appeal, members of the Public Service Commission, members of the Electoral Commission, the Attorney General, the Controller and the Auditor-General. The job of Controller and Auditor-General is also established under this chapter. His or her duties are to:

- confirm that withdrawals from the Consolidated Fund are legal and approve these withdrawals;
- assess whether monies taken and spent by parliament have been used properly in terms of the authority given by parliament; and
- audit and report on the public accounts of the government, courts, commissions established by the Constitution and the clerk of the National Assembly.

Chapter eight deals with the Public Service. This chapter establishes and sets out the powers and functions of a number of public service offices as outlined below:

- The Public Service Commission
- Members of the Kenya Police Force
- The Attorney-General
- The Controller and Auditor-General

Chapter nine deals with trust lands. This chapter says that Trust lands are defined as those lands outside the Nairobi area as at the 12th of December 1964 and owned by a county council. Other land covered by this chapter and defined as Trust lands are land in special areas as defined by law; land which was known as special reserves, temporary special reserves, special lease-hold areas and special settlement areas before the 1st of June 1963; land known as communal reserves on the 31st of May 1963; and land in respect of which a permit to occupy it is in force.

The Constitution places control of all Trust lands in the County Council where the land is located. County Councils are asked to hold these Trust lands on behalf of the communities living on that land.

Chapter ten contains general issues like procedure for one who wants to resign from public service. It also defines some of the terms used in the constitution. Chapter eleven was a transitory provision dealing with the linkage between the pre-independence and post-independence constitutional framework.

The constitutional Review process+ areas for constitutional review

The constitution of Kenya as exists today and described above is different from the independence constitution. The difference has been achieved through a series of constitutional amendments. Some of the changes were desirable and well intentioned. However the bulk of them ended up going against democratic needs and realities in the country. The upshot is that the current constitution does not have adequate checks and

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balances amongst the three arms of government. The constitution creates an all powerful presidency at the expense of the other institutions. Analysts have quipped that the powers of the president are so expansive that even their proper use would easily turn one into a despot.

Secondly in 1991 section 2A was repealed and multi-party politics reintroduced. However the constitutional structure due to the numerous amendments is not supportive of a multi-party democracy.

The Constitution of Kenya was arrived at through a negotiation process with the British colonial powers and the political elite. Ordinary citizens did not participate in the process of its development to ensure ownership. The Constitution also has a weak Bill of Rights. The Bill of rights has numerous exceptions making it easy for those rights to be denied citizens. The Bill also deals only with the traditional civil and political rights and does not address social and economic rights.

Due to the defects in the current constitution and its use to restrict democratic space, there started especially towards the end of the 80's and more consistently still early 90s an agitation for constitutional reform. Following the 1992 multi party elections, it became evident that the withdrawal of section 2A of the constitution was not enough. There continued oppression of citizens. These led to more agitation and call for constitutional reforms as a sure way of creating a stable democratic culture in the country. In January 1995 the President stated that constitutional reform was important for his government and for Kenya generally.

Several sections of society including church leaders, civil society and politicians continued calling for comprehensive constitutional reform. Part of the debate was who should undertake the process of reviewing the constitution, whether a constitutional commission, parliament, constitutional conference, national convention and constituent assembly. The argument that parliament should be the avenue to be used was mainly supported by the former government of President Moi. However the argument against this was that parliament is unrepresentative of the entire population, it is also one of the institutions to be reformed, the constitution is a contract between the people and their rulers and they need to be involved and that the tradition is not to leave the task of major constitutional reform to parliament.

The other method is through the constitutional review commission. This involves a commission going around collecting views from the public, collate the views and from this draft a constitution. Parliament or a constituent assembly would then debate the draft and adopt it with or without amendments.

The third method for constitution making is through a constitutional conference. Here representatives of different sectors of the country meet and discuss the type of constitutional change or system required. A draft constitution is prepared and presented to parliament for debate and enactment. This differs from the Commission approach as there is no collection of views before, it being assumed that the conference represents the public.

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A constituent assembly on the other hand is a body elected by citizens to debate a draft constitution prepared by a National Constitutional Commission or a Constitutional conference. It is elected only to discuss the draft constitution.

Lastly is the avenue of a national convention. This is a meeting where representatives of all sectors of society attend and discuss all aspects of the country's life and the constitution is only one of the issues. It requires a lot of time and useful whether the situation has generated to such a level where a fresh start is necessary.

The discussions on which option to adopt was discussed extensively. Meanwhile the 1997 elections were approaching and there were disagreements as to whether to postpone the elections and do a thorough review of the constitution or do this after the elections. Eventually some minimum reforms under the auspices of IPPG were undertaken before elections.

Debate about comprehensive reforms continued after the elections. As part of the IPPG package in 1997 there was drafted and passed the Constitution of Kenya Review Commission Act, 1997 to govern the process of reviewing the constitution. The discussions after the elections amongst stakeholders took place in a series of meetings at Bomas of Kenya and safari park. The discussions led to the amendments of the 1997 Act. This was done in 1998. Further amendments occurred in 2000 and in 2001.

There were however divergent opinions on the Act. A section of society felt that the process under the Act gave too much control to parliament. The end result is that two parallel processes on reviewing the constitution emerged. One led by a Commission appointed by the Parliamentary Select Committee under the Act and the other led by other stakeholder coalescing around the religious leader and referred to as the Ufungamano initiative. This latter commission was referred to as the People's Commission of Kenya. The difference arose because the 2000 amendments increased the role of the president and parliament in the review process.

When Professor Yash Ghai was appointed as the chair of the PSC-led review process, he refused to take his oath of office and instead led negotiations which led to the merger of the two commissions into one. This led to the amendments of 2001. The amendments amongst other things expanded the size of the Commission from 15 to 27 commissioners and created one commission. The Act stated that the review and the Commission were to be guided by several principles. These include:

- Accountability to the people of Kenya;
- The review process should allow for all the differences of the Kenyan people including social-economic status, race, ethnicity, gender, religion faith, age, occupation, learning, persons with disabilities and the disadvantaged;
- Provides the Kenyan people with a chance to actively and freely participate in making proposals for a new constitution;
- Is conducted in a free manner;
- Is guided by respect for international principles of human rights, gender equity and democracy; and

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- Ensure that the outcome of the review process honestly reflects the wishes of people of Kenya

In terms of process following the merged of the Commissions and the establishment of the Constitution of Kenya Review Commission (CKRC), the Commission undertook awareness to let the citizens know about their existence and role. The Commission then collected views throughout the entire republic. Thereafter the Commission analysed these views and produced a draft report and draft constitution. In accordance with the review law, there were the elected representatives to the national constitutional conference which was then convened by CKRC at Bomas in October 2002. However president Moi dissolved parliament on the same day the conference convened thus throwing it into disarray as a third of the delegates were members of parliament.

After the 2002 elections, the Bomas Conference was reconvened and deliberated on the draft by the Commission, which was then adopted with amendments in March 2004. Unfortunately the conference after the elections was held against the background of disagreements amongst the ruling coalition, NARC which fights spilled to Bomas where the conference was being held. The politicians could not agree on key aspects of the draft constitution leading to a section of the conference led by the bulk of government ministers walking out of parliament.

Secondly just after the conference a court ruling in the case of *Njoya V. Republic* almost brought the review process to a halt. The court amongst other things held that a new constitution can only be adopted by the people through a referendum.

The events after this have essentially been characterized by confusion and posturing amongst the political class. The consequence is that Kenyans still do not have a new constitution.

Highlights of proposed changes to the current constitution

Although there is a disagreement about the draft constitution, consensus exists that the draft is substantially better than the current constitution and is good for the country. There is disagreement only about certain aspects of it. The proposals that both the commissions draft produced in 2002 and the Bomas draft contain include an expansive Bill of rights which is not held back by several derogation clauses and which includes more rights than civil and political rights. The draft constitution also introduces the concept of devolution of powers. The disagreement is currently not on devolution but on the required levels for devolution. There is also proposed a reduction of the powers of the presidency and creation of more checks. One of the avenues proposed is through the creation of the office of a Prime Minister.

The draft also makes provision for environmental management and also the ownership, use and management of land and other natural resources vesting the same in the people of Kenya. The draft also contains provisions which are progressive and promotes the rights of women and gives them more opportunities to participate in governance.

Conclusion

Kenya's process of reviewing its constitution has been long and winding. Throughout the process the Kenya people have been very clear about the need for and the kind of constitution they desire. However their political leaders have always not gone together with them due to political interests. It is these interests, which still hold the constitutional review process in abeyance and prevent the Kenyan people in realizing their dream of a new constitution. One only hopes that Kenyans will continue engaging the process so that the country and its people can realize a new constitution that reflects their aspirations, hopes and wishes and that it made by them and not imposed on them by political leaders.

Chapter 6

Human Rights

Introduction

The concept of human rights is as old as the human race itself. It has nonetheless evolved over time to become what we know today. Even in African traditional life, folktales, songs and dances contained messages on the value of respecting people and their property. There were also ways of dealing with those who did not follow the community's customs. When these societies were colonized, the colonizers imposed foreign values on them and blatantly trampled on their rights by, for example, forcefully taking over their land. Freedom struggles followed, such as the Mau Mau land and freedom movement, after which countries like Kenya rid themselves of these oppressors.

All over the world, the 19th and 20th centuries were marked by grave human rights violations perpetrated through activities such as slave trade, the First and Second World Wars and Hitler's Massacre of over 6 Million Jews in Nazi Germany. These violations prompted the world's nations to come up with principles of safeguarding human rights. These principles have been in use over a long time and continue to be improved upon through application and refinement. Even with the existence and wide acceptance of the human rights principles, violations continue throughout most of the world. State-sanctioned racial discrimination, *apartheid*, perhaps the world's most apparent form of human rights violations, has ended in South Africa but genocide, disappearances, torture, arbitrary killings by law enforcement agencies, and other forms of human rights abuse are widely reported elsewhere.

What are Human Rights?

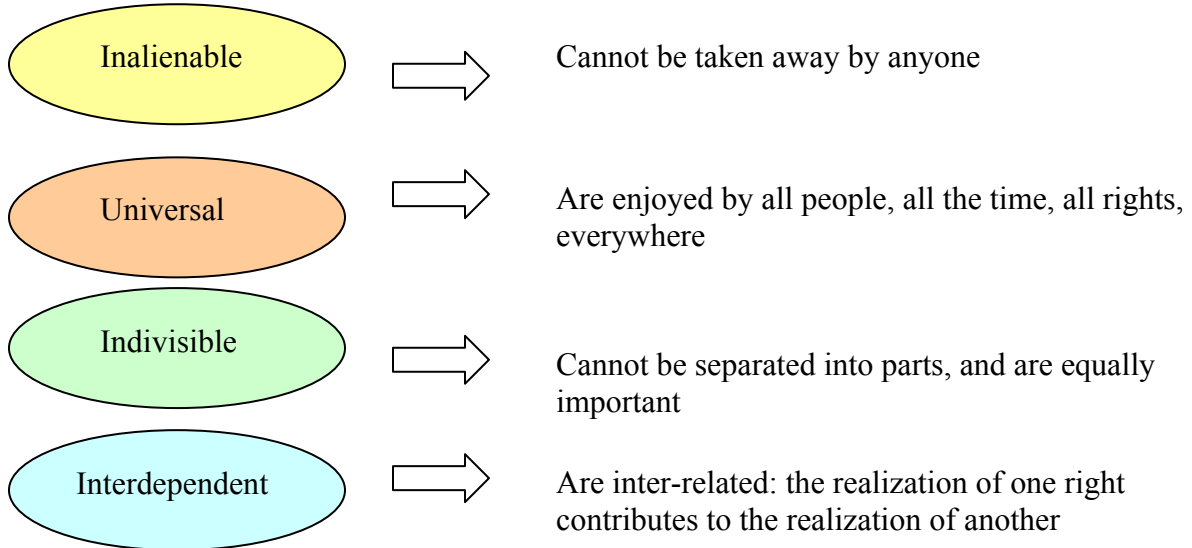
Human rights are entitlements that all human beings have by virtue of the fact that they are human beings. They are necessary for human beings to live a life of dignity. Everyone has human rights, regardless of their age, sex, race, colour, language, tribe, social or economic class, religion or political beliefs. However, it is important to remember that rights are human constructs: they are seen through the eyes of human beings and exist for the benefit of humans only. They are also moral codes in all societies on what is right or wrong, permissible or not permissible. They protect all people from exploitation and dominance by more powerful people.

Characteristics of Human Rights

After years of debate and argument, a number of things can now be said of human rights. At the 1993 World Conference on Human Rights in Vienna, Austria, a Declaration was adopted that proclaimed, amongst other things, that human rights are "inalienable, universal, indivisible and interdependent". To say that human rights are *inalienable* is to say that they cannot be taken away from a person by another person, the state or whatever other entity. It is only possible to violate them, but not take them away. Even when a person is jailed, he or she does not lose his or her rights: they are only limited. Human rights are *universal* because they apply to all people in the world. They are values that apply to all members of the human family irrespective of where they are. They are

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also *indivisible*: no rights are more important than others and the enjoyment of all must be pursued equally. Finally, human rights are interdependent because the full enjoyment of one right is dependent on the enjoyment of one or several other rights. For example, one cannot enjoy all the other rights if the right to life is taken away.



Some people have argued that not all human rights apply equally to all people in the world. That there are certain rights which cannot be said to apply to others, and are therefore not universal as such. This argument, while mainly weak, has some merits. In Islamic and other countries, for example, it may not be possible to argue successfully for gay rights. The right to adequate food also presupposes that such food is culturally acceptable.

Categories of Human Rights

Human rights can be classified into three categories. This is not to say, that some rights are more important than others, but is merely a way of illustrating the various aspects of human rights that human rights must be applied to, in order to safeguard human dignity. These are civil and political rights; social, economic and cultural rights; and group or solidarity rights.

Civil and political rights

Also referred to as *first generation rights*, civil and political rights enable citizens to participate in governance and to freely discuss issues. They affirm an individual's rights to:

- life
- freedom from discrimination
- freedom and security of the person
- freedom of worship, belief and opinion
- freedom of expression
- freedom of movement and residence
- freedom of assembly and association
- privacy

- a fair trial
- participate in governance
- vote and be elected

Economic social and cultural rights

Also referred to as *second generation rights*, economic, social and cultural rights relate to people's sense of belonging, dignity, survival and preservation of cultural practices.

They include the right to:

- good health, which includes the right to healthcare services, reproductive health rights and emergency medical treatment
- education
- adequate shelter
- adequate food, and which is culturally acceptable
- adequate safe and clean drinking water
- reasonable standards of sanitation
- leisure and rest
- participate in the cultural activities of one's community
- preserve one's cultural heritage
- cultural identity, including the right to speak one's language, and to form, join or maintain cultural, religious and linguistic associations
- marry and found a family
- just and favourable working conditions
- equal pay for work of equal value
- social security, social benefits and pension
- form, join and participate in trade unions and to strike
- form and join and employers' organization
- acquire and own property
- quality goods and services

Group or solidarity rights

Group or solidarity rights, normally referred to as third generation rights, refer to rights that we enjoy as communities and other forms of groupings. Some of these rights are still contestable and do not enjoy universal recognition like other rights. They include the right to:

- a clean and healthy environment
- self-determination
- development
- protection as a minority

Human Rights Instruments

Principles of human rights agreed to by the countries of the world are written down into international legal instruments which are signed by the countries in question. They create binding obligations on the countries that have signed them. The three foremost legal instruments are the Universal Declaration of Human Rights (UDHR, 1948), the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) and the International Covenant on Civil and Political Rights (ICCPR, 1966). These three are, together, known as the International Bill of Rights.

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The UDHR drew its inspiration from the history of the two World Wars and the massacre of over six million Jews by Hitler to proclaim principles that would prevent the world from slipping back to the misery that had been witnessed before. It proclaims that all human beings are born free and equal in dignity and rights. It constitutes the most comprehensive, yet summarized proclamation of human rights under international law. Adopted by UN General Assembly on December 10, 1948, it constitutes a “common standard of achievement for all peoples and every nation”. Many international legal scholars argue that the UDHR constitutes customary international law, on the basis of the characteristics that normally constitute such law, and *is binding even on countries that did not sign or accede to it*. It contains the whole range of human rights within one consolidated text.

The ICESCR was adopted by UN General Assembly on December 16, 1966 and entered into force on January 03, 1976. It contains rights that are programmatic (that is to say those that are to be realized progressively). Most of the rights in the ICESCR are considered “non-justiciable”, that is incapable of adjudication in court, but this view is fast-changing all over the world as courts find creative ways of holding states accountable for non-realization of such rights. In India, for example, the courts have linked the right to a clean and healthy environment to the right to life, thereby making it justiciable. These rights were also considered “costly” since they obliged the State to provide services. They mostly confer positive obligations (that is, an to do something). Selected examples include the right to an adequate standard of living, including right to food; housing; health; property; social security; work and rights in work; education; human rights education; cultural rights; development; clean and healthy environment; self-determination; minority rights; rights of immigrants and migrant workers

The ICCPR was adopted by UN General Assembly on December 16, 1966 and entered into force on May 23, 1976. It contains rights that have long been considered “absolute” and “immediate”. Most of the rights in the ICCPR are considered “justiciable” and are also considered “free” in the sense that they do not cost the state much. They mostly confer negative obligations (that is, an obligation to refrain from doing something). Selected examples include the right to life; freedom from discrimination; freedom and security of the person; freedom of worship, belief and opinion; freedom of expression, freedom of movement and residence; freedom of assembly and association; privacy; fair trial; political participation; periodic and genuine elections.

In addition to the International Bill of Rights, there are a number of other human rights instruments signed by states. Examples of these are the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1980), the Convention on the Rights of the Child (CRC, 1987) and the African Charter on Human and Peoples’ Rights (ACHPR, 1981).

CEDAW borrowed from existing human rights instruments to expound on the rights of women. It sought to guarantee the protection of women from discrimination and to create a world order in which women enjoyed equal rights and opportunities with men. CRC, also drawing from the existing international human rights instruments, expanded

the international legal protection that children have and is the key instrument on children's rights. The African Charter on Human and People's Rights was adopted by the OAU as an African standard of human rights. Besides human rights, it also makes provision for duties.

Domestication of Human Rights

In Kenya, as in many other countries, human rights provided for under international instruments are not immediately applicable to citizens of Kenya unless those rights are recognized by the laws of Kenya. Human rights recognized by the laws of Kenya can be enforced and protected by Kenyan courts. The process of recognition of such human rights and other international treaties is known as *domestication*.

The Constitution of Kenya, in chapter 5, recognizes the following rights:

- Protection of right to life
- Protection of right to personal liberty
- Protection from slavery and forced labour
- Protection from inhuman treatment
- Protection from deprivation of property
- Protection against arbitrary search or entry
- Provisions to secure protection of law
- Protection of freedom of conscience
- Protection of freedom of expression
- Protection of freedom of assembly and association
- Protection of freedom of movement
- Protection from discrimination on grounds of race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex

Nevertheless, many of these contain exceptions, which provide instances when the state can derogate from the human rights of citizens. These numerous exceptions have led many human rights commentators to refer to the Bill of Rights in Kenya's constitution as a Bill of Exceptions. Another limitation in this Bill of Rights is the concentration on civil and political rights only and the exclusion of the economic, social and cultural rights. The need to expand this Bill of Rights and remove the numerous exceptions has been one of the aspects of Kenyans' struggle for a new constitution.

The Constitution also establishes a mechanism through which victims of human rights violations, or people who have a reasonable fear of their rights being violated, can seek the protection of the courts to ensure that they receive compensation for their human rights violations or to stop the intended violation of their human rights. They are supposed to make an application, known as a constitutional reference, to the High Court, which hears evidence and makes a decision on the matter. A number of citizens have managed to stop wrongful prosecutions or obtain compensation for human rights abuse in this manner.

When the state, any individual or other entity acts in disregard of the human rights of any citizen, that citizen is said to have suffered a violation of his or her rights. This is different

from the commission of a crime which is concerned with the mere violation of some law, such as the law against theft. Nevertheless, as in the case of theft, it is possible for both a crime and a human rights violation to occur. The theft is punishable under the law as a crime but it is also a violation of the individual's right to own property.

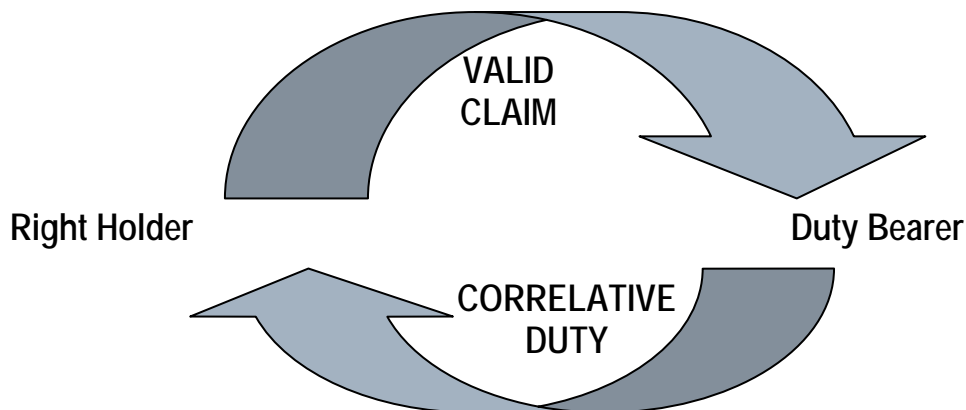
Mechanisms for Protection of Human Rights

International and regional human rights instruments such as ICCPR, ICESCR, and ACHPR, contains mechanisms to monitor a country's compliance with their provisions. Some of these mechanisms merely receive reports and make comments on them, known as concluding observations. These concluding observations are meant to provide a continuing opportunity for dialogue with the technical support to the country in question in respect to its citizens' rights. There are others which can hear complaints from countries and individuals and make binding decisions on human rights violations. Nevertheless many of these mechanisms do have some limitations and the majority of the world's citizens rely on their domestic laws and courts to protect their rights.

Human Rights and the State

When one looks at the nature of human rights as expressed through various international human rights instruments, one of the things that can be seen is that human rights constitute correlative relationships. A person will not be said to have a right to something unless some other person owes them a duty either to do something or to refrain from doing something to facilitate the realization of that right. The person who has a right is referred to as a *right holder* while the person who has a duty is referred to as a *duty bearer*. Right holders are citizens individually and collectively while duty bearers can be individual citizens, the state, state agents, corporations, NGOs and other entities.

Rights are correlative human relationships that change over time



e.g. "A school-aged child has a **valid claim** (right) to education – others have correlative **duties** (or obligations) to ensure that the right is realized."

Duty bearers normally have four sets of duties. The first one is to *respect* the right, or to refrain from interfering directly or indirectly with the enjoyment of the right. Secondly, they have a duty to *protect* the right, which involves taking measures to prevent other people or entities from interfering with the enjoyment of the right. Thirdly, they have a duty to *facilitate* the enjoyment of the right, which means that they should adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures towards the full realization of the right. Finally they have the duty to directly *provide* assistance or services for the realization of the right. The last two are sometimes lumped together to constitute the duty to *fulfill* the realization of the right. Because citizens pay taxes and have ceded their power to govern themselves to the state, it bears a heavy duty to ensure that rights are respected, protected and fulfilled.

Human Rights Monitoring

Human rights monitoring is crucial to ensuring human rights protection, fulfillment and respect. Monitoring involves continuous and accurate observation, investigation, recording and publicization of incidents or case of human rights violations. It may also involve collection of information on performance of obligations and the effects of human rights interventions

Monitoring must produce the following information:

- How is the intervention being implemented?
- When is it being done?
- Who is/is not doing what?
- What are the effects?
- What is working/is not working?
- What is changing?

Results should be contained in a report, which must inform the management cycle of the particular intervention or form the basis for advocacy work with different state agencies.

The purpose of monitoring is to collect and analyze information on the implementation of development initiatives that have a bearing on human rights. There is also need to know whether the development measures that have set up are working and to document their effects on people. Sometimes, it is to identify if there is need to change policy measures that are producing negative unexpected results. Monitoring also helps to identify capacity issues that need to be addressed.

Human Rights Education

Human rights education is an important initiative in the protection and promotion of human rights. Many of the world's inhabitants are unaware of their human rights. Thus, they are not able to recognize violations or non-realization of their rights.

Human rights education should aim to equip citizens with knowledge on human rights concepts. It should be done in a way that not only gives the learners knowledge but also leads to changes in behaviour, whether it is by claiming their rights or respecting other people's rights. For this reason, participatory methods where learners have an opportunity to contribute to the learning are the most beneficial. Although different

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organizations may focus on specific human rights, it is even better to have a comprehensive understanding of human rights, and not just the one right that is being focused on.

It is important for human rights violators to be pursued and promptly punished by the State. Lack of punishment tends to encourage others to commit violations. It may also encourage the continuation of situations that make people vulnerable to violations or non-realization of their rights.

Chapter 7

Democracy

Meaning of democracy

Democracy means different thing to different people. However there is almost universal consensus that democracy is a good and desirable state. So much so that even states that are manifestly undemocratic normally claim to be democratic.

The term democracy comes from two Greek words '*demos*' meaning the people and '*kratias*' meaning authority. Abraham Lincoln, a famous US president defined democracy as a "government of the people, for the people by the people." Democracy therefore refers to rule or a way of governing based on the consent or will of the people. The essential elements of democracy include:

- Recognition of the fact that power belongs to the people
- Recognition of the importance of the following goals
 - Greater freedom for the people
 - A just society
 - The same rules for all
 - Equality before the law
 - Respect for the rules of law and
 - Equal opportunities for all.

In a democracy people rule themselves either directly or indirectly through their representatives. The citizens play a role on how the government operates as they have opportunities to contribute to the process. The citizens also decide who shall rule them through a process of periodic elections.

In a democracy power belongs to the people. Those they elect get donated power to govern on behalf of the people.

Forms of Democracy

Democracy can be exercised by people either directly or indirectly through representatives. These are the two main forms of democracy: direct and indirect democracy.

Direct Democracy

Here people rule themselves. All adult members of a community under direct rule decide on the day to day issues that affect them. Due to the fact that all adult members must be involved in decision making directly, this form of democracy is only practicable in small communities. It is not possible when the numbers of adult members are large for decisions would never get made. To apply this type of democracy to govern a country with millions of people like Kenya would require that you bring the people into a stadium everyday to daily decisions on how the country is to operate. This is impossible.

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The only examples of situations when direct democracy is exercised are when very important decisions are about to be made in a country. In such instances the country conducts a referendum on the issue so that all adults can vote and give their say on what decision should be taken. When Kenya's new constitution is finalized, it is expected that a referendum will be held so that all adult Kenyans get an opportunity to vote for or against the new constitution. A second example is under the East African community, it is envisaged that there will progressively be an East African Federation. There is a proposal to have a federation by 2012. Before this happens, there will be a referendum for the citizens of East Africa to vote whether they want a federation or not. It is only in this type of circumstances when direct democracy is possible in a large community.

Indirect Democracy

This is also referred to as representative democracy. This form of democracy emerged due to the impracticality of exercising direct democracy in large societies. Here people elect representatives and give them a mandate to decide on important daily issues on their behalf. The mandate is given for a specific period of time after which they have to elect other representatives or renew the mandate of those they had elected before.

The representatives make decisions on behalf of the people who elected them and are accountable to the people. Accountability is mainly exercised through the process of regular elections. Those representatives who do not account for the actions and who did not represent the people well do not get their mandate renewed during the elections.

Since the representatives are expected to articulate the views of the people who elected them, it is expected that they will be easily accessible to consult with the people. At the village level representatives are elected to represent the village in school committees, development committees and even local church committees. At the national level, this form of democracy is mainly exercised through the institution of parliament. Kenyans are governed according to agreed rules. Most of these rules are made in parliament. In an ideal world all Kenyans would directly participate in the process of making these laws. However since this is not possible, Kenyans every five years elect their representatives who are called legislators or members of parliament. These legislators then go to parliament to make laws on behalf of the people.

There are different forms of representative democracy. The two most common are parliamentary democracy and presidential democracy. In addition some countries like Kenya have a mixed system comprising both elements of parliamentary and presidential democracy.

In a parliamentary democracy citizens elect members of parliament to represent them. These members of parliament make laws on behalf of the people. The elected members of parliament then choose one of them to head the executive arm of government. The person so chosen is called a Prime minister. Usually the Prime Minister is the leader of the party with the majority members in parliament. The Prime Minister once chosen will appoint people he/she wants to serve in cabinet. A prime minister will remain in office as long as he/she enjoys the support of majority of the members of parliament. If the person becomes unpopular then parliament can pass a vote of no confidence in the

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Prime minister. If this happens the Prime Minister, must vacate office and parliament will elect another Prime Minister from amongst its members.

The other type of representative democracy is presidential. Under this system voters elect representatives to the legislative body called parliament and also elect a president who will be the head of the executive. The president holds power for a fixed period then citizens get an opportunity to vote him/her back to or out of office.

The president unlike under a parliamentary system is not under the direct control of parliament. Parliament however can check the powers of the president just the same way he/she also checks the power of parliament. This is what is referred to as the principle of checks and balances. This principle is also applicable to the other arm of government, the judiciary. Under this system, the president appoints members of the government and they do not necessarily have to be members of parliament. They are normally experts in their field.

Both forms of indirect democracy have their advantages and disadvantages. Parliamentary democracy makes it easy for the government to pass laws as there is very little disagreement between the executive and legislative arm of government. However its disadvantages are that the division between the executive and legislature is weaker hence diluting the application of checks and balance. To try and balance the weaknesses of each of these systems some countries have a combined parliamentary and presidential democracy.

Government, and its roles in a democracy

Government is the institution through which the state exercises its power over its territory and regulates social behaviour. Since in modern day life not all people can participate in the process of governance, the government as an entity is the one that regulates conduct in society and governs on behalf of the citizenry.

In Kenya the government is composed of three arms, the executive, the legislature and the judiciary.

There are different types of governments. The type of government in a state depends on the state's history as well as the socio-economic and political realities. The main types of governments that exist around the world include:

- Monarchy
- Aristocracy
- Oligarchy
- Dictatorship
- Democracy

Monarchy

This is a system of government in which the highest authority is vested in a King, queen, emperor or empress. This person is usually called a monarch. The power of the monarch is hereditary, that is it is passed from one person to another within the same family. Everybody living in the area or country owes direct loyalty to the monarch.

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A monarchy can be either absolute or constitutional. In an absolute monarchy, the monarch exercises absolute authority unlimited by any other institution or rule while in a constitutional monarchy the powers and authority of the monarch is controlled by the constitution.

Aristocracy

This is a form of government where the rulers are chosen from people of a particular class in society usually the highest social standing. This form of rule was practiced in ancient times where members of the nobility or aristocrats are the ones who rule. Governance is therefore based on one's social standing in society.

Oligarchy

This refers to rule by a few members of a community or group. When referring to governments, the classical definition of oligarchy, as given for example by Aristotle, is of government by a few, usually the rich, for their own advantage. It is compared with both aristocracy, which is defined as government by a few chosen for their virtue and ruling for the general good, and various forms of democracy, or rule by the people. In practice, however, almost all governments, whatever their form, are run by a small minority of members. From this perspective, the major distinction between oligarchy and democracy is that in the latter, the elites compete with each other, gaining power by winning public support. The extent and type of barriers impeding those who attempt to join this ruling group is also significant.

Dictatorship

This form of government is not democratic. Under it one person or a small group of people hold power. In practice the dictator either ignores rules laid down or applies them ruthlessly and only in manners that are to the dictator's view and interest. The dictator's words are of greater effect than the law and are often taken as the law. A dictator does not require consensus or consultation in the process of governance. They instead resort to compulsion and force to ensure that their commands are obeyed and their authority followed.

Democracy

In a democracy, as already stated, government exists and performs its functions with the consent of the people. This consent is normally granted through regular elections. People are also frequently consulted and listened to by the government. Such a government respects the essential elements of democracy. Such a government adheres to democratic principles, is accountable to the people, provides avenues for citizens' participation in decision making, provides equal opportunities to its citizens and conducts regular free and fair elections.

Democratic governments are the most common type of government. Indeed all states aspire to be democratic. There are in practice several classifications of democratic governments. They can be classified as either parliamentary or presidential as already discussed above.

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Democratic governments can either be federal or unitary. A federal government is one where power is devolved and divided amongst the different geographical units or regions that make up the state. A unitary government on the other hand is one where power and authority of government is centralized. The central government exercises control over all other units in the state. All the other units are therefore subordinate to and lower than the central authority.

In exercising democratic governance, governments normally adopt different approaches and philosophy. These are also ways of categorizing democratic governments. One will here talk that a government if a liberal democratic, social democratic, conservative, democratic central or socialist.

A liberal democratic government is one that stresses liberty, freedom of the individual and social pluralism as the most important for success of democracy. The system focuses on the protection of individual rights and freedoms and a free market. The state is expected under a liberal democratic system to provide a lot of room for individual development. It reduces the welfare role of the state by transferring such responsibilities to citizens and non-state actors.

A conservative government is the opposite in certain respects to a liberal state. Such kind of government also believes on freedom of individuals but gives the state also a strong function to perform. It is also very slow to adapt to new changes and ways of doing things.

A social democratic government is one that promotes the well-being and social security of the individual citizen by minimizing inequality of wealth and privilege. It stresses the need both for a welfare state and social reforms in order to ensure that every one has access to basic services and social security without discrimination. The system believes that the state has the responsibility to address inequality in society. It focuses on minimum quality of life for all people and safeguarding the dignity of human beings.

Socialist democracy commonly referred to as communism or socialism believes in the role of the state as the all provider for citizens. It believes that the state should provide for all needs of the individual and that individuals within the state should be at the same level of life. What one works for is the benefit of the entire state and the members within it.

Institutions of Democracy

Democracy is built around institutions. The state is the unit in which people exists within a geographical unit so as to pursue common goals under one government. The government is the principal unit for managing affairs within that state. In a democracy such government is the institution that has been democratically chosen by the people to govern on their behalf.

As a democratic institution, a government is traditionally composed of three branches or arms. These are:

- The executive

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- The Judiciary
- The legislature

It is through these three arms that the government exercises its power and authority to control and influence conduct within the state. Each of these organs performs different but complementary tasks. The executive carries out policies and laws passed by the legislature. It is the arm that runs the government. It is in Kenya composed of the President and ministers and other civil servants. The day to day running of government business is carried out by the executive. The Legislature on the other hand is the principal body that makes laws and policies. It is the arm that best captures the representative interests and powers of the citizens. It is composed of members of parliament elected from constituencies and is headed by the speaker of parliament. This arm also supervises the executive. The other arm of government is the judiciary. It is headed by a chief justice who is a judge. The task of the judiciary is to interpret and apply laws passed by the legislature. It also deals with any dispute that occurs within the state and decides those disputes in accordance with the laws of the country.

Discussions on the arms of the government are never complete without stating the important roles of citizens in the process of governance. Citizens play a very important role in government. It is them who elect the government, who then acts on their behalf.

Separation of powers

Each of the organs of government performs distinct functions. This is necessary to ensure that one organ does not dominate the others or that the same organ makes laws, executes those laws and sits in judgment over disputes when they arise. This is where the concept of separation of powers comes in. the concept sets limits on the work of each of the organs of government. It requires that the institutions of government be organized in such a manner that each performs separate functions. Further it requires that each organ have the independence to carry out its work properly without undue influence, and pressure from the other arms of government.

No arm of government should therefore be more powerful than the other. This will enable each arm to provide checks and balances on the others and thus prevent abuse of power by any of the three arms. This is what forms the basis for the concept of checks and balances.

Checks and balances

These are mechanisms established to ensure that each arm of government performs its functions and further that no arm abuses its powers. The mechanism enables every arm of government to check on the use of power by other arms while its powers are also being checked. The Kenyan constitution provides mechanism for the application of the concept of checks and balance. The president as head of the executive checks on the legislature by accepting or rejecting bills. He/she has power to reject a bill passed by parliament. The judiciary can also cancel a law passed by parliament if the same does not conform to the constitution. At the same time the executive has to seek approval from parliament before using public resources. This approval is sought through the

budget process. A judge cannot also be dismissed from office by the executive except in accordance with the laid down procedure after the recommendation of a tribunal.

Other institutions

The result of the above discussion is that the arms of government perform very critical functions in a democracy. Mechanism also exists to ensure that they perform these functions effectively and do not abuse their powers. Citizens and their institutions also exist as a check on the powers of government. Through regular elections citizens can remove from office those who do not represent their interests in government. Two other institutions exist in society that performs very key roles in a democratic government. The first institution is that of non-governmental and community based organizations. These are institutions formed by citizens that are not part of formal government as we all know it. They perform the important function of enabling citizens to participate in activities that are for the improvement of their welfare and also empower them to better perform their tasks.

There is also the institution of the media. The media performs a very important role in a democracy. It keeps the citizens aware of the actions of government and provides citizens with key information to enable them make informed decisions. To perform its role the media needs to be free of government control, be independent and non-partisan.

The other institution that performs an important function in a democracy is the institution of the political part. It is an avenue through which citizens participate in political affairs of the country and the principle mechanisms of competing for and acquiring political power and office in the country.

The last two institutions that also play an important role in society are the institutions of religious leaders and groups and also the private sector. Religious groups perform the task of providing avenues for citizens to satisfy their religious needs. They also participate in governance by keeping the government in check to ensure that it is democratic. The private sector is also a key player in governments. They contribute their ideas and participate in projects and developments in the country.

Indicators of democracy

Although there is not one definition of the term democracy there are certain elements that distinguish a democratic state from that state which is not democratic. Not all states will have all the indicators below. They are however ideals which all states should aspire for in the process of building democracy, otherwise referred to as the democratization process. These elements include

Multiparty system: in a democracy citizens compete for power through political parties. The most popular political party and which garners the majority votes in an election usually form the government. A political party brings together people who share a vision for a country and have an ideology on how they would want the country governed. It is important to have different political parties to give people with different ideologies and visions the opportunity of propagating those ideologies and thus allowing for healthy

competition. This is one of the indicators of democracy, that is the existence of more than one political party in a country. A multiparty system allows for opposition to the political party that wins elections to play the role of a watchdog keeping the ruling party in check. During elections voters also have a choice of candidates, parties and policies to choose from.

Bill of Rights

All human beings are born free and equal. As human beings they are entitled to certain fundamental rights. These basic rights are referred to as human rights. These rights include civil and political rights like the right to life, freedom of expression and freedom of association. It also includes economic, social and cultural rights and also third generation rights or group rights.

The basic rights which all human beings are entitled to should be guaranteed by every democratic state. They are normally included in the constitution. The bundle of rights is normally referred to as the Bill of rights. The existence and content of the Bill of rights is an indicator of democracy. A country that does not guarantee and protect the Bill of rights cannot be called democratic.

Political Tolerance

Democracy requires that people tolerate and live in harmony with each other. Although the wish of the majority usually prevails by the majority having their way the minority must also be protected and be given an opportunity to have their way. A democratic society is one that respects diversity.

In most democracies political parties and civil society organizations are the main actors who stand out for democracy. Democracy requires that political parties and civil society groups exist and be tolerant of each other. When a political party forms government it should tolerate the other parties that have divergent opinion from its own. During campaigns for political office, parties should differ on ideas but not express these differences violently. Civil society must also be given the space to operate.

Tolerance even extends to the family and village level. We should not expect everybody to have similar views as ours but we must accept the rights of those with divergent opinions to express those rights.

Regular Free and Fair Elections

One of the hallmarks of democracy is the holding of regular free and fair elections. This is an opportunity that exists periodically for the citizens to choose their officials. In a democracy the period should be predetermined so that everybody knows how frequently the elections shall be held. Secondly everybody who is qualified, that is being of the agreed age should be allowed to participate in the elections. The playing field must also be level. All parties intending to be elected must be given an equal opportunity to campaign. There is also need for an independent body to oversee the process of elections and to count the election result.

After the elections have been concluded and the results announced, democracy requires that all people accept the election results. For this to happen the elections must be free

and fairly held. Failure to accept the election results may result in violence. This is undemocratic. Instead provision should exist for any party that is aggrieved with an election result to seek redress in the judicial system. This requires the existence of an independent and impartial judiciary.

Accountability

Accountability means being answerable for. It requires that every action that government takes must be justifiable and must be action which the government can account for. Elected people must make decisions and perform their duties according to the will and wishes of people, not themselves. This means that people must have a way of knowing what is happening. The people need to have an opportunity for interacting with their leaders and being informed of the actions they have taken on their behalf. This is what accountability provides for.

Transparency

For the government to be accountable, the people must be aware of what is happening within the country. Transparency is the creation of openness and access for the people to see clearly what is going on in the government and society. Citizens must also be in a position to question and receive clarifications on unclear issues. If a leader is accountable, they have nothing to hide and will therefore be transparent. A transparent government will give citizens information on decisions that affect them and thus offer them an opportunity to know what is going on and participate in governance.

Control of abuse of power

Citizens of any state give the government the power to govern on their behalf. This power must be exercised in a positive manner and where it is not, this will be abuse of power. One of the ways to avoid abuse of power is to ensure that there is separation of powers between the three arms of government and that these arms act as checks and balances against each other.

Establishment of fair procedures is another way of checking abuse of power especially when dealing with the public. This is what is known as due process of law. Due process protects citizens from arbitrary government. Due process requires that people be informed of proposed government actions and where necessary a hearing be conducted before the decision is made. The right to be heard is a fundamental part of due process. There is need too for an independent judiciary.

The media also plays a very critical role in ensuring that there is control of abuse of power. It creates awareness on the actions of the government and informs the government on people's views. It also helps to unmask abuse of power. Prevention of abuse of power is one of the indicators of a democracy.

Rule of Law

The rule of law is based on the idea of government by law. The concept has several elements. Firstly is the element that the government can only exercise the powers granted to it by the law. Secondly, it is a requirement of the rule of law that all be treated equally under the law. One can also not be punished unless the person has broken the

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law and is rightly judged through the established judicial process. Lastly the rule of law requires that there be separation of powers between the three arms of government.

The essence of the rule of law is to require equality of all before the law and that government only exercises power in accordance with the law. The principle of equality which is also a hallmark of democracy is included in the concept of rule of law. It requires that the law should apply equally and that all people should be treated equally be they rich or poor, young or old, female or male. It therefore is against discrimination or favoritism. Equality means that all individuals are valued equally, have equal opportunities and are not discriminated on the basis of such issues as colour, race, creed, gender or sexual orientation. Equality means people have equal opportunities.

However there are instances when even in a democracy people can be positively discriminated against or not treated equally. This is when affirmative action is applied. This is the process of taking steps to favour certain people in society so as to make up for past discrimination against them by others.

Economic Freedom

In a democracy every individual should have the right and ability to own and use property without the fear that such property can be taken away unfairly by the state. People should also have the opportunity to work and provide for their livelihood and the freedom not to be forced into slavery or to provide forced labour. Democracy presupposes that there is freedom to work and acquire property legitimately and thereafter to enjoy the fruits of the acquired property.

Safeguards of democracy

In order to safeguard democracy or ensure that democracy is guaranteed certain safeguards need to be put in place. Some of these safeguards are discussed below.

Civic education

This is the process of enlightening citizens of their rights and duties in society. Civic education is important for democracy to survive as it improves people's knowledge and skills to participate in public life. Civic education also helps to develop amongst citizens a sensible political culture in which citizens are not only aware of their rights and duties to create a better society, but are also aware of the rights and duties of the state. The task of providing civic education is normally performed by the government and civil society organizations. Even religious bodies also perform the duty of providing civic education.

Accountable and transparent system of government

The existence of a transparent and accountable government also helps to guarantee democracy. A government that acts according to the wishes of the people and in which people have opportunity of getting information on government decisions and where citizens are regularly consulted is one which promotes democratization.

Respect for the Rule of Law

To safeguard democracy it is also important and necessary that all within the state act according to the rule of law. No individual or institution should be above the law or

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treated more favourably than others. Government must act within the confines of the law and should not disregard laws and regulations that have been set.

Free and fair elections

The holding of regular free and fair elections in which all qualified people are allowed to vote and also those qualified are allowed to offer themselves for and vie for elective office is a hallmark of democracy. To ensure that there is democracy it is essential that the elections be conducted regularly in accordance with well laid down electoral laws and supervised by a competent and impartial body.

Independence of Public institutions

In democracy all public institutions must have the capacity and power to perform their duties competently and without undue influence from other institutions and or individuals. It is only then that they will perform their duties in a fair manner and in a manner that is acceptable to all without fear or favour.

Checks and Balance

It is important in a democracy that a system of checks and balances exist so as to ensure that no institution overreaches its powers and that the organs of government perform their functions in accordance with the laid down rules without overstepping their powers.

Chapter 8

Elections

Importance of Elections

One of the most widely used methods in the world today of choosing leaders or a government is through elections. An election can be defined as the democratic process of selecting one person from another among a group of candidates to fill a position or political office. The word *election* comes from the Latin word meaning *to choose*. While it is important that we do not confuse elections for democracy, they are nevertheless an essential characteristic of democratic rule. This is so because they give people the opportunity to choose their own leaders and to replace those they consider unpopular. In this way, elections then serve as an important tool with which people can control their leaders. By participating in truly competitive elections, citizens also play an important role in the continued democratization of their countries.

Through elections, people make decisions about those who will make *public* decisions for them. One of the characteristics of modern government is that it is representative. The government is composed of a few people chosen by the people. By voting, a citizen uses his or her individual power to give someone else the authority to act on his or her behalf. With a single vote, the citizen gives another citizen the authority to decide on how the government will raise money through taxation and other means and how that money will be spent on services such as health, education, roads and other aspects of a country's development.

It is important to remember that elections also contribute to peace and stability. If they are administered properly, they provide a peaceful way of changing political leaders and governments. Without elections, leaders would be determined through violent takeovers, either by some citizens or the military, known as *coups d'etat*. It is also important to remember that elections are only one of the ways in which citizens can participate in their governance. In between elections, citizens have a right to call on their elected leaders or government to perform certain tasks and account for promises made.

History of Elections in Kenya

Elections in Kenya can be traced back to 1905 when the colonial government came up with a law establishing a Legislative Council (Legco). Although the Legco originally consisted of European representatives who were hand-picked by the Governor, they were later elected by the white community then living in Kenya. In the course of the struggle for independence, other races were gradually allowed to participate in the elections. After the lifting of the colonial ban on political parties, and just before Kenya attained political independence, the first multi-party elections in which all adults of voting age participated were held in 1961. The next elections were held in 1963, the year when Kenya attained internal self-government. Both elections were competitive and the turnout was very high.

Since then, Kenya had elections regularly in 1966, 1969, 1975, 1979, 1983, 1988, 1992, 1997, and 2002. This history contains a number of interesting lessons for those

interested in understanding elections in Kenya. The first is that they can be divided into times when Kenya had different political systems. The 1961, 1963 and 1966 elections were held in a competitive system where many parties sponsored candidates. From 1969 to 1979, however, elections were non-competitive because there was only one party fielding candidates. Although the law allowed the existence of many political parties, these had been frustrated by the ruling Kenya African National Union (KANU) party, and the leaders of parties like the Kenya People's Union detained. In 1992, the party pushed an amendment to the constitution that forbade the existence of other political parties. So the elections from 1983 to 1988 were held under a system where, by law, only one party could sponsor candidates. By 1990, Kenyans were tired of this non-competitive system and successfully agitated for a multi-party system, which was re-introduced in 1991. Since 1992, elections in Kenya have been held in a competitive multi-party system where many political parties sponsor candidates.

Election Standards

For an election to be considered democratic, it must meet certain standards. Not any contest will be described as democratic. The United Nations, in various legal instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, requires states to hold "periodic and genuine" elections. Over time, this has been translated to mean that democratic elections must be open, peaceful, free and fair.

Four standards are necessary to safeguard a democratic election, namely:

- (a) Any person meeting the minimum legal requirements, such as age and citizenship, must be allowed to run for an office;
- (b) Any person meeting the minimum legal requirements, such as age, citizenship, and residence, must be allowed to register and vote;
- (c) The votes must be accurately and fairly counted, and the results announced promptly;
- (d) People must be allowed to vote in private to protect them from being intimidated.

The secrecy of the ballot box has been tried and proved as the best means of ensuring free and fair elections in many countries over the whole duration in which democracy has been in practice. In a democratic election, candidates must be chosen by the people as opposed to being hand-picked by interested parties.

It is a condition for holding free and fair elections that the dates for the elections being prepared for is announced well in advance to obviate suspense and uncertainty. In addition, such elections must be held in an atmosphere bereft of corrupt practices such as bribery, personation and undue influence, violence, rigging and coercion. Finally, it is a legitimate expectation that the election results in free and fair elections are accepted, respected and acted upon as provided for under the constitution and other electoral law.

Therefore past elections in which the secret ballot was not being used (such as the infamous *mlolongo* elections of 1988), or in which other parties' candidates were harassed and intimidated (such as the Little General Election of 1966, the 1992 elections after the resumption of a multiparty system) cannot be described as free and

fair. Elections which favour one party to the detriment of others are not only undemocratic, but can result in civil strife if the disaffected parties decide to take the law into their own hands. An example of this is the case of Uganda where Yoweri Museveni (who later became president of Uganda for many years) led a guerrilla movement to overthrow the Milton Obote government.

Laws Governing Elections in Kenya

In Kenya today, elections are governed by the following laws:

- (a) The Constitution of Kenya
- (b) The National Assembly and Presidential Elections Act
- (c) The Local Government Act
- (d) The Election Offences Act

The Constitution contains qualifications for candidates and qualifications for participation as a voter. It also establishes the Electoral Commission of Kenya, which is mandated to conduct all elections. It also gives the High Court power to hear all disputes arising out of elections, normally referred to as *election petitions*. The National Assembly and Presidential Elections Act contains comprehensive procedures and the finer details on the conduct of both presidential and parliamentary elections in Kenya covering the aspects of registration, nomination of candidates, campaign period, conduct of the elections, counting, announcement of results and handling of election disputes. The Local Government Act, in addition to establishing Kenya's system of local government, contains details on how the representatives in the local authorities are elected.

In addition to these laws, there are other laws which have a bearing on elections because they regulate issues such as media coverage, the holding of public meetings and so on. Examples are the Kenya Broadcasting Corporation Act, the Public Order Act, the Public Collections Act, the Societies Act, the Penal Code and the Witchcraft Act. At various times in the history of Kenya, there have been calls by some people for the laws relating to elections to be consolidated in one law but so far this has not been done.

The Electoral Commission of Kenya

The Electoral Commission of Kenya (ECK) is the body created under the Constitution to manage elections in Kenya. The ECK is supposed to conduct its affairs impartially and independent of control by any person or body. To ensure that independence, members of the Commission have security of tenure like the holders of other constitutional offices such as judges and the Attorney-General. This means that their jobs are protected by the law during their terms of office and they can only be removed from office through an elaborate process spelt out in the constitution that is to say a tribunal appointed by the president.

The ECK is made up of the Chairman and up to 21 other commissioners, all appointed by the president. Members of Parliament, the armed forces or civil servants do not qualify to be appointed as commissioners. The ECK is allowed to employ its own staff for its day to day operations. The ECK has the following responsibilities under the law:

- (a) Registration of voters, in respect of which it is supposed to maintain and revise the voters' register;
- (b) Direction and supervision of all presidential, parliamentary and local authority elections;
- (c) Dividing Kenya into such constituencies and boundaries as it may deem fit, so long as it is within the constitutionally limited number; and
- (d) Conducting voter education in Kenya.

Electoral Systems

In each election, the voters normally have an understanding and expectation of the manner in which their votes will be translated into seats and how the winner will be determined. The manner in which the votes cast for individual candidates is translated into seats in parliament or the local authorities and who wins the presidential, parliamentary and civic elections is known as an *electoral system*.

Currently, Kenya uses the *first past the post* (FPTP) system, which is also widely used in Britain and many of the countries formally colonized by the British, such as India, Uganda, Tanzania and the United States of America. Under this system, as the name suggests, the candidate who receives the highest number of votes in each electoral area, whether it is a constituency or a ward, is pronounced the winner. This is the case even in a situation where the candidate's votes amount to 40% of the votes cast while his opponents share the remaining (and larger) proportion of 60%.

This system has its advantages and disadvantages. Its main positive attribute is its simplicity and ease of implementation. Nevertheless it has widely been criticized for its unfairness in allowing candidates with fewer votes overall to win. In both the 1992 and 1997 General Elections, KANU had a smaller proportion of votes than the seats it won in parliament. The (FPTP) system has also been said to encourage winner-take-all politics marked by cut-throat competition in which communities are easily divided along ethnic and other lines. Finally, it is said to be the worst possible electoral system for women. In the top ten countries with the highest female members of parliament in the world, none used a FPTP system.

Other options in use elsewhere that have been suggested, but which have so far not been adopted, include *proportional representation* and *mixed member proportional representation*. In a proportional representation system, voters vote for parties and the seats in the legislative body are then distributed amongst the parties that attain votes above a certain threshold limit in direct proportion to the share of votes each party receives. This is considered not only fair, but also ensures that each vote counts. It was used in the first all-race elections in South Africa and is in use in many western European countries such as Sweden, the Netherlands and Finland. In a mixed member proportional representation system, one set of members of parliament is elected in a typical FPTP system, while a number of seats are distributed on the basis of the proportion of votes each party receives. This second set of seats is used to balance the unfair effects of the FPTP system. This system has been praised for the manner in which combines the simple attributes of a FPTP election with the fairness of a PR election. It is in use in Germany, Namibia and South Africa since its second all-race elections.

While there is no electoral system that is necessarily good for all the countries, every country is expected to choose an electoral system that not only suits its local circumstances but also ensures fairness. Besides, it is also possible to use an electoral system to shape the character of political competition and to guarantee greater participation of women and other groups.

Registration of Voters

For a person to vote in any election, such a person must be registered as a voter in some constituency. Before a person can qualify to be registered as a voter, he or she must:

- (a) be a citizen of Kenya, who has attained 18 years of age;
- (b) have been ordinarily resident in Kenya for a period of not less than one year before the date of registration, or a period of four years in the last eight years before registration;
- (c) have lived for at least five months in the last twelve months preceding the date of registration, or carried on business in the constituency for the same period, or lawfully possessed land or a building in the constituency for a similar period.

The following are not qualified to be registered as voters:

- (a) People who have been declared by a competent authority to be of unsound mind;
- (b) People who have been declared bankrupt and have yet to be discharged of this status by a court of law;
- (c) People detained in lawful custody;
- (d) People found guilty of election offences, in the period before the next general election
- (e) Election officials
- (f) People employed in the disciplined forces

For a long time, the ECK used to register voters only close to the General Election. This has changed and now the ECK conducts annual registration exercises after which it revises the registers. Every person who qualifies to be registered as a voter has a right to be registered. The registration officials will normally require evidence of identification and age, which could be a national identity card or a valid Kenyan passport. Upon registration, the person is issued with a voter's card which entitles such a person to vote in presidential, parliamentary and local authority elections. If this card is lost or damaged, the voter may be issued with another one. If a voter also moves from one constituency to another, so long as they are within the stated residency requirements, they may apply for a new voter's card. At the close of the registration period, each registration officer compiles a register of voters.

Once the register of voters is compiled, the ECK publishes it for public inspection at various places within the constituency, usually at the divisional offices. The purpose of this inspection is to verify the correctness of the names and other details in the register. It also provides an opportunity for the following to lodge complaints in relation to the register:

- (a) People who applied for registration but whose names do not appear in the register;
- (b) People who, though duly registered, have since changed their minds for whatever reason and now wish to object to their own registration;
- (c) People who wish to object to registration of any person for reasons laid down in the law.

The complaint in (a) above is known as a *claim* while the complaints in (b) and (c) are known as *objections*. Claims are made to the registration officer in respect of each registration area, with the possibility of an appeal to a resident magistrate's court and subsequently to the High Court, while objections are made to a magistrate's court with the possibility of appeal to the High Court. Any orders made by the courts are addressed to the registration officer who carries out the orders.

Events Preceding Elections

In Kenya, elections are held whenever the terms of political offices end or whenever there are vacancies caused by various factors allowable under the law. The president is allowed two terms of five years each, while the members of parliament and councillors have terms of five years without term limits. Since elections for all three are normally held simultaneously, the respective terms also expire at the same time. The elections held at the expiry of these terms are commonly known as *General Elections*. After a general election, any vacancies that occur due to death or other disqualifying factors in the law, such as bankruptcy or loss of an election petition, are filled through elections to fill such vacancies, known as *by-elections*.

Towards the end of the term of members of parliament, or at any other time, the president dissolves parliament. Dissolution of parliament brings to an end the terms of all members of parliament, including that of the president. Almost soon thereafter, the Minister for Local Authorities dissolves the local authorities as well, bringing to an end the terms of all councillors countrywide. Elections are normally held within 3 months thereafter based on a calendar that is laid down in the law.

When parliament is dissolved, the Speaker is supposed to issue legal orders, known as writs, to the ECK indicating the existence of vacancies in all the constituencies. In the case of a by-election the writ is issued after consultation with the ECK. Within 10 days of receiving the writs, the ECK transmits each writ to a returning officer in the respective constituency and also publishes a notice in the Kenya Gazette specifying:

- (a) The day or days when each political party shall nominate candidates for the elections;
- (b) The day or days for presentation of nomination papers by candidates to the returning officers for the elections; and
- (c) The day or days of the poll, which shall not be less than 14 days from the date of presentation of nomination papers.

Nomination of Candidates

Qualifications

For a person to be nominated to contest any election, they must certain qualifications laid down in the law. To be nominated for election as president, a person must

- (a) be a Kenyan citizen;
- (b) have attained the age of 35 years;
- (c) be registered as a voter in some constituency;
- (d) be proficient in English and Kiswahili; and
- (e) be nominated by a registered political party and seconded and supported by 1,000 persons who are registered as voters.

Kenyan law also states that the person who is elected as president must be elected as a member of parliament in some constituency and must garner at least 25% of the votes cast in at least 5 provinces.

Any person who wishes to be nominated for election as a member of parliament must:

- (a) be a citizen of Kenya;
- (b) have attained the age of 21 years;
- (c) be registered as a voter in some constituency;
- (d) be proficient in English and Kiswahili
- (e) be nominated by a political party

Any of the following cannot contest a presidential or parliamentary election:

- (a) A person who owes allegiance to any foreign government;
- (b) A person under a death sentence;
- (c) A person declared to be of unsound mind by a competent authority under the laws of Kenya;
- (d) A person who has been found bankrupt and is yet to be discharged of that disability by a court of law;
- (e) A person in the civil service who has not resigned within 6 months of the election;
- (f) A person convicted of an election offence in the last election;
- (g) A person serving in the armed forces or a local authority; or
- (h) An election official

In order to qualify to contest as a councilor in a local authority, the prospective candidate must:

- (a) have attained 18 years of age;
- (b) be a registered voter;
- (c) be nominated by a registered political party;
- (d) be a citizen of Kenya; and
- (e) not be disqualified to contest an election under any other law.

Any person with the following disabilities will not qualify to contest a civic election:

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- (a) A person declared to be of unsound mind by a competent authority under the laws of Kenya;
- (b) A person under the death sentence;
- (c) A person serving a term of imprisonment;
- (d) A person who has been declared bankrupt by a court of law and has yet to be discharged of that disability;
- (e) A member of staff of any local authority;
- (f) A person who has, within 5 years before the date of the elections, or since his or her election, has been surcharged for an amount exceeding KSh. 1,000;
- (g) A person who has been convicted of a criminal offence 12 months prior to election and sentenced to imprisonment for a term of not less than 3 years and has not received any pardon;
- (h) A person who cannot read, write and speak the official language of the local authority in question;
- (i) A person who has been found guilty of an election offence under the Election Offences Act; or
- (j) A person who, within 3 years of his or her election or nomination, has been convicted either of the offence of exceeding his powers or refusal to disclose his or her interest in a local authority.

Party Nominations

In the multi-party political framework, each political party is supposed to hold its own party's nomination of candidates for presidential, parliamentary and civic elections. Assuming that they meet the qualifications for contesting the seats they are interested in, candidates seeking nomination will need to be proposed and seconded by members of their respective parties. According to the law, each party is supposed to be guided by its constitution and rules in this exercise. For many years, there have been complaints that this is not done in quite a number of parties. Sometimes, disputes arising from these nominations have been taken to court but this undemocratic practice continues. Currently Kenyan election laws do not allow the participation of independent candidates. This restricts the choices open to people who do not wish to be associated with any party in their quest for political office.

Presentation of Nomination Papers

The presidential candidates are supposed to present 40 numbered foolscap papers each with 25 signatures and their respective electoral numbers. This should take place between 8 am to 1.00 pm on the days fixed for the nomination of candidates at the election.

Presentation of nomination papers for parliamentary elections should take place not less than 21 days before parliamentary elections. Parliamentary candidates should be proposed, seconded and supported by not less than 7 and not more than 18 persons other than the proposer and seconder. Statutory declaration should be delivered to the returning officer together with the nomination papers not earlier than one month before the nomination day. Presentation of nomination papers should be made between 8am and 1pm on the nomination days.

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The hours for presenting nomination papers for local authority elections to the Electoral Commission are 8am to 12 noon on the nomination days. Every nominee for the civic election should be proposed, seconded, and supported by not less than five and not more than seven persons other than the proposer and seconder.

Election Day Activities

In a General Election, which is supposed to be held every five years, presidential, parliamentary and local authority elections are held on the same day. There are a number of important details relating to this stage of the election process.

Opening and Closing of Polling

The times for the opening and closing of polling stations will be announced in the Kenya Gazette by the Electoral Commission when announcing the date of the elections. In the past, it has been the practice to have polling stations opening at 6.00am and closing at 6.00pm. Where the polling station opens late, it is normal for the presiding officer to extend for time equivalent to the length of the delay in opening.

However, it should be noted that a presiding officer is authorized under law to postpone voting at the polling station when they are interrupted by a riot, open violence, flood or other natural catastrophe or other cause. In this event, the presiding officer is expected to re-start the proceedings at the earliest practicable time after the event causing the postponement has been dealt with.

In postponing the proceedings under these circumstances, the presiding officer is empowered to transfer the proceedings to another polling station in the same constituency. If he or she does so, he or she is expected to convey this change of venue to the voters in that area by all available means. A presiding officer may extend the hours of polling at his or her polling station where polling has been interrupted for one of the reasons mentioned above and shall.

Transportation of Voters to a Polling Station

It is an offence for anybody to transport voters to and from the polling station, using any vehicle, vessel or animal of transport, be it a donkey or a camel. However, where voters are unable to reach their polling stations from their place of residence because they have to cross the sea or part of it or a river, means may be provided for conveying such voters to their polling stations, or to enable them cross in order to reach their polling stations.

This course of action is only allowable if the assistance is given equally to all the voters regardless of whether or not they support the particular candidate or agent who has supplied the means of transport.

Limitation of Political Propaganda on Polling Day

Political propaganda of any form is strictly prohibited by law on the Election Day. Accordingly, political campaigns are not allowed on that day nor is the use of musical instruments, posters, speakers, cassettes, audio-visual equipment, or vessels, animals, motor cars, trucks, or other vehicles for the purpose of passing on political message.

Maintenance of Secrecy in Elections

All those authorized by law to have access into the polling stations are required to take an oath of secrecy. These include election officials, candidates and their agents as well as election observers. They are required not to disclose information such as:

- (a) proceedings in the polling stations and counting halls on how people voted, for example, who voted for which candidate;
- (b) the number of votes; and
- (c) the security arrangements pertaining to election materials.

Admission to Polling Stations

The presiding officer is authorized by the law to regulate the number of registered voters to be admitted to the polling station at the same time and shall exclude all other persons except:

- (a) the candidates and their agents;
- (b) election officers on duty;
- (c) police officers on duty;
- (d) persons necessarily assisting blind or incapacitated voters; and
- (e) observers approved or accredited by the Electoral Commission.

The presiding officer is supposed to admit to the polling station not more than 2 agents for each candidate but he may refuse admission to a person claiming to be an agent for a candidate if that person does not produce a letter of appointment as an agent signed by that candidate.

Election Procedure

Elections in Kenya, like in many other democracies, are held by secret ballot. Where there is a by-election, there may only be one ballot box, and in a general election, there will be three: one for the local authority elections, one for the parliamentary elections and another for the presidential elections. Immediately before the start of the voting, the presiding officer should show the ballot boxes to people lawfully present in the polling station, and should also allow those candidates and their agents present and allow them to ascertain that the boxes are empty. The boxes are then sealed so that they may not be opened without breaking the seal.

After the ballot boxes have been sealed the presiding officer will place them in the polling station at a point where they can at all times be in view of himself or a deputy presiding officer and of the candidates and their agents. Any candidate who wishes to affix the seal of his or her party to the ballot box is allowed to do so. The presiding officer then announces the start of voting.

Before a ballot paper is given to a registered elector for the purpose of voting, it is stamped with the official mark of the Electoral Commission. The number and name of the elector as stated in the register is then called out and the electoral number of the voter marked on the counterfoil of the ballot paper. A mark is then placed on the copy

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register against the electoral number of the elector to denote that a ballot paper has been given to the registered voter but without showing any particulars of the paper. Usually this is done by just drawing a red line across the name. The electors' card is then stamped to show that a ballot paper has been delivered to the voter. The voter then marks his or her vote in favour of the candidate he or she would like to elect and casts it in the ballot box. He or she then has to allow one of the clerks to dip one of his or her fingers in ink of distinctive colour and which is sufficiently indelible to leave a mark for the period of the election and to have his or her identity card marked with the seal of the Electoral Commission leaving a permanent impression on the card. Except in the case of a person assisting a voter who is disabled or illiterate, no other person should be present in the polling booth when a voter is marking his or her ballot paper.

The presiding officer is also allowed to assist such voters. Every time a voter is assisted, the presiding officer is supposed to record in the copy register, by means of a symbol placed opposite the name of the elector, the fact that such a voter was assisted. The presiding officer is required by law to allow one representative of each candidate to witness the marking of the vote under this regulation. After the voter has cast his or her vote, he or she is required to immediately leave the polling station.

Where the elector spoils a ballot paper unintentionally or carelessly, he is entitled to be given a fresh one by the presiding officer. The presiding officer should cancel the spoilt ballot papers, and the mark counterfoil accordingly.

At the close of elections, each presiding officer is supposed to make a written statement of the following:

- (a) the total number of ballot papers issued to him by the returning officer at the start of the elections;
- (b) the number of spoilt ballot papers;
- (c) the number of unused ballot papers.

Thereafter, the presiding officer, in the presence of those candidates or their agents present, should put into separate packets (a) the spoilt papers, if any; (b) the marked copy register; (c) the counterfoils of used ballot papers; and (d) statements prepared by the presiding officer relating to the polling proceedings. He or she should also seal each of those packets. He or she should then seal the ballot box to prevent the insertion of anything into such boxes.

Up to the 1997 general elections, the votes would all be transported to a central place within the constituency for counting. Since 2002, the votes are now counted at the polling station and the votes are counted at the polling station and results relayed to the returning officer at a central location in the constituency. Ballot papers which do not bear a mark that clearly shows the intention of the voter; or on which votes are given for more than one candidate; or which anything is written or so marked as to reveal the identity of the voter, is not counted. Once the results from all the polling stations have been collated, they are announced by the returning officer before the candidates or agents present.

Election Observation

At any election, the law allows people, who have applied for accreditation from the Electoral Commission and to whom such accreditation has been granted, to observe the entire election process. Election observation involves the observation and scrutiny of the electoral process from the time there is a sniff of elections in the air to the polling day and the counting of votes. Ideally, however, the process should begin when the election date is announced. Observers should be neutral and non-partisan in terms of the politics of the day, and should also observe the following:

- ♣ Refrain from being “pocketed” by candidates or their agents for their own interests;
- ♣ Avoid hampering in any way the proceedings at both polling stations and counting halls;
- ♣ Avoid a visible political stand which would indicate open support or canvassing for a particular political party;
- ♣ Not to allow themselves to be unduly influenced or pressured by any extraneous factor in the performance of his duties;
- ♣ Be people of moral uprightness, honesty and firm commitment to fair play;
- ♣ Observe the oath of secrecy not to divulge the official proceedings at polling stations and counting halls;
- ♣ Be firmly committed to the principles of democracy, human rights and the Rule of Law;
- ♣ Perform their duties diligently and conscientiously. This involves being on the alert at all times for any manifestation of electoral malpractice before and on the polling day.

Election Offences

In order to safeguard the integrity of the election process, the law makes it illegal for people to do certain things. Any person caught doing any of the things forbidden can be charged in a court of law and, if found guilty, sentenced to a prison term or fined such an amount of money as the law prescribes for that offence. Examples of election offences include:

- ♣ Campaigning at polling stations on polling day
- ♣ Preventing or barring people from voting
- ♣ Bribing voters
- ♣ Pretending to be someone so that you can vote in his or her place (known as impersonation)
- ♣ Voting (or attempting to vote) more than once
- ♣ Threatening or tricking a voter to vote in a certain way
- ♣ Registering more than once as a voter
- ♣ Willfully destroying a voter’s card
- ♣ Manufacturing, or assisting someone to manufacture, a voter’s card
- ♣ Divulging any information obtained from polling stations or counting halls in breach of the oath of secrecy regarding elections.

Election Petitions

Anyone who is dissatisfied with the results of an election can file a case in court and ask the court to cancel the election, known as an *election petition*. Although election petitions are important in enforcing the rights of voters and candidates regarding elections, there have been concerns in the past regarding the manner in which the courts have handled them. One petition, in which a loser had challenged the election of Joshua Angatia as the Member of Parliament for Malava, took more than five years to determine. When the court eventually cancelled the election, there was not even enough time to organize a by-election! There have also been concerns regarding the use of strict interpretations of the law to deny voters and candidates justice. In one instance, the court declined to even listen to the case of a loser in the party nomination. Instead, he was ordered to await the results of the election, in which he would not participate because he had been rigged out of the party nomination, and file an election petition later. In another, the court refused to hear a case filed by Mwai Kibaki against the election of Daniel arap Moi in 1997 because it had not been served personally – yet Mr. Kibaki as clearly unable to do so, despite numerous attempts, due to the security detail around Mr. Moi in his capacity as a sitting president.

Engendering the Electoral Process

Women's participation in leadership and decision-making in Kenya is still skewed in favour of men. But this is not limited to Kenya only. Even in the ancient Roman Empire, women did not have the right to participate in governance. The admission of women into politics, by allowing them the freedom to vote as a first prerequisite of that political participation, is a fairly recent phenomenon. Available data shows that women have been granted the right to vote only in the last 30 or so years. In Iran, women finally got their right to vote in 2003 after years of struggle and loss of lives.

Term	Number					
	House Total	Elected Women	Nominated Women	Total Women	% Women	%Men
1963-1969	163	0	0	0	0.0%	100.0%
1969-1974	170	1	1	2	1.2%	98.8%
1974-1979	170	4	2	6	3.5%	96.5%
1979-1983	170	4	1	5	2.9%	97.1%
1983-1988	170	2	2	4	2.4%	97.6%
1988-1992	200	2	1	3	1.5%	98.5%
1992-1997	200	6	1	7	3.5%	96.5%
1997-2002	222	5	4	9	4.1%	95.9%
2002-2007	222	10	8	18	8.1%	91.9%

In Kenya, women's participation in elections has been unequal since independence (See Table below). Although there have been changes over the years, it has never constituted over 20% of the total number of seats, yet women constitute close to 51% of the population. The situation is only slightly better in the local authorities. The causes for this unequal participation in leadership and decision-making include stereotypes about their

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roles, discrimination at party level and electoral violence. With regard to electoral violence, it not only affects women more significantly but also includes humiliating psychological violence. In one election campaign, a male candidate whipped out of his pocket a pair of panties and told the crowd that they belonged to the female candidate competing him, who had been in his house the previous night!

There are signs of improvement, with a few women holding positions of power in the civil service, the local authorities, parliament and the cabinet. Nevertheless there is still need to create a situation where women contest for political power on a more equal footing with men and in which their access to political power is not based largely on tokenism.

Chapter 9

Governance

What is Governance?

Governance refers to how a group of people living or working together manages their relationships and control behaviour within the group. It therefore refers to the management of relations between the leadership and their people. In a broad sense it refers to the process of managing public affairs. It extends to the manner and extent in which citizens take part in the process of governance. In a country or state governance is normally undertaken by government. The government has the power to manage the affairs of the public on behalf of the people. However since governance is larger than government, the government in managing affairs must do so according to the will of the people. In practice too there are also other actors who play a role in the process of governance. These include civil society and private sector.

Good governance is one that is democratic and participatory and one where the citizens will is respected and taken into account in decision-making processes.

Levels of Governance

Governance can be seen at different levels within the society. Some of the important levels include:

- Family level
- Community level
- Nation state level
- Provincial level
- Local authorities

At each of these levels there are different actors who play different roles to ensure that the process of governance is carried out in an effective and democratic manner.

Family Level.

This is normally the smallest unit in society for purposes of governance. At this level the actors include the father, mother and children. In extended families the actors are much larger and include relatives. At the family level, members share duties and family tasks. For there to be harmony and good governance it is necessary that the members discuss amongst themselves so as to reach a decision on issues affecting their family and to determine their priorities. Although the parents are normally the head of the family through the process of discussion all members of the family participate in decision-making. This helps to ease tensions and avoid conflicts.

Community Level

The community is a grouping of individuals with common interests. It is normally composed of several families. As far as governance is concerned there is an increased number of people at the community level. These people all need to be involved in the

decision making process. This makes the process more complicated. However since all these people are affected by the decision a mechanism has to be found to involve them and to ensure that their interests are taken care of. Even if the decision is made by a few nominated individuals the important thing is that all the members of the community have a mechanism for taking part in discussions on matters affecting the community. Such communication channels must be clearly established and known by members of the community so as to maintain peace and harmony within the community.

Local Authorities Level

These institutions have been established to ensure that citizens participate in governance at the local level. By their very nature, local authorities provide services at the local level. Examples of local authorities include county council, town councils and municipal councils. Even at this level there are several interests of the residents that need to be balanced in the process of governance. Local authorities provide basic services to the people and are critical if well managed. However in Kenya local authorities have become synonymous with failure and corruption due to their poor management. Secondly over the years the powers of local authorities have been reduced and the same transferred to the central government. The minister for local government for example has overriding powers over local authorities including the power to dissolve councils at will. Further appointees of the central government like town clerks have more powers than the elected representatives of the people, the councilors.

Due to the limitations of the current local authorities, a central feature of the constitutional review debate in Kenya has been the drive towards devolution of power so as to strengthen the role of local authorities and improve governance at the local level

Provincial Level

At the provincial level to ensure governance is carried out there exists an agency referred to as the provincial administration. As conceived this was to provide links between the central government and the people all the way from the top down to the grassroots level within the villages. The work of the provincial administration is to carry out government decisions at the provincial, district, division, location and sub-location level.

The provincial administration starts with the office of the president and moves down to the Provincial Commissioners, District Commissioners, the Divisional officers, the chiefs and then sub-chiefs.

Nation State Level

Within a state the range of diverse interests and groups are varied. All these must be listened to and their interests taken into account in the process of governing the state. This is not easy to do. It is however essential for their to be good governance and for those with the principal responsibility to govern to be able to do so in a representative and fair manner. Several issues that need to be done to aid the process within nation state includes opening a channel of communication between the government and the governed.

In the process of trying to balance the interests of various forces in the state, the government must try as much as possible to ensure that the interest of all sectors of

society are taken into account and implemented. This requires a high degree of fairness and justice. Only then will there be peaceful co-existence amongst the diverse members of the state. Good governance in a state requires that the government adhere to the rule of law by respecting laws and regulations governing the society. Further such laws and regulations must be applied equally to all people in the society without fear or favour.

Leadership and Governance

Strong and effective leadership is important in creating a strong, thriving and healthy society. Leaders guide people's energies towards the goals of society. For good and effective governance a leader should be democratic and govern in accordance with the will of the people. A leader who is not democratic is called an authoritarian leader or a dictator. Such leader does not govern in accordance with the law and soon runs down institutions and creates bad governance in the country.

A democratic leader also encourages participatory leadership, one in which the citizens participate.

Challenges to Good Governance

There are several challenges to efforts at good governance. These include:

- (i) **Corruption:** this involves the misuse and abuse of the official powers for private benefit. It involves the improper and unlawful enrichment by officials through abusing their powers and their offices. It involves stealing of public fund or using the said funds for private gain. Bribery and extortion are forms of corruption. Both the giver and taker of corruption are guilty. Fighting corruption requires cooperation of both government and the citizens.
- (ii) **Political Patronage:** this is the process by which politicians give support to another person or people as a way of maintaining a relationship for political purposes. Such leaders tend to favour a certain group of politicians when allocating public resources.
- (iii) This involves favouring one's own relatives over other individuals. It results in people being given jobs to which they are not suited. This is dangerous for good governance as it kills the culture of merit-based appointment
- (iv) **Bureaucracy and Red-tape:** bureaucracy usually refers to a large organization with very clear features and many rules and procedures that enable the organization to achieve its objectives. It is usually associated with a large organization like the civil service. A bureaucratic organization is organized in a series of levels with the highest being at the top. They are very difficult to understand and change due to the many rules and procedures. They cause delays and inefficiencies which are often referred to as red tape. A lot of time is spent making decisions. They are inefficient and slow. Many officers in the organizations avoid taking responsibility for what the organization does or fails to do.

Ways of Entrenching Good Governance

Entrenching good governance is a cooperative process requiring the adoption of several approaches but above all calling for setting up an integrity system in society. An integrity system provides a practical framework of checks and balances to prevent corruption and other illegal practices that damage the public interest. It also encourages an environment that improves the quality of official decision-making.

Leadership is very important in achieving good governance. However, electing a good head of state or government does not always guarantee good governance. Support from the wider society is required for its success. Leaders must get support from a wide range of groups. Building political will for good governance needs to begin at the grassroots. Leaders must also set the example for the rest of society. They must be committed to good governance.

Institutional Pillars for Good Governance

Good governance to be successful and sustainable requires the existence of several institutions. It is through these institutions that good governance can be introduced in society and also encouraged. Some of the critical institutions are:

- an elected and accountable parliament
- a responsive executive
- auditor-general
- ombudsman
- independent anti-corruption agencies
- public service
- local government
- civil society
- private sector
- international actors and mechanisms

An elected and accountable legislature

Elected parliaments play a crucial role in ensuring good governance. They have the legitimacy and legal right to hold the executive accountable for actions taken by it. Parliament promotes good governance not just by checking and balancing other organs of the government but also ensuring that activities are free of corruption.

In Kenya two crucial committees that assist parliament in carrying out this task are the Public Accounts Committee (PAC) and the Public Investment Committee (PIC). The former's task is to find out how the government or public money is spent by public servants while the latter deals with government or public investments.

Parliament also has powers to set up committees with special mandate to investigate a matter of national importance after which they are disbanded. Lastly parliament has power to pass a vote of no confidence in or to impeach the president for actions that are not in accordance with the public good.

The Executive

The executive has a central role in building, maintaining and respecting a country's constitution and governance system. It should be an example of the integrity of a country's political system and its components and assumes the role of a leader in a pro-democratic system. The executive needs to be responsive to the needs of the society.

The Judiciary

An independent, impartial and informed judiciary is a key component for ensuring good governance. The judiciary needs to have constitutional protection and also needs to be accessible to the people. One of the critical issues is appointment of judicial officers. The method of appointment should be transparent and ensure that they are not under any control or influence by other organs like the executive.

Individual members of the judiciary should be held accountable for their actions in such a manner that improves the overall accountability and independence of the institution. Thus a judicial officer who engages in corrupt practices, for example, need to be punished.

Auditor-General

The task of this institution is to audit the state's income and expenditure, and acts as a watchdog over its financial integrity. The auditor-General to be effective should enjoy security of tenure and independence.

The Ombudsman

This is also referred to as the complaints office. It is an office that receives and investigates complaints about bad administration of the government. It is therefore independent of the executive. It gives people opportunity to have decisions affecting them reviewed by independent and expert people without the expense and delay of a court case. The office to be effective and enjoy public confidence must be independent of political control and have sufficient resources. It also needs to be easily accessible. Kenya does not have an office of the Ombudsman although there has been a lot of discussion for the establishment of one and is one of the proposals that is in the draft constitution.

Independent Anti-Corruption Agencies

Although the law enforcement agencies like the police have powers and authority to investigate and prosecute all offences in society, it is necessary to have specialized agencies exclusively to deal with corruption cases. This is due to the pervasive nature of corruption and its sophistication over recent years. The success of an anti-corruption agency depends on their independence, availability of sufficient resources at its disposal and the honesty and commitment of its personnel. In Kenya there exist the Kenya Anti-corruption Commission. The predecessor of this, the Kenya Anti-corruption Authority was declared unconstitutional in 2001 and disbanded.

Public Service

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The honesty and commitment of the civil service is a key factor in ensuring good governance. They are the implementers of the bulk of the policies of government. Unlike politicians, the civil service is supposed to be neutral and professional. However, they are daily under immense pressure including from the politicians to engage in corrupt practices. Their ability to withstand such pressures and perform their tasks professionally is what will guarantee good governance.

Local Government

Local governments are closest to the people in the current government structures. They have been at the center of several corruption scandals at the lower levels. Efforts to rid them of corrupt practices are therefore very important and also visible to the citizens.

The Media

An independent media plays a crucial role in the process of governance. They provide an avenue of communication between the governors and the citizens. It also helps to keep the government in check. It is essential that the freedom and independence of the media be guaranteed by law and not subject to individual whim. The other challenge is the need to fight corruption within the media just like in other sectors of society. This is even greater due to the important role that the media plays in society.

Civil Society

Civil society has become a major player in democracy and development in the world today. They have backed popular demands for greater accountability to the people. They have helped to start important anti-corruption efforts. Their contribution is essential in all efforts to ensure good governance and fight corruption. Their role needs to be strengthened.

Private Sector

The private sector plays a significant role in the development of a country. Their contribution is key as it is only through good governance that an enabling environment will exist for the private sector to operate profitably.

International Actors

The world is today more interconnected than ever before. Thus the contribution of international actors to the process of good governance in a country is essential. Kenya must cooperate with and seek help of the international actors to ensure that its efforts at governance and fighting corruption are successful.

o *Principles Underlying Institutional Pillars*

The existence of institutions is essential for good governance. However institutions alone is not sufficient. In addition it is essential that several rules and principles be followed. These rules and principles include:

- (i) Free and Fair elections: the process of choosing the leaders of a country must be free, fair and legitimate so that everybody has an equal chance of electing and being elected to govern the country
- (ii) Judicial review of official actions: judicial review is the process through the lawfulness of administrative acts. The process allows citizens to challenge

actions taken against him or her and is therefore a useful avenue of ensuring that those in administrative positions carry out their duties in accordance with the law and do not victimize or favour certain people but instead act fairly.

- (iii) Public service ethics, monitoring assets and integrity system: the need to encourage and keep high levels of honesty in the public service is linked with the citizen expectations for a better service. More governments are beginning to reassess the way in which they handle issues of corruption and the resultant loss of confidence in the honesty and efficiency of public administration. The integrity of public officials can be tested in many ways and it is essential that rules are made to fit the society's conditions.
- (iv) Conflict of interest, nepotism and cronyism: conflict of interest occurs when one with power is required to make a decision on a matter in which he/she has personal interest. The person makes a decision that favours their personal interest and not the best possible decision. Conflict of interest, nepotism (giving jobs to relatives) and cronyism (giving jobs to friends) can for example, ensure that the best person is not necessarily the person hired for the job. To avoid these vices it is essential that clear procedures and rules are introduced that help identify and deal with conflicts of interest and prevent serious weakening of the operations of an organization.
- (v) Public Procurement: the buying of goods and services by the public sector is big business and a potential avenue of corruption. It is essential that checks and balances be put in place and private professionals be involved too to ensure that the process of public procurement is transparent and corruption-free.
- (vi) The right to information, public awareness and public records: to ensure democratic governance it is imperative that citizens have a right to information protected by law. Such right should extend to the right to access public records and also that efforts at public awareness be encouraged.
- (vii) Giving citizens a voice: citizens with power are a vital support to a county's system of governance. Citizens need to be informed, to know their rights, be willing to claim them and be prepared where necessary, to complain without fearing oppression. Paralegals and their organizations are important avenues for giving a voice to citizens.
- (viii) Citizen's participation: citizens need a supportive environment to enable them play an active and meaningful role in the process of governance.
- (ix) Fighting corruption: it is important that adequate and specific legislation exist to encourage the fight against corruption

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Good governance involves the proper management of public affairs and resources. The management of natural resources, which also forms part of good governance, is discussed in a separate section. In this section we discuss the management of the other public resources specifically finances.

Taxes, loans and grants in aid are some of the most important sources of government income or revenue. Industry and commerce are other sources. Together these sources provide the government with the money to do its duty to society. The government as the custodian of public resources needs to use the resources effectively with care, good planning and efficiency. Proper use of public resources improves governance. It also prevents wastage and allows for sound national development. Mismanagement of resources on the other hand weakens people's faith in the system of democracy and results in further corrupt practices.

The government has a duty to efficiently manage and report back to the public on the use of public resources. A number of institutions exist to assist the government to check on how public resources are used. These institutions act as watchdog of public resources and may therefore be said to contribute further to good governance. They include the office of the Controller and Auditor General which checks whether the government money has been used as planned, the Ministry of Finance which is responsible for making decisions on government income and spending, the Central bank of Kenya which is the main banker of the government. Its duties include managing incomes and monetary policies of the country and supervising activities of all public institutions and commercial banks.

Kenya and Global Governance

Kenya is a sovereign state. This means that it has power to make decisions and act without seeking the authority of another state or organization. The reality of the modern world is that states need each other as they pursue their national interests. State therefore enter into treaties and other agreements with other states as part of their sovereign rights and to pursue their interests.

Kenya, for example is a member of several regional and international organizations. Each of these organizations has its own rules and membership to it comes with both obligations and rights. Some of the organizations which Kenya has joined include the United Nations, The African Union, the east African Community and the Common Market for Eastern and Southern African States (COMESA).

To be able to relate with other countries Kenya has a ministry in charge of foreign affairs. It also invariably has diplomatic missions in majority of countries with which it has relations. The way Kenya relates to foreign nations is governed by its foreign policy.

Due to the world having become a global village despite Kenya being a sovereign state some of the acts within the country are governed by commitment Kenya has entered into by being a member of the international community and by joining several regional and international organizations. This is some of the effects of globalization. For example, the

United Nations has over the years developed minimum human rights standards that all states member parties to the UN and the UN Human Rights treaties must guarantee their citizens. Similarly Kenya must participate in and join hands with other states in efforts to ensure international peace and security. It is in pursuit of this duty that Kenya continues to contribute forces to be deployed in peace-keeping missions and also why Kenya was a key actor in efforts at resolving the Sudan and Somalia conflicts and guaranteeing peace in these countries.

As part of the global process there exists certain international institutions that also affect governance within the country. The two most crucial are the International Monetary Fund (IMF) and the World Bank. In the recent past they have attached conditions to the loans they grant to developing countries with an intention of improving governance in those countries.

Settling International Disputes

Global governance normally stress that when disputes arise they should be resolved peacefully. There is therefore a lot of premium paid on amicable settlement mechanisms. The International Court of Justice has long existed as an avenue for arbitrating international disputes. Other methods that are mentioned by the UN Charter include:

- (i) **Negotiation:** this method of dispute settlement involves direct discussions between or among the parties to the dispute with the aim of arriving at an agreement. It is at the heart of diplomacy and works well if all parties are truthful and moderate.
- (ii) **Mediation:** in mediation, the parties to a dispute agree to invite a third party to help them reach an agreement the mediator does not make a decision on behalf of the parties but helps them to reach an agreement through compromise
- (iii) **Enquiry:** this process involves investigation by an independent party into the facts of the dispute and the writing of a report of the findings. This report is then used for negotiating a settlement. The investigation by an impartial party helps to reduce the tensions and mistrust normally associated with international disputes especially over facts.
- (iv) **Arbitration:** this a method of resolving a dispute through the use a neutral third party agreed upon by the parties. The third party called an arbitrator listens to both sides of the disputes, looks at the applicable law and then reaches an award.
- (v) **Conciliation:** it is similar to mediation save that under conciliation the third party is an international body whose help has been sought to help solve the dispute. The conciliator investigates the facts of the dispute and suggests the terms of settlement that are acceptable to the parties.
- (vi) **Judicial Settlement:** this is the process of settling a dispute through an international court. It is different from arbitration because in arbitration legal principles to be applied are limited to what the parties earlier agreed. There is no such restriction in judicial settlement.

Chapter 10

Gender and Development

Understanding Gender

There has been immense interest in gender-based approaches to development in recent times. Gender analysis and training are now considered essential tools in the development process and it can now safely be argued that there is new international commitment to gender equity and women's advancement. However, the situation across many countries in the world is still one of unequal gender relations. Yet, despite its usefulness in the context of development, gender is not a very well understood concept and is, in certain respects, actually a misunderstood subject. Some people confuse it with sex, yet others confuse it with women. This section provides definitions of some of the concepts critical to the understanding of gender.

Social Construction of Gender

The dictionary meaning of gender is "the condition of being male or female". This equates gender with sex, yet the two are different: while sex refers to universal, biological characteristics of women and men, gender refers to men's and women's roles and relationships in a specific culture or society. Gender is therefore said to be a "social construct" because it is defined, supported, and reinforced by structures and institutions in society.

Difference Between Sex and Gender	
Sex	Gender
Universal	Differs within/between cultures
Biologically determined	Socially constructed and learned
Permanent	Dynamic, changes over time
Influenced wholly by genetic factors	Influenced by a wide range of social and economic factors

Gender Stereotypes

The concept of gender is based on stereotypes of male and female behaviour that are often associated with sex. In the most common, for example, women are assigned the role of child-rearing (a social role) because they are the ones who give birth to children (a purely biological function). Yet there is no doubt that any person can take care of children. The only reason why this happens is because society has closeted men and women into neat social pigeonholes in which stereotypes are built around the perceived capabilities of men and women.

Gender Relations

The social relationships between men and women as specific sexes which in turn create systematic differences in the positioning of men and women are known as *gender relations*. At one level, there is both connection and mutual support. For instance, a married woman is expected to provide family support by bringing up the children and taking care of the family's social needs while married men are expected to protect the

family and to provide security. At another level, the relationship can also be of separation and competition. There is difference and inequality where one sex has the power and control over resources whereas the other does not. Gender relations vary from society to society and are affected by other social relations such as class, race, ethnicity and disability. For instance, it may be difficult for a women to access certain resources but even more difficult for a poor woman or a woman with a disability. In the final analysis, gender relations can determine livelihoods, HIV/AIDS infection rates and participation in politics and decision-making.

Practical Needs, Strategic Interests

Different roles generate both practical needs and strategic interests. *Practical needs* are immediate and material and arise from current conditions. Women's practical needs often arise from the responsibilities assigned to them in the gender division of labour. Child care services, maternal and child care are ways of meeting these needs. While these practical interventions can increase the participation of women in development, they are unlikely to change the gender relations and, in fact, may preserve and reinforce inequitable divisions of labour. Strategic interests are long-term, and are related to the positions of women and men. They focus on equalizing gender-based disparities in wages, education, employment and participation in decision-making bodies. Nevertheless practical needs and strategic interests are linked: responding to practical needs identified at the community level can provide an entry point for identifying and addressing their long-term strategic interests.

Gender Analysis

In order to determine how gender relations may affect one person's status over another one's, it is important to undertake a gender analysis. This involves examining and evaluating the sociological relations between men and women to assess the impact that certain laws and policies have on the ease with which they can access certain resources or participate in certain activities. It explores and highlights the relationships of men and women in society and the inequalities present in those relationships by asking the following questions:

- Who does what?
- Who has what?
- Who decides?
- How is it done?
- Who gains?
- Who loses?
- Which men?
- Which women?

In the course of the analysis, the gender roles, gender division of labour, access and control, and power relations are examined. Gender roles are about how women are expected to behave in specific contexts. Women in many communities, for instance, are expected to be publicity shy and to follow rather than lead. With respect to *gender division of labour*, although men and women are both involved in productive labour, their functions and responsibilities will differ. At the community level, men tend to have formal

leadership roles and perform high status tasks while women often do the organizing and support work. Because women are active in all three types of labour (reproductive, productive and community) they are said to have “triple roles”. *Access and control* are about the distinction between the opportunity to make use of something as distinguished from the ability to decide the use of something and to impose that decision on others. In looking at the gender relations around land for instance, it is important to ask if women own the land on which they farm. *Power relations* refer to the ability of a group to change its destiny and course by taking action to ensure gender equality. Many women, for instance, owe their advancement to the men in their lives and lack the independence to determine their own course.

Practical Needs versus Strategic Interests	
A. Practical Needs	B. Strategic Interests
<ul style="list-style-type: none"> • Tend to be immediate, short-term, 	<ul style="list-style-type: none"> • Tend to be long-term.
<ul style="list-style-type: none"> • Unique to particular women (site specific) 	<ul style="list-style-type: none"> • Common to almost all women (e.g. vulnerability to physical violence)
<ul style="list-style-type: none"> • Relate to daily needs; food, housing, income, health, children, etc. 	<ul style="list-style-type: none"> • Relate to disadvantaged position; subordination, lack of resources and education, vulnerability to poverty and violence, etc.
<ul style="list-style-type: none"> • Easily identifiable by women. 	<ul style="list-style-type: none"> • Basis of disadvantage and potential for change not always identifiable by women
<ul style="list-style-type: none"> • Benefits the condition of some women 	<ul style="list-style-type: none"> • Improves the position of all women in a society
<ul style="list-style-type: none"> • Can be addressed by provision of concrete and specific inputs (e.g. food, hand pumps, clinic, etc.) 	<ul style="list-style-type: none"> • Must be addressed by consciousness-raising, increasing self-confidence, education, strengthening women' organizations, political mobilization, etc
Addressing Practical Needs	Addressing Strategic Interests
<ul style="list-style-type: none"> • Tends to involve women as beneficiaries and perhaps as participants 	<ul style="list-style-type: none"> • Involves women as agents or enables women to become agents
<ul style="list-style-type: none"> • Can improve the condition of women's lives 	<ul style="list-style-type: none"> • Can improve the position of women in society
<ul style="list-style-type: none"> • Generally does not alter traditional roles and relationships 	<ul style="list-style-type: none"> • Can empower women and transform relationships

Women in Development/Gender and Development

Women’s development, in the context of the gender debate has largely been represented by two schools of thought. These are the Women in Development (WID) movement, which can be traced back to the 1970s, and the Gender and Development (GAD) movement, which can be traced back to the 1980s. Although the two are different, they can contribute to women’s advancement and increased gender equity. Women-specific projects enable women to address their practical needs and gain experience for future projects in which they will be mainstreamed. The GAD approach, which aims to integrate gender into programmes, enables women to address their strategic interests while women and men work together towards mutual goals and greater equality. Both deserve consideration by development planners.

WID and GAD		
	Women in Development	Gender and Development
The Approach	<ul style="list-style-type: none"> Seeks to integrate women into the development process 	<ul style="list-style-type: none"> Seeks to empower women and transform unequal relations between women and men
The Focus	<ul style="list-style-type: none"> Women 	<ul style="list-style-type: none"> Relations between men and women
The Problem	<ul style="list-style-type: none"> The exclusion of women from the development process 	<ul style="list-style-type: none"> Unequal relations of power that prevent equitable development and women’s full participation
The Goal	<ul style="list-style-type: none"> More efficient, effective development 	<ul style="list-style-type: none"> Equitable, sustainable development Women and men sharing decision-making and power
The Strategies	<ul style="list-style-type: none"> Implement women’s projects, women’s components, integrated projects Increase women’s productivity and income Improve women’s ability to manage their households 	<ul style="list-style-type: none"> Identify and address short-term needs determined by women and men to improve their condition Identify and address women’s and men’s longer-term interests

Gender Bias

Bias is a prejudice or special influence that sways the mind. In the context of gender relations, it amounts to treating men and women differently on the basis of their sex. It is based on the sexual stereotypes and culturally defined gender roles that determine how we perceive a certain sex. However, gender bias is not always this straight-forward: sometimes treating two people who face different constraints in accessing a constraint

equally may result in bias. It can be dealt with through the implementation of programmes that promote greater gender equality and equity.

Gender Equality

Equality refers to the fact that men and women have equal opportunities, rights and obligations in life. It entails the concept that all individuals, men and women, are free to make choices and to and develop their personal skills. It also refers to the fact that different aspirations, behaviours, and needs of women and men are considered, valued and favoured using one yardstick. There are limitations in dealing with equality, which mainly flow from the manner in which various people utilize their opportunities. For example, introducing free primary education will not necessarily lead to more girls enrolling in school if there are other factors militating against girls' attendance of schools, such as lack of friendly sanitary facilities. This is why gender equity is important.

Gender Equity

Gender equity refers to fair treatment of women and men, according to their respective needs. Gender equity acknowledges that at times special attention needs to be paid to address the special needs of one sex. It requires that we look at the strategic interests of the disadvantaged gender (in Kenya's case women) and try to bring meaningful changes in women's lives.

Strategies for Responding to Gender Inequalities

There are many ways to reduce gender inequalities between men and women. These include:

- Affirmative action quotas in the education sector, so that more women can access education. The ability to access education improves on a capability without which women cannot achieve their strategic interests.
- Affirmative action quotas in leadership positions, such as the seats reserved for women and other disadvantaged categories in countries like Uganda
- Changing the electoral system: most of the counties with high numbers of women representative s in legislatures have a proportional representation system
- Reducing the prices of, or providing for free, items that are critical to women's access to education, such as sanitary pads
- Mainstreaming gender in all development programmes
- Establishment of special watchdog bodies to monitor the attainment of gender mainstreaming, for example the National Commission on Gender and Development
- Reducing the incidence of factors that hinder women's access to leadership positions, such as electoral violence

Institutions for the Promotion of Gender Mainstreaming

Since 1985, Kenya has always had a Women's Bureau, but which was an under-staffed department without much clout. Following the 2002 General Elections, the president established a Ministry whose responsibilities included, amongst others, gender and the National Commission for Gender and Development was eventually established in 2004. The Gender Commission is in charge mainstreaming gender in all development approaches and advising government accordingly. Such institutions, by providing technical expertise for gender mainstreaming and acting as a watchdog on government

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development programmes, may speed up Kenya's attainment of the goals of the Beijing Platform for Action and ensure greater gender equality and equity.

Chapter 11

Violence against Women

Introduction

Violence against women ranges from wife beating, female circumcision, to rape and defilement. Women have suffered serious injuries and even death as a result of such violence. There are several reasons why gender violence is rampant in society. These reasons are a mixture of social, cultural, economic and political factors. Underlying violence against women is the existing patriarchal society's view of women as objects rather than equal members of the human race. There are on-going campaigns by lobby groups for the eradication of all forms of gender violence and discrimination. This chapter discusses some aspects of domestic violence. It deals with wife beating and sexual offences, two of the most common forms of violence against women. It is hoped that this discussion will create awareness on issues of gender violence, sensitize the citizenry on its causes and effects, and challenge them to identify and suggest solutions to the problem.

Wife Beating

There are many women who have gone through painful life experiences at the hands of people they trusted. While there are many "justifications" offered for why men beat their wives, none of them is sufficient. Traditional justifications centre on the man's customary right to chastise the wife. This so-called right was based on the thinking that a woman was a man's property: he had bought her with bride price. A woman was also regarded as inferior to the man so that, like his child, he could discipline her to "make her straight." Indeed in most traditional African societies, it was all right to "discipline" the wife every so often. This was backed up by folklore to the effect that if a woman was not beaten, she could easily begin thinking that she was no longer loved by her husband!

Today it is accepted that the woman is a man's partner in marriage and not her property, irrespective of the payment of the bride price. Bride price is different from purchase price. Traditional justifications centering on the woman's inferiority have also been disproved. Some men engage in wife beating as an unconscious way of releasing their frustrations with their employers, co-workers or their financial situations. But what such men should realize is that women, too, have their own frustrations and they do not release them on men. They have to learn to live with their frustrations.

A few incidents of wife beating have been traced to the man's mental sickness, which he may not even be aware of. Because the wife is as much a human being as the husband and thus equally entitled to her human rights, beating her is a violation of her human rights. Wife beating is a crime: those who beat their wives break the law and may be convicted of assault and battery if a complaint is made about their conduct leading to persecution.

Victims of domestic violence suffer both physical and mental injuries. Some have died, others have suffered serious burns. Some have broken limbs to show. Apart from the physical harm, victims also suffer mentally. They agonize over the beatings. Their self

esteem and worth is eroded. They blame themselves for the violence. Some end in hospital.

A victim of wife beating need not feel guilty: no-one has the right to beat or threaten another. The important point to emphasize is that women should feel they have control over their lives. Here are a few tips on what victims could do:

Do Something

A victim should not wait for another attack She should do something to protect herself or the beatings may turn into a habit. The longer she waits the more difficult it becomes to act. Even if she has been beaten for many years she can still protect herself from more beatings. It is never too late.

Go to a Safe Place

The victim could go to a relative's house and ask to stay for a while. It will show the man that she has choices, and that she will not accept violence. She does not have to leave home but going away may give her a chance to decide what to do next.

Seek the Help of the Family

Generally, customary law allows a battered wife to ask her family or her husband's family for help. The family can ask the husband to promise not to beat her again. They can also ask him to pay compensation. If the immediate family is unwilling to help, the victim could seek the help of extended members of the family.

Get Medical Help

If there are injuries, the wife should seek medical attention as soon as possible. Keep the medical records safely since they may be required as evidence if he is charged in court.

Go to a Rescue House

A rescue house is a place where abused women can go and obtain accommodation and counselling while contemplating what to do. In Kenya, the Women's Rights Awareness Programme (WRAP) runs a rescue course.

Make a Criminal Complaint

When a husband beats or threatens his wife, he commits a criminal offense. Under the penal code wife beating is outlawed in all forms, from subtle molestation to serious mutilation. According to the law, any person who intimidates or molests any other person is guilty of an offence and is liable to imprisonment for a term not exceeding three years. Intimidation is described as threatening to injure a person's body, reputation or property. It does not matter even if the person intimidated and molested is the wife of the attacker. It is with intimidation and molestation that chronic gender violence begins.

Physical assaults are also outlawed under the law and any person found guilty is liable to imprisonment for a jail term ranging from one year to life. A common assault, like a shove, a slap or a tempered blow could be punished with one year in jail while a serious injury could be punished with life imprisonment with or without corporal punishment. The wife has a right to make a complaint by reporting the matter to the police. Sometimes

police may decline to intervene arguing that they cannot interfere in family quarrels or by trivialising the injuries. The law says that the police must help. Police will arrest the husband and charge him in court. If the husband is charged, the wife has to be ready to stand in court as a witness, but if she declines, the case will be dismissed. It may be worthwhile for the wife to leave the house pending the outcome of the case.

If the two reconcile, it is possible for the criminal charges to be withdrawn. Should the case proceed, it is up to the magistrate to decide if the husband is guilty or not guilty and determine the punishment.

Seek a Restraining Order

The wife may seek from a Magistrate's court a binding order directing the husband to stop beating or threatening her. She will be required to swear an affidavit stating what has happened, and the basis of fear of subsequent beatings. Summons will be issued to him to attend court on a named day. The magistrate will listen to both before issuing a restraining order. If the husband beats the wife after the restraining order has been issued, he commits an offense and may be jailed.

Obtain Judicial Separation

The wife can seek judicial separation because of domestic violence, whether the marriage is customary or statutory. A judicial separation means that the court gives the wife permission to live away from the husband. The court can order the husband to pay maintenance money to the wife and children, and order him to leave the house. It is possible to separate from the husband informally, but a judicial separation is better because the husband becomes legally excluded from the wife's house. Unlike divorce, judicial separation does not bring a marriage to an end and neither party can remarry.

Obtain a Divorce

In customary and statutory marriages, divorce is allowed on the grounds of violence. The reason for seeking divorce have to be given and proved. At the time of granting divorce, issues of the custody of children and division of property should be raised.

Rape and Related Sexual Offences

The law defines *rape* as sexual intercourse by a man with a woman without her consent. The consent to sex must be freely obtained. Consent obtained because of threats, intimidation or drugs is not acceptable. Rape attracts a maximum punishment of life imprisonment.

Defilement is having sexual intercourse with a female aged less than 14 years. Even if she agreed to have sex, the law presumes that a female below 14 years is not in a position to give consent for sexual intercourse. The maximum punishment for defilement is 14 years.

Incest is sexual intercourse between two close relatives e.g. father/daughter, son/mother, brother/sister and grandfather/granddaughter. The punishment for anybody found guilty of incest is a maximum jail sentence of five years.

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Indecent assault is conduct that lowers the dignity and modesty of a woman. Recently a *matatu* tout, who kissed a school girl was jailed for life. On appeal, the High Court maintained that the sentence was just and declined to reduce it. It is also indecent assault if, as happens in public transport vehicles, words are uttered or gestures made intended to lower a woman's modesty. It is not a defence that the girl consented if she is under fourteen years. Any person found guilty of the offense of indecent assault is liable to a prison term of five-years.

The law says that a husband cannot rape his wife. However, if a man forces his wife to have sex, then he may be convicted of indecent assault and be punished. This statement of the legal position is, however, subject to debate. Different countries have settled on different positions. In Britain for example, it is now a judge-made law that husbands can rape their wives. Although under Kenyan law husbands cannot rape their wives, it is rape if a man impersonates a husband and has sex with the wife, because the consent for this act will have been obtained fraudulently.

Why Do Men Rape Women?

Many "reasons" have been offered as to why men rape. Here are some of them.:

Drunkenness

Some men allege that they commit rape when they are drunk. This is not a valid reason. How come every man who drinks is not a rapist. Drunkards who go on rape orgies are mentally sick and should seek medical assistance.

Provocative dressing

Some men allege that they are provoked to rape by the dressing of women. Again this is no reason. A woman has a right to choose how to dress so long as she does not exceed the bounds of reason and indecently expose herself. If she does, she should be charged by police in court, not raped.

Sexual "hunger"

Men just out of prison or whose freedoms are limited often allege sexual starvation as a reason to rape. For one, abstention from sex causes no known sickness and neither is it uncontrollable.

Whatever justifications men offer, the bottom line is that rape is a manifestation of man's desire to control and subjugate the woman. The rapist usually wants to show the victim how powerless she is and how powerful he is.

Effects of Rape

Rape has short and long term physical and psychological implications. Infection with a venereal disease or even the incurable HIV/AIDS are possible results. So is pregnancy (in which case abortion is allowed by the law). Physical injuries of the genital area and elsewhere often result as the victim puts up a struggle. Psychologically, a victim feels deeply violated and loses self-esteem and confidence in men. It is hard for her to subsequently maintain a relationship with a man. The scars of rape linger for long.

Careful counseling is required, as well as the administration of a course of post-exposure antiretroviral therapy.

Living with Rape

A women who has survived a rape ordeal should take measure so ensure the preservation of evidence, begin her healing process and avoid catching an infection:

- Report the incident to the police as soon as possible.
- Inform a friend or a relative who should record what has been said.
- Record what has happened in as much detail as possible in writing.
- Go for a medical examination immediately and obtain a medical report.
- Report the attacker to the police as soon as possible, or where the attacker is not known, any person she suspects could have raped her.
- Make a statement at the police station and sign it.

However, she **MUST NOT**:

- Bathe before going for medical examination.
- Dispose of the clothes she was wearing until they have been examined, and she is advised to do so.
- Accept any kind of inducement or bribe from anybody so as not to report the matter to the police.
- Say anything to people whom she suspects have other motives in questioning her.

Why Survivors Do Not Report Rape

Though rape is a crime, it is different from theft or murder. People who have been raped are less likely to report the crime. And there are several reasons why they would not want to report:

Self-blame

Rape victims may think that somehow, it was their fault that they were raped. Most women have grown up believing that women "ask for" rape.

Shame

Rape victims may feel embarrassed or ashamed. They would not want it made public that they were raped; for that is what reporting would do. They would prefer nobody knows what has happened to them.

Fear

Most times, a rapist threatens the rape victim that if she reports what has happened to her, she will suffer more, and perhaps even death. This is especially so where the rapist is known to the victim. A woman who has been so threatened may take such a threat seriously, and fearing the consequences, not report the rapist at all. And such fears are quite real in circumstances where say a rapist is granted bail pending his trial or where even if he is convicted, it only for a short time.

Lack of Energy

Often, after a woman has been raped, she is exhausted and does not have any energy left to do anything, including reporting the matter to the police.

Rape in the Family

In a number of cases, women are raped by members of their own families: fathers, brothers, uncles and cousins. In such situations, women are worried about reporting their own family members to the police; will it wreck the family, they ask themselves?

Attitudes of the Police

It is known how the police treat people who report such crimes to them. They laugh at the victims, and ask them embarrassing questions. The police also broadcast the victim's experience to all and sundry, and usually derive obscene pleasure from that. Rape survivors would certainly be uncomfortable if they were to be subjected to such experiences, and may, therefore, refuse to report this to the police.

All for Nothing

Because rape is difficult to prove, and because the police and the courts tend to distrust what the victims say, many victims are worried that they will go through the ordeal of a court case all for nothing. They fear that the rapists will not be convicted, or even where convicted, only a very short sentence will be meted out.

Though the reasons given above are many (and there could even be more) many rape victims still find that reporting to the police is still the best thing for them to do.

Rights of a Rape Survivor

A rape survivor being questioned by the police has rights. As far as possible she should insist on these rights.

Right to Confidentiality

All the information given to the police is confidential. A victim has the right to ask that the police exercise discretion if they want to call at her house or her work to ask questions.

Respect

A rape victim has a right to be treated with respect. The police questioning her should give her due respect. It is possible that the police may ask very embarrassing and humiliating questions. Where the woman feels the question is humiliating, she can ask and should ask the relevance of the question.

Right to Privacy

A woman has a right to tell her story to the police in a place out of the public's hearing. Indeed every effort should be made to make the conversation as private as possible. Private conversation is good for both the woman's feeling and the police investigation.

Female Police Officer

A rape victim has a right to tell her story to a woman police officer. This right may however be denied where there are no women police officers. Most police stations are now setting up special desks to attend to complaints of sexual offences.

Right to a Companion

During the reporting, the victim has a right to have a relative, friend or counselor or even a lawyer during the questioning. She is to do whatever is comforting to her under the circumstances. Where a survivor finds it easier to talk to the police in the absence of friends or relatives, that is alright for her, and she should insist.

The Survivor's Rights in the Courtroom

After the rape survivor has reported the attack to police and the rapist has been apprehended, police are under a duty to take the rapist to court where he will be charged with the offense. The police usually require that sufficient evidence be gathered during the investigation so that a strong prosecution case is established. Most rape victims have never been to court before, and the mere thought of appearing before a judge or magistrate could be scaring. It is, however, important to create confidence in oneself, and trust that the course one is engaging in is intended to make the world a better place to live in. So much so that rape victims should be encouraged and given support when they are to appear in court. A rape survivor will need to know what kind of experience to expect in court. And, as noted earlier, it is not a hilarious or ceremonious occasion. It is a time when one's private life and affairs can be probed. It is a humiliating and embarrassing experience, but very vital and necessary.

A rape victim will find it useful to seek legal advice before appearing in court. A lawyer will explain to her the various issues relating to the trial, the people to find in court and work, and generally what is expected other as a complainant and a witness. At times, the complainant may ask to have her case heard in private. When a case is heard in private, it means that members of the public are asked to leave the courtroom and only people who are actively involved in the case are left. They are only allowed back when the victim has finished giving evidence. Cases heard in private are, however, few. It is a general principle that cases be conducted in public.

Adequacy of Sentences Given To Rapists

A person who has been found guilty of rape by a court of law is liable to life imprisonment with or without corporal punishment. In the past there has been a lot of dissatisfaction with the sentencing of rapists. Many people feel that the sentences accorded to the rapists are not adequate, hence they more or less fail to deter other people intent on attacking or raping. Rape survivors, in particular, would feel dissatisfied if the rapist is only given a light sentence, such as a short prison term or a probation sentence or even a suspended sentence. Perhaps the important thing is to have a rape victim prepared for possible disappointment where she has been expecting a stiff sentence but a judge or magistrate applying any of the sentencing options, gives a light sentence. According to some, there are too many light sentences because most of the magistrates are men, so they never really understand what it means to be raped. Yet sexual offences are on the rise. One way to address this problem is to institute a

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minimum sentence for rapists. There may also be a law soon to provide for the chemical castration of rapists.

Chapter 12

Employment and Labour Relations

Introduction

This chapter concerns itself with issue to deal with the relationship between employers and their employees. It therefore addresses aspects like the right to work, discusses the employment relationship, its terms and conditions and also termination. The process of entering into an employment relationship and that of collective bargaining are also discussed. In the process of employment an employee can get injured. This chapter therefore also addresses the legal situation regarding injuries at work and compensation for such injuries. The aim of the law regulating labour relations is to ensure that there is peace and fairness in the employment process and also that workers who sell their labour do not get exploited or harassed in the process.

Individuals right to Work

Every individual has a right to work. This means that unless one is prevented by age, sickness or other limiting factors one should have a right and opportunity to use his/her labour so as to gain returns and earn a living. In the evolution of human right internationally, the right to work and labour standards generally were amongst the first to emerge. The principal body charged with the task of formulating rules to govern labour relations at the international level and setting standards on the same is the International Labour Organization (ILO). ILO was established in 1919 and since its establishment has adopted several codes and conventions on labour relations.

One of the most important instruments adopted internationally on human rights is the Universal declaration on Human Rights (UDHR), adopted in 1948. It was followed in 1966 by two binding conventions, the International Covenant on civil and Political Rights and the International Covenant on Economic and social Rights (ICESCR). Both the International Covenant on Civil and Political Rights (ICCPR) and ICESCR together with the Universal Declaration on Human Rights forms of the international Bill of Human rights.

Labour rights derive their basis from the International Bill of Rights. The right to work, to free choice of employment and to just and favourable conditions of work are fundamental human rights. It is guaranteed by Article 23 of UDHR and Article 6 of ICESCR.

Employment Contracts

The relationship between an employer and employee is a labour relation. It is also a contract, where each party undertakes to perform certain obligations with the employees biggest obligation is to provide his/her labour while the employer is generally to provide payment for the services rendered. The relationship is a contractual one.

There are several laws in Kenya that deals with labour issues and thus govern several aspects of the employment relationship. The sources include:

- The Constitution: although the constitution does not expressly contain a provision guaranteeing the right to work, it has several useful provisions addressing aspects of the employment relationship. Two of the most useful provisions are

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those outlawing discrimination on the grounds of race, tribe, place of origin, residence, political opinion, colour, creed or gender. This provision prohibits employers from discriminating against their employees. The constitution also guarantees the freedom of association, which includes the right to form and join trade unions of an employee's choice.

- Employment Act: this is the basic law on employment issues. It sets forth the relationship between an employer and employee and a worker. It defines the benefits, duties and obligations of the employer and employee.
- The Regulation of wages Act: this Act establishes the wages Advisory Board and wage councils that establish the regulations that govern wages and conditions of employment of different categories of workers in Kenya. The areas covered include minimum wage, hours of work, overtime and leave amongst other issues.
- The Trade Union Act: this provides for the registration and management of trade unions.
- The Trade Disputes Act: provides for the settlement of trade disputes between employer and worker. Under the Act a worker is entitled to join a trade union and participate through the Union in Collective bargaining agreement.
- Workmen's Compensation Act: this Act identifies procedures for claiming money payable to a worker who suffers an accident resulting in death or injury while performing work related issues
- The Factories Act: this establishes minimum health, safety and welfare conditions that each employer must provide workers.
- Public Health Act: this deals with health conditions and public places including places of work and also includes the requirement for a health certificate and provision of toilet facilities at public places
- National Social security Act: this law regulates the National Social Security Fund, a fund to which all employees and employers must contribute so as to give an employee some security during retirement.
- National Hospital Insurance Act: deals with the establishment and operations of a national Hospital insurance Fund, a compulsory scheme to which all employees are members and which takes care of certain medical expenses of employees when sick and admitted to hospital
- Public Holidays Act: This law defines all the public holidays in Kenya and these are days on which all employees should generally not work.
- Income Tax Act: this law affects employees by providing the amount and modality of paying income tax which is deductions made to government from one's salaries.
- Law of contract Act: since employment is a contract it is also governed by the Law of Contract Act.
- Common Law: the common law also governs the employment relationship
- International law: Kenya as a member of the International Labour Organization has ratified a number of important Conventions related to the right of workers. The Kenyan government is obliged to ensure that the rights under these conditions are applied and protected in Kenya.

Terms and Conditions of Employment

An employment relationship normally contains several terms and conditions. These terms will include the rights and duties that both employees and employers have under the relationship. An employer cannot impose terms on the employee. These are regulated by law and also negotiated between the two parties. The terms can also be determined through a collective bargaining process.

The terms and conditions of employment include;

- **Payment of Wages:**
- **Annual Leave:** Every worker is entitled to a minimum of 21 days leave with full pay every year. Public holidays are not counted as part of the leave. If employment is terminated after the completion of at least two or more consecutive months of service in a leave year, for every month worked, the worker is entitled to 1 $\frac{3}{4}$ days of leave with full pay. An employee cannot be forced to forgo annual leave.
- **Maternity Leave:** according to Kenya's labour laws female workers are entitled to a minimum of two month's maternity leave in year. A worker who takes her maternity leave forfeits her leave days for that year. The maternity period is below the international standards, where the Maternity Convention of 1962 provides that the period should be three months.
- **Sick Leave:** after one has served a period of two consecutive months with an employer he/she is entitled to sick leave for no more than 30 days with full pay and thereafter to a maximum of 15 days with half pay in each period of twelve consecutive months of service. A doctor's report is needed
- **Compassionate Leave:** this may be requested for "personal reasons" like attending an important family event or a funeral. It should be done with prior arrangement with the employer. It is offset from the annual leave. If these have been exhausted then the employer, at his/her discretion may grant the employee up to 5 days leave without pay.
- **Weekly Rest:** An employee is entitled to one paid rest day per week, which is normally Sundays. The day of rest can however vary depending on the nature of the work. If a worker works on a rest day they are entitled to overtime payment
- **Rest on Public Holidays:** Employees are entitled to rest on public holidays as gazetted from time to time.
- **Working Hours and overtime payment:** an employee's working hours vary but the normal requirement is to work for between 40 and 45 hours per week, for 8 hours a day for five days and for 5 hours on Saturday. When one works for more than the required hours then they are entitled to be paid overtime. The minimum requirement is 1 $\frac{1}{2}$ times payment for overtime on Monday to Saturday and twice on Sunday and public holidays.
- **Need for Letter of Employment:** one who has worked for more than one month is entitled to a letter of employment upon resignation or termination of employment. This letter contains basic information like the name and address of the employer, name of employee, nature and usual place of employment and date when employment commenced. However an employer is not under compulsion to give more than the letter of employment by giving a reference on the employee's character.

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- **Housing and Housing allowance:** the labour laws of Kenya oblige the employer to secure housing or in place of it provide a housing allowance for its employees. The law only provides that the accommodation to be provided should be “reasonable” but does not define what is reasonable. In practice the allowance is based on one’s position in society. The house allowance should normally be at least 15% of the basic salary
- **Safety:** the employer is entitled to ensure safety at the workplace. This includes the requirement to provide protective clothing for certain types of work. The employer is required to secure a safe working environment by employing sufficiently trained workers, maintaining working equipment and tools in a safe working condition, shielding or fencing off dangerous machinery, and keeping premises clean, lighted and safe.
- **Health:** An employer should strive to ensure that their employees have access to basic health facilities. The first avenue for this is through the compulsory National Hospital Insurance Fund. This scheme covers parts of the medical costs of the contributors. However it is inadequate to meet even the most basic medical needs. In practice employers also arrange for private medical cover for their employees. If a worker falls sick or is injured at work the employer is required to provide at the employer’s cost, medical treatment unless the injury was self-inflicted or contracted when employee was absent from work without good cause. Transport to and from hospital has to be provided by the employer

Duties of Employers

The employee’s duties include ensuring that there is work available during the subsistence of the employment, to respect the rights of workers discussed above and most importantly to pay the employees their entitled salaries fully and promptly

Duties of Employees

Employees have certain duties which they owe the employer and which they must perform to sustain the employment relationship. The employees have the general and important duty to perform their contractual task of working and providing their labour for the benefit of the employer and the employer’s business. The employee is required to perform all tasks within their scope of the job description diligently. The employee is also expected to arrive at work early and carry out assigned work responsibly. They should also not be drunk at work and must always carry out their tasks faithfully to the interest of the employer

Worker’s and employers association

Both the constitution and labour laws guarantee freedom of association. Employers’ and employees are therefore free to form and join associations to represent their interests. Employees normally form or join existing trade Unions with the Umbrella Union being the Central Organisation of Trade Unions in Kenya. For employers, there exists the Federation of Kenya Employers and other sector specific association.

Collective bargaining

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This is a process through which workers negotiate their employment terms with their employers. As stated earlier negotiations can either be individual or done jointly by the employees. This latter one is referred to as collective bargaining. The labour laws normally only provide the minimum requirements for terms of employment. Through the aspect of collective bargaining the parties can agree to better terms for their relationship that stipulated under the law.

Collective bargaining has two important roles. Firstly, it forms the basis of work contracts between employers and employees to which both parties are bound. The rules that result from collective bargaining are in more chances of being enforced since both parties jointly agreed to them.

Secondly, the exercise involves the exercise of power relations. Employers on one hand are the owners of capital and property and can therefore decide to employ or sack employees. They can even lock- out employees or even sack them. Employees on their part can withhold their labour through the use of strikes, boycotts and go-slows. Collective bargaining is thus an opportunity for both sides arbitrate the power relations and arrive at a consensual relationship.

In a collective bargaining process, the employers and the employees choose their representatives to the negotiation process. The representatives then meet and identify the issues for negotiation. Although the issue of salaries is at the center of negotiations it is not the only issue. All the issues discussed under the heading on terms of employment can be the subject of the negotiations. In the process the parties have to consider the living conditions in the country, the inflation rate, the performance of the company or employer and the level of productivity of the workers. These are the factors that will help the parties arrive at an agreeable collective bargaining agreement.

Once the negotiations are complete and the terms of the agreement have been reduced into a collective bargaining agreement, the same is to be registered with the industrial court and then the implementation process begins. The agreement is binding until it is either renegotiated or it comes to an end. A party who violates it can be taken to the industrial court with the innocent party asking for adherence to the terms of the agreement.

It should be remembered that collective bargaining cannot take place unless the employees are members of a union and the union has been recognized. The Trade Union Act legislates on recognition agreement between employers and trade unions. This is the process by which the employer accepts the trade union as a bargaining partner. In turn the trade union accepts the guidelines, which the parties shall apply in their day to day dealings. Such agreement to be enforceable must be registered with the industrial court of Kenya.

Dispute resolution

Disputes often arise in the employment situation amongst different players. A trade dispute is a dispute or difference between employer and employees or amongst employees themselves. A dispute can relate to employment or non-employment of a person(s), or the terms of employment or conditions of labour. The main causes in Kenya

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include conditions of service, conflicts over wage and salaries, levels of allowance, dismissals and suspensions and recognition of unions by employers.

The trade Disputes Act deals with the manner of resolving disputes when they occur at the workplace. There are both voluntary and non-voluntary mechanisms for resolving employment related disputes

Voluntary

Employers and employees unions are encouraged to resolved conflicts amongst themselves peacefully and using internal mechanisms. Workers who are not members of a union should present their complaints or grievance to their immediate supervisor. If no resolution occurs then the worker should seek audience with management. When these fail then the worker should file a formal complaint with the labour office nearest to the workplace. Those who are members of the union should report to their shop steward who will try to intervene with the management failing to which the matter will be reported to the branch and eventual to the head of the union.

In either of the above processes the parties will seek to solve the problems through dialogue, conciliation and mediation. It is only when the voluntary mechanism fail that the aggrieved party may resort to the non-voluntary resolution mechanisms.

Non-Voluntary Mechanisms

The mechanisms established under the Trade Disputes act for resolution of disputes when the voluntary approach fails is through the office of the Minister, industrial court and labour offices.

o Minister

The Trade Disputes Act requires that a contested dispute be reported either by the worker through their trade union or by the employer to the minister. The minister then initiates a conciliation process involving the two sides. Either an independent person is chosen for the purpose or the parties choose a panel. If this fails, procedures of the industrial court apply. In some case the minister may appoint an investigator who reports the findings of the investigations and on which basis the minister makes a recommendation for the resolution of the dispute.

The minister has very wide powers over labour disputes. Employees intending to go on strike need to give the minister notice of the intended strike twenty one days in advance, failure to which the minister has powers to declare the strike unlawful. The minister can also refer a dispute to the industrial court for resolution.

o The Industrial Court

An industrial court is established under the Trade Disputes act. Its principal function is to resolve disputes that cannot be resolved by peaceful and voluntary means. The court is headed by a judge of the High court and assisted by two laypersons. For long there were only two judges in the industrial court. The NARC government however increased the numbers of judges in the industrial court. It has jurisdiction to hear and determine disputes between unionized employees through their trade union and

employers. An individual employee cannot file a case individually before the court. The court has powers to order employees who have been sacked to be reinstated or to order for compensation.

A lawyer may represent the union or the employer. Witnesses are called and heard before the court makes its decision.

○ Other Courts

Employees also have the option of filing a normal suit in the high court to seek redress for employment related disputes. There have been ongoing discussions as to whether the jurisdiction of the Industrial court should be enhanced to give it exclusive mandate to handle all employment related disputes whether from unionisable or non-unionisable employees.

○ Labour Offices

There are employees who for one reason or another are not members of trade unions. Workers especially those who are not members of unions can use the labour offices to fight for their rights. They have powers to institute and conduct proceedings in ordinary courts on behalf of employees.

Under the Employment Act an employee can report their grievance to the labour office who will try to mediate between the employer and employee. If this fails then the office will pass the case to a magistrate and with the court's permission can prosecute the case.

Termination of employment

Employment contract just like every other legal contract can be ended through several means. The methods by which an employment contract can be terminated include:

- **Termination by Notice:** Normally either an employee or an employer can terminate the employment contract at any time they desire. All that each side who desires to use this method is obliged to do is to give the other notice of the intention to terminate the relationship. This notice enables the other side to make necessary arrangements for when the relationship ends. For an employer, the notice might enable them recruit another employee while for an employee it might enable them look for alternative employment. The period of notice varies but it is usually provided for in the employment contract. Sometimes the circumstances are such the party required to do so is either unable or does not want to give notice. In this circumstance they are required to pay the other side salary equivalent to the notice period.
- **Retirement:** Normally the employment laws provide the age upon which an employee is required to retire. When an employee reaches the retirement age then the employment must be terminated, as the employee will be required to vacate their job. The normal reason why a retirement age is fixed is firstly to give all sections of population an opportunity to get and exercise their right to work by requiring those above a certain age to quit and pave way for the younger generation. The law also assumes that when one reaches that age they will no longer be productive and need to retire and enjoy all they have worked for during their productive years.

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- **Death or Illness:** these are two circumstances when an employment contract will end because it is no longer possible to continue with it. Since an employment contract is personal when death occurs especially of the employee then the employment contract ends. Death of the employer too can lead to termination of the employment contract. Prolonged illness for a very long period of time can also make it impossible for an employee to continue performing their employment contract. However, not every illness situation should result in termination of employment. A sick employee needs to be given time to recover by first being given sick leave with pay, then with half pay and lastly without pay. However if the sickness continues even after this making it impossible for the employee to perform their obligations, the employer can terminate the employment after giving the contractual notice of the intention to do so. Other ways by which an employment contract can end is if the employer is declared bankrupt or if it is a company, when the company is sold or assigned.
- **Summary Dismissal:** this is termination of the employment contract by the employer for gross misconduct. Employees expect their employers to provide adequate work and not to be careless or negligent. In return the employers expect the employees to be loyal and have integrity. Employees must justify the position of trust to which they are placed and the law regulates this. Employers are thus given, by law powers of summary dismissal to enforce these rights.
- An employee may be dismissed if they perform acts that amount to gross misconduct. These include absence from work without permission or lawful cause; being drunk at the work place; willfully neglecting to perform any assigned work; use of insulting or abusive language or behaviour in the work place; knowingly failing to obey a lawful and proper command that is within the scope of employment, arrest for a crime punishable by employment; and committing a criminal offence against the employer or his property. When one is summarily dismissed they lose all their employment dues.
- **Termination due to Redundancy:** this is where the employment contract is terminated through no fault of the employee. Redundancy occurs at the instance of the employer when the employer feels that they can no longer afford to pay their workers and has to reduce the workforce. The workers can therefore no longer be productively retained by the employer. When redundancy occurs an employer is under an obligation to follow the procedure set down by law. Firstly, the employer needs to inform the workers or their union or the labour office the reasons for the redundancy and discuss the procedure to be applied to identify those to be declared redundant. The redundant worker shall be paid in lieu of their earned leave days and also to one the payment in lieu of the notice period. In addition the employees are entitled to a special package called severance pay to compensate for the loss of employment. When employment situation improves then those declared redundant should have the first opportunity to get their jobs back.

Industrial relations principles

These are general principles, which are accepted as governing the employment relationship. Currently they are not incorporated into Kenya law. They are however

negotiated and agreed on by the three social partners in the employment relations and these are employees, employers and the government. All the partners are expected to abide by the principles as negotiated.

Although there is no legislation governing industrial relations, the tripartite parties signed the Industrial Relations Charter in 1962 and these is what governs industrial relations in Kenya. The relation is tripartite because it involves three partners who have bound themselves to consult in all aspects that affect labour relations in the country. The three partners are the Central organization of Trade Unions (COTU), which is the umbrella body of trade unions in Kenya, the Federation of Kenya Employers which is the representative of Employers and also the Government through the Ministry of labour and Industrial Court.

Workman's compensation principles

Injuries, illness and sometimes death do occur at the workplace. How this are dealt with is the subject of workman's compensation laws. In Kenya these are dealt with by the Workman's Compensation Act.

Under the Act, any worker who is injured by an accident at work or becomes ill with a disease caused by work-related activities may make a claim for and be paid workman's compensation. In addition a personal representative of a worker who dies as a result of work-related accident may make a claim under the Act.

A worker may make a claim for compensation even if they were negligent or responsible for the accident.

When one has been injured, the worker may either file a civil case in court for damages against the employer or claim compensation under the Workman's compensation Act. However if any compensation is paid under the Act, the same shall be deducted from the amount awarded in the civil suit. Unlike a claim under the Act, negligence or responsibility is a defense for a claim for damages under civil law.

When a worker decides to file a claim under the Act, they must report the accident to the employer who in turns reports to the nearest labour officer. The Employer has to fill a form called form LD 104, which indicates the circumstances surrounding the injury. A medical doctor must also complete the form indicating the nature and extent of injuries suffered by the worker. Following medical examination, the employer should pay compensation to the worker amounts are set in the Act and vary according to the nature and extent of the injuries.

The Act does not apply to casual employees nor those earning above a certain amount of money as salary per month nor to members of the armed forces. The amounts of compensation available under it are very low because the Act has never been amended to bring it in tune with modern day realities.

Social security

This refers to the framework that exists to provide those who are working, fall sick or have ceased to work for some reason or the other with financial support or services. The services include medical, pension, provident and retirement benefit schemes. A majority of the schemes are connected to or based on employment. They are also regulated by legislation.

In some countries the social security system is so advanced that it ensures that even the unemployed and the elderly are provided for under a welfare system where they receive financial support from the state. The nature and extent of the social security varies from country to country.

In Kenya the social security is based on three elements. The first element is that of medical insurance. There is no comprehensive compulsory medical scheme in Kenya. What exists is regulated by the National Hospital Insurance Act. Under it all workers make a minimal monthly contribution to the fund which can then be used to offset some of the medical bills when one is admitted to a recognized health institution. Every contributor is issued with a card every year. However the amounts that can be paid when one is admitted is fixed at a certain rate per day which rate is very low.

The second is provident and pension schemes. A few years ago, the government passed the Retirement Benefits Authority Act, making it possible to regulate retirement benefits schemes for employees. Employees and employers usually contribute a certain percentage to this scheme which money will be available to the employee on retirement.

The last scheme is the National social security scheme. Despite its name the scheme is not a complete social security scheme as well known. This is due to the fact that the amounts paid into it are very low and thus the ranges of benefits under it also are very little. Under All permanent employees are required to pay a certain amount monthly to the social security fund. The employers pay an equal amount too on behalf of their employees. The money is then available on the retirement or death of the employee.

Discussions have been going on with a view to reforming both the national social security fund and also the National hospital fund to not only rid them of the perennial corruption which bedeviled them in the past but also to turn them into truly comprehensive social security schemes in Kenya.

Chapter 13

Claims Arising From Injuries

Introduction

The law dealing with compensation for harm to a person or to his or her property as a result of the wrongful act of another is known as the law of *torts*. For example, if Okwomi is hit by a motor vehicle, which is being driven recklessly by Njuguna, the law of tort gives Okwomi a legal right to claim compensation from Njuguna. Likewise if Kantai allows his cattle to graze on Njeri's land, Njeri can claim compensation.

The law of torts applicable in Kenya is largely obtained from English common law. It is mainly found in text-books and case law from English and Kenyan courts. Although there is no statute that defines the law of torts, sometimes statutes can make provisions relating to torts. For example under the Occupier's Liability Act, the owner of premises is liable for injuries suffered by people in the premises as a result of structural defects in the building, even if they are trespassers.

The Nature of Liability in Torts

By definition, a tort is a civil wrong (as opposed to a criminal wrong) which gives rise to a suit for compensation in damages or for which some other remedy would be necessary such as an order to stop the wrong from happening or an order to put things right after the wrong. The right to file a lawsuit in tort springs from the breach of a duty which a person owes other persons in general. For example, the driver of a motor vehicle owes other road users a duty to drive his car in such a manner that it does not endanger their lives. This is different from harm suffered when a contract is breached because the duty in a contract is owed only to people who have signed the contract. By its nature, a tort is a civil wrong committed against an individual whereas a crime is a public wrong committed against the Republic of Kenya, even though it may be an individual who is injured as a result.

Another important element of the torts is that of compensation. In the case of the breach of a contract, compensation is meant to put the wronged party in the position in which he or she would have been if the contract had been performed, while in the case of a tort, the compensation is meant to put a person in the position in which he or she would have been had the wrong not been committed. Torts can also be distinguished from crimes because of this aspect. If Njuguna is arrested by police and charged with the offence of dangerous driving, Okwomi gains no compensation from the fact that Njuguna has been sentenced to a term in jail or even fined KSh. 5,000. To obtain compensation for his hospital expenses and for the other aspects of his injuries, Okwomi would have to file a civil lawsuit against Njuguna for compensation. However, the criminal proceedings and the conviction against Njuguna can be used in the civil lawsuit as evidence of Njuguna's recklessness.

It is important to remember that the law does not always give a remedy where harm has been suffered. Two principles are especially important in this regard: *damnum sine injuria* and *injuria sine damnum*.

Damnum sine injuria

In cases where someone has suffered harm but not as a result of a wrong recognized by the law, there is no remedy. For example, it is possible for someone to lose a lot of money in a business because his or her competitors are charging less for the same products. But the law in a free market economy allows traders to charge whatever they want for their goods or services. Likewise, if someone slips on a muddy path in the village and breaks his or her arm, he or she will not be able to sue anyone successfully for such an injury no matter how severe.

Injuria sine damnum

Where the harm suffered is unaccompanied by any loss, the law will not also give a remedy. If, for example, while shopping in a supermarket, a person slips and falls, they will not obtain compensation from court if they cannot show that they suffered any loss as a result of the fall. The court cannot award compensation merely for a fall. It must be a fall resulting in injury which can be proved to have resulted in some loss, either through payment of a hospital bill or pain, suffering or loss of a particular bodily function.

Liability

Besides, the person who has suffered harm is required to show that the harm was suffered as a result of someone's act or failure to act. If a person slips, fall and gets injured, they will not be able to obtain compensation for their injuries unless they can show that someone was under a duty to maintain the premises in which they fell and got injured in such a way as to prevent such a fall. Sometimes, though, a law may define cases in which there will be no need to prove liability. Where someone brings into his compound and keeps there something, for his own purposes, which escapes and injures others as a natural consequence, he or she will be liable even if he or she can prove that he or she took all the necessary measures to prevent its escape. If, for example, Britney brings into her house a pet python which escapes and swallows the child of Zawadi, she will be held liable for the loss of Zawadi's child. This is called the principle of strict liability and does not require proof of recklessness.

The Principle of Vicarious Liability

The person who commits a tort is always liable. Sometimes, however, it may be possible for another person who did not commit the tort to be liable for the injuries resulting from the tort. If we take the example of Njuguna and Okwomi above, it is possible for Mali Mingi Enterprises, the owners of the motor vehicle that Njuguna was driving and his employers, to be liable for Okwomi's injuries. This is called vicarious liability because it arises out of someone else's actions.

As a basic rule, an employer is liable for any tort that his employees commit in the course of their employment. It is based on the argument that just as the employer benefits from the services of his or her employee so too should he or she be liable for their actions while they are serving him or her. But proof of an employer/employee relationship is just the basis. There is also need to prove that the act complained of was committed in the ordinary course of the employee's work for the employer. The employer is liable even if he or she can prove that the employee was "on a frolic of his or her own". In one case, a

company was held liable although there was proof that the driver was involved in an accident in Nyali, far away from the expected place of work which was between Moi Avenue in Mombasa and Moi International Airport at Port Reitz. The owner of a *matatu* will also be liable for all the injuries suffered by passengers traveling in it even if he or she can prove that the driver and conductor had disobeyed his instructions not to overload the *matatu*.

Common Torts

A number of torts are discussed below to illustrate some of the principles of torts. These are trespass to land, trespass to the person, malicious prosecution, trespass to goods, nuisance, negligence, defamation, passing off, and inducing breach of contract.

Trespass to the Person

The torts falling under this category include assault, battery and false imprisonment. Assault is any act which causes in another a reasonable apprehension of the infliction of violence on their body. Battery refers to the actual infliction of violence. If Munameza points a gun at Peter, this is an assault, unless he can prove that Peter knew the gun was not loaded and was therefore not apprehensive of the harm he could suffer if Munaweza pulled the trigger. If, however, the gun is loaded, Munaweza pulls the trigger and Peter suffers injury as a result, this is battery. It is also the offence of attempted murder if Peter does not die and murder if he dies as a result of the gunshot wound. Assault and battery are actionable *per se*. This means that they can give rise to a lawsuit even if there are no losses. In the ordinary course of a day, many acts of assault and battery technically occur as people shove each other into buses and so on, but these rarely give rise to lawsuits because those who suffer the acts ignore them. Possible defences to assault and battery are *volenti non fit injuria* and lawful arrest.

A person whose physical freedom is unlawfully restricted can sue for false imprisonment. For example if the arrest is made without a warrant, or if a police officer with a warrant nevertheless arrests the wrong person. Other examples would be locking a person in a room or detaining a person for longer than is permitted. Possible defences include parental authority over children (but not a husband's authority over his wife or vice versa), *volenti non fit injuria*, or lawful arrest.

If a person initiates a prosecution against another, which is terminated in favour of the accused, and it can be shown that the prosecution was initiated without reasonable cause or evidence and that the prosecution was instituted with malice, he or she may be liable for malicious prosecution. It does not follow, however, that in all cases where the accused is acquitted there is a reasonable cause of action for malicious prosecution. Many of these cases fail at the point of proving lack of reasonable or probable cause. As long as the defendant can show reasonable or probable cause, the suit will fail.

Trespass to Land

An unlawful interference with someone's land is known as trespass. The owner of land or someone who has a lease or licence to use it can sue. The offending person is liable even if they interfere without knowing that they are actually doing so. This may be by entering upon the land, misusing a right of entry, remaining after the authority to remain

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on the land has been revoked (such as after the end of a lease), or throwing rubbish on another's land. Trespass is not actionable *per se*, which means that some loss must be proved as a result of the interference. Trespass is also a crime. Possible defences to trespass include licence (traders have a right to enter land to collect goods) and necessity (for example to put out a fire in an adjoining compound).

Trespass to Goods

This is the unlawful act of direct physical interference with the goods of another person, either by detaining them (which is known as *detinue*) or stealing (known as *conversion*). Possible defences include right to possession (as in the case of hire purchase companies repossessing goods after the hirer defaults on payment), statutory authority or judicial authority (as in the case of proceeds or property acquired using the proceeds of certain criminal acts, such as living on the earnings of prostitution or drug trafficking).

Nuisance

Nuisance can be defined either as a public nuisance or a private nuisance. A public nuisance is an unlawful act or an omission to discharge a legal duty which causes inconvenience or annoyance to the public. A public nuisance is a crime, but if a member of the public can prove that he or she suffered greater harm than the rest of the public, they can sue as a result of the nuisance. A good example is where a shopkeeper can prove that the obstruction of a road (a public nuisance) resulted in loss of customers (and therefore business). A private nuisance is an unauthorized act or omission which interferes with another person's use or enjoyment of his or her land. This may be in the form of noise, smells, smoke, pollution of air or water and access to a public road. A reasonableness stand is always applicable: a one off Christmas party is probably reasonable, even if it is noisy, but to hold frequent parties going into the dead of night causing excessive and continuous noise would amount to private nuisance. It will be no defence to say that the person complaining found the nuisance going on (for example where someone buys land next to a tannery); or that it is beneficial to the community (providing employment). Statutory authority may be a defence in certain circumstances and Act of God would also be a defence.

Negligence

Negligence is the omission to do something which a reasonable person, guided by ordinary considerations regulating human conduct, would do, or doing something which a prudent and reasonable person would not do. The test of reasonableness is based on what a plain, ordinary person would do. In one English case, it was said that a reasonable man was "the man in the Clapham omnibus". This could be your Kenyan equivalent of the man in the *Kayole matatu*.

To prove negligence, it must be shown that the defendant owed the plaintiff a duty of care; that the defendant breached that duty; and as a result of such breach of duty, the plaintiff suffered loss. The question whether the person complained against or sued owed a duty of care is always one for the court to decide but is clear in many instances. It is based on the principle that every person owes people who are likely to be injured by his or her actions a duty of care not to do those things which could reasonably be expected to result in injury to them. In one famous case, a person who consumed a

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beverage from an opaque bottle and noticed as she was about to finish that it contained the decomposed remains of a snail successfully sued the manufacturer of the drink.

Sometimes all that one needs to prove is that things could have been different were the defendant not guilty. For example, if a person is taken into surgery and has complications after the operation which worsen his condition, he or she is not expected to prove all the details relating to the issue. All he needs to state, for example, is: "When I went to the doctor's clinic, I had a bad pancreas, now I am paralyzed from waist down". This is known as the doctrine of *res ipsa loquitur* (the thing speaks for itself). Injuries suffered as by passengers a result of road accidents, medical malpractice, collapsing buildings and the escape of noxious fumes are examples of possible actionable injuries due to negligence. Possible defences to negligence include Act of God, inevitable accident, and necessity. It is also possible, in a lawsuit for negligence, to reduce one's liability by arguing that the plaintiff also contributed to their injury by not taking reasonable care. Much as the driver of a motor vehicle is supposed to take reasonable care not to knock down pedestrians, he or she may reduce liability for injuries resulting from such accidents if they can prove that the pedestrian suddenly stepped into the road when they were least expected to do so without looking to see if there was an oncoming vehicle.

Defamation

Defamation is defined as the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally, or which tends to make them shun or avoid that person. Defamation can be either of two types, libel or slander.

Libel is defamatory statements published in some permanent form. It may be contained in a book, newspaper, magazine, or even chiseled onto a tombstone. Under Kenyan law, defamatory statements aired on radio and TV are also considered libel. Libel is actionable per se: you do not have to prove some particular loss. It is also a crime under Kenyan law.

Slander, on the other hand, is a defamatory statement which is contained in speech or some other significant sign or gesture. Slander is not a crime unless the words complained of are treasonable, seditious or likely to cause a breach of the peace. There are only four cases in which slander would give rise to a lawsuit without the need to prove special loss. These are:

- An allegation that the plaintiff has committed a serious offence;
- An allegation that the plaintiff is suffering from a contagious disease;
- An allegation of lack of chastity of any woman or girl; or
- An allegation of unfitness, dishonesty or incompetence in any office, profession, calling, trade or business carried on by the plaintiff.

For defamation to be proved three elements are necessary. First, the words must be defamatory. They may be defamatory either in their ordinary meaning or when taken in the light of certain facts known to a certain class of people. In the latter case, they are known as defamatory innuendo. For example, to publish a statement that a married

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woman gave birth to a baby is not necessarily defamatory. But when it is known to certain people that the woman has only been married for one month, the defamatory innuendo here is that she has been living a life of sin.

Secondly the defamatory words must refer to a particular person. This could be either by direct naming or using a description that only fits the person in question. A statement that "All lawyers are thieves" will not be defamatory but one to the effect that "a lawyer practicing in Kisumu who drives a vintage Jaguar" could be, since this is a rare car and the people in Kusumu would certainly know who is being referred to.

Finally the words must be published to some person other than the plaintiff. A letter from the chairman of an organization to the chief executive about a third person would be defamatory, as would be slanderous gossip overheard by a third person. Under the common law, since husband wife are deemed to be the same person, a statement from a husband to his wife and vice versa is not publication. It is important to remember that each person who publishes the initial defamatory statement is guilty in their own right. If a newspaper publishes a defamatory story, the reporter who wrote the story, the newspaper editor, the company that owns the newspaper, and even the vendor of the newspaper are all equally guilty of defamation. In fact the only reason the vendor never gets sued is because it would be against the rule of thumb not to sue a *man of straw*! If you sue the vendor, you may obtain a judgment against him, but may find that he does not have enough money to pay thus rendering your judgment useless in monetary terms.

There are a number of defences to defamation. It is possible for the defendant to prove that what he was saying was true. This is known as *justification*. Since defamation is about injury to character, the law will not defend the character of those who have tarnished their own character already. If it is true that the plaintiff has once been convicted for robbery, this is the truth and not defamation. It is also possible to argue that the defendant was only making known his or her fair opinion on a matter of public interest. The comment must therefore not be about the plaintiff's private life and should not be motivated by malice. Another defence to defamation could be privilege. It is said to be *absolute privilege* if it was made in judicial proceedings. Communications by one officer of state to another officer of state are also absolutely privileged. It would be qualified privilege if the statement was made in circumstances where there is a moral, legal or social duty to give them and a reciprocal duty to receive them, for example in a testimonial by a former employer. Fair and accurate reports of public meetings are also covered, as are statements on matters where there is a common interest. A complaint made by a patient about a doctor to the Medical Practitioners and Dentists Board would probably fall in this description. It is also possible under Kenyan law to state that the defamatory statement was made unintentionally, so long as there is an offer of amends, which may be a correction of the story with a suitable apology or some sum of money. In all other instances an apology is also a limited defence which helps to reduce the damages.

Passing Off

Passing off is the intentional sale of goods by one person as if they were the goods of another. This may be through the use of the name of a reputable manufacturer and

supplier of such goods, or by imitating a trade name or trade mark. This may be the case even if there are minor variations in the name, but which ordinary members of the public would not easily differentiate. A good example can be seen in many of the counterfeit products from China under labels like Panasonnic (instead of Panasonic), or Selko (instead of Seiko). Even pirated software falls in this category, even if it runs properly when installed on a computer.

Inducing Breach of Contract

It is a tort if someone knowingly and without lawful justification induces someone not to perform their obligations under a contract. If, for example, Mwadime offers Likhotio a larger salary to leave his employment with Saitoti, an Likhotio thereby terminates his contract of employment with Saitoti, Saitoti can sue Mwadime for inducing breach of contract. Although money is the commonest form of inducement, other forms also apply. Under Kenyan law, trade unions are protected from such actions when they call a lawful strike.

Defences to Torts

In addition to some of the special defences above, it is possible for someone to escape liability even for an act that leads to harm in certain instances. There are a number of defences in a lawsuit arising out of personal harm. Some of the possible defences are self-defence, *volenti non fit injuria*, inevitable accident, Act of God, statutory authority, and necessity.

Self defence

All people are entitled to defend themselves or their property or members of their families from harm. If, in defending herself against a rapist, a woman knees him in the groin, she will successfully defend herself against his lawsuit for battery. The main decisive factor here is one of reasonableness: it should be shown that the force used was necessary and related to the harm that could have been suffered unless the force was used. In the same way, a person is entitled to keep a fierce dog in their compound to ward off attacks by robbers, thieves, burglars and the like.

Consent (or Volenti non fit injuria)

It is also possible for someone to avoid liability against a lawsuit for a tort if they can show that the injured person consented to acts in which the risk of suffering harm were well-known beforehand. Simple examples are found in the world of sport, especially in boxing and some forms of wrestling. It is assumed that all boxers know the risk they are exposing themselves to and that they have willfully accepted to encounter those risks. Mohammed Ali, one of the world's most famous boxers, now suffers from Parkinson's Disease, a debilitating psychological and physical condition, as a result of the many blows to his head in the course of his career, yet he cannot sue any of the boxers he fought against. In other sports, it may not be as straightforward: if it can be proved that a full back swung his boot with reckless abandon into the forehead of a striker in a soccer game, he or she may still be liable for injuries arising out of such conduct. The fact that the referee issued a red card may be strong evidence of reckless conduct on the part of the full back.

Inevitable accident

If someone can prove that harm was suffered by another through an accident that could not be avoided under the circumstances by taking reasonable precautions, it is also a defence against some torts. In one case, a member of a bird-hunting group who was injured by a bullet which bounded off a thick tree branch. The court dismissed his case because it was proved that the member of the group who had fired the bullet had not been negligent in any way. Inevitable accident, for reasons stated before, cannot be a defence in a case of strict liability. After a road accident, if police cut through the wreckage of a car to retrieve the injured victims, they cannot be sued for losses resulting from this act of necessity.

Act of God

This is a defence that people easily resort to whenever the harm suffered can be linked to some natural event, such as a storm or landslide. But it is not enough that such natural occurrences are involved. For the defence to succeed, it must be shown that the harm occurred exclusively because of such natural occurrence. If a company that supply's a town with water builds a dam to stop the natural flow of water but maintains it to such standards that it easily caves in after a torrential downpour upstream, they may not successfully rely on Act of God as a defence. If the occupants of a hotel are killed by a tsunami, a rare occurrence in many years, which carries water for long distances off-shore the hotel owner can successfully rely on Act of God as a defence.

Statutory Authority

When a law authorizes someone to do what would otherwise be a tort, the injured party does not have a remedy in law. :Local authorities and certain agents of the government are given statutory authority, sometimes with limitations, to do certain things in fulfillment of their mandate. This may be one of the reasons why the owners of houses built on road bypasses may not be in a position to sue successfully for the destruction of some of the palatial mansions that were brought down by Ministry of Roads, Public Works and Housing bulldozers in the early days of 2003.

Necessity

The law allows someone to do something that would otherwise be a tort if it can be proved that this was to prevent some greater damage. For example, one of the ways of spreading fires in sugar cane plantations is for patches of sugarcane to be cleared by graders so that by the time the fire reaches the cleared patch, it has nothing more to burn and gets extinguished naturally. The owners of the patches of sugarcane scraped away by the grader cannot successfully sue for compensation since this was action that was deemed necessary to stop the total consumption of their cane by fires that spread much too quickly over large tracts of land to be put out using other conventional means such as water or foam.

Chapter 14

Business Relations and Contracts

Introduction

In the society we live people frequently enter into business relations. They do this normally through contracts indicating what they have agreed with each other to do. This section highlights the kinds of relations that people who intend to carry out business may enter into. It then discusses the law regulating contracts highlighting the essential features of a contract. The chapter also states the process of entering into a contract, the essentials of a contract, performance of a contract and means of ending a contractual relationship.

Human beings enter into contracts everyday. In certain times they are aware of the contractual relationship while in other times they are not aware that their actions create a contract between them and the person they are dealing with. It is true to say that it is impossible to live a life without entering into a contract. It is however a more prevalent occurrence in business relations. Every person involved in business at one time or another enters into a contract. This is so as to create certainty over what they are doing or intend to do. We will first discuss the process of entering into a contract before discussing examples of business relations that one may enter into.

What is a Contract?

A contract is an agreement between one or more parties that gives rise to obligations that are enforced or recognised by law. What distinguishes contractual obligations from other legal obligations is the fact that the former are based on agreement of the contracting parties. In Kenya, the Law of Contract Act governs contractual relationship. One remarkable feature of the Law of Contract is its exclusive reference to English Law and general outlawing of customary laws. English law is only supplemented by statutory law.

A contract can either be oral or written. There is no requirement under Kenyan law that a contract be oral or written. Parties can therefore choose whether to write down their contract or just to have an oral one. Whichever they choose, they must however ensure that their contract is valid. The law lays down certain requirements for a contract to be valid. These are referred to as the essentials of a valid contract. They include:

- (i) Offer
- (ii) Acceptance
- (iii) Consideration
- (iv) Contractual capacity

For there to be a contract the parties normally have to reach agreement. To constitute a valid contract there must be two or more separate and definite parties to the contract; those parties must be in agreement; they must intend to create legal relations; and the promises of each party must be supported by consideration or by some other factor which the law considers sufficient.

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o Offer

An offer is an expression by one person or group of persons or by an agent made to another indicating his willingness to enter into a contract with the other party. The person making an offer is called an offeror while the one to whom it is made is referred to as an offeree. An offer can either be made to a specific party or to the entire world. If you want to buy a cow you can either make an offer to the owner of a cow that you know or make an offer to anybody willing to sell a cow to bring it to you. An offer must be clear and definite. If the offer is vague, it is not possible to determine what the offeror intended and therefore no contract will arise even if the offer has been accepted. For an offer to be acceptable there must be a clear manifestation of intention to contract. A party merely making a preliminary statement of the terms upon which he/she is willing to contract does not amount to an offer. This is an invitation to treat only. An invitation to treat is a mere declaration of willingness to enter into negotiations; it is not an offer and cannot be accepted so as to form a binding contract.

o Acceptance

An acceptance of an offer is an indication, express or implied, made while the offer remains open, of the offeree's willingness to be bound unconditionally to a contract on the terms stated in the offer. Before the acceptance, the offeror can revoke his/her offer without incurring any contractual liability. The acceptance of an offer can be determined by considering factors such as correspondence which has been going on between the parties, or evidence of any oral statements that have been exchanged by the parties. The conduct of the parties after the offer is made may also be a useful indicator of the acceptance.

The person to whom the offer is directed should not in accepting it, modify its terms. If the offeree varies the terms of the offer, an acceptance of the initial offer is not possible since a counter offer has been made.

An offeree who varies the terms of the offer is regarded as making a new offer which can be accepted, rejected or ignored by the offeror. It is however possible for the offeror to accept the counter offer in which case there will be a contract in terms of the counter offer. Again if, despite the counter offer, the offeror continues to treat the offer as subsisting he/she will be bound by a subsequent acceptance.

A counter offer (which terminates the offer) must be distinguished from a request for information (which does not affect the offer). A person who merely asks for further information about the subject matter of the contract may subsequently effectively accept the offer. The distinction is not always easy to draw: the test is objective. What would a reasonable person have understood from the conduct of the offeree?

If the acceptance is made subject to a condition then no contract arises until the condition has been fulfilled. These conditional acceptances frequently occur within contracts for the sale of land.

Acceptance of an offer must be communicated to the offeror if a contract is to arise; the general rule is that an acceptance is not communicated until it is actually brought to the attention of the offeror. The common law rules for communication of acceptance are as follows:

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- (i) Silence does not, in general, amount to acceptance.
- (ii) The acceptance must be through the prescribed method of communication.
- (iii) The rule as to communication of acceptance by post is that acceptance sent through post is effective at the moment that the letter of acceptance, properly addressed and stamped, is posted.

o *Consideration*

Generally the consideration for a promise is simply the reason why it was made. It is a promise made by or an act done by one party to a contract in return for another person's promise or act. It means that for a contract to be binding, a person must do or give something to the other person in return to what the other person will do. If one goes to the shopkeeper to buy soap, a contract is formed. The shopkeeper will offer to sell you the soap while you will accept the offer and pay for it. The payment is your consideration. Consideration is a promise.

Classification of consideration

There are three types of considerations: executory, executed and past consideration. Executory consideration is a promise for a contract to be performed in the future. Executed consideration, on the other hand is a promise which is performed by one party immediately the contract is entered into. Good consideration may be either executory or executed.

The last type of consideration is past consideration. It is not considered as a good consideration. It is a promise made in return for an act which has already been performed. It is past because the promise is made in consideration for an act which was done before and without having in mind this consideration or promise. Such kind of considerations are not enforceable by law. For instance if two friends Jackie and Nekesa are swimming at a pool and Jackie is rescued from drowning by Nekesa and a week later she promises to pay Shs. 2,000/= in consideration of Nekesa having rescued her, the promise to pay is not enforceable. The reason being that the only consideration for it is past consideration. The justification for this is that the past consideration is not the exchange for the promise; the promise may have been induced by the consideration but the consideration clearly was not by the promise. Neither was it suffered or done in reliance on the promise.

There are several general rules concerning consideration. First consideration must have some real value, that is it needs to be adequate. It however need not be sufficient. The courts are not concerned with the economics of the contractual bargain and will generally not judge adequacy to see whether or not the bargain is fair. It is not the function of law to save a person from a financially unsound agreement. It is necessary, however, to show that there is some value attached to the consideration but it need not be shown to be economically adequate. It might be possible for one party to show that the inadequacy of the consideration is in fact due to fraud, undue influence, mistake or misrepresentation in which case this would affect the validity of the contract and relief would probably be given to the innocent party.

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The second rule about consideration is that it must move from the person who is claiming the performance of a promise. One cannot rely on consideration of a third party.

Thirdly consideration must be legal. One cannot make a promise to commit an illegal act and expect such kind of contract to be enforced. If one was to be paid for killing somebody, the killing is an illegal and therefore an unacceptable consideration.

Lastly generally consideration must be present or future. Past consideration is not proper consideration. However, the rule that past consideration is not sufficient to support a subsequent promise is subject to some exceptions.

(i) If the acts constituting past consideration were undertaken at the request of the party who subsequently makes the promise and there was a silent, unexpressed understanding that the acts would be paid for, then a subsequent promise to pay is enforceable.

(ii) With reference to negotiable instruments, such as cheques and promissory notes, past consideration is sufficient to support the promise to pay as contained in the instrument. The plaintiff, who sues on a negotiable instrument, need only show that some previous holder had once given value and he/she was himself/herself not required to prove fresh consideration.

Contracts also need to be certain and complete. It is not the duty or intention of the law to create the terms of the contract for the parties. It can only give effect to what the parties intended. Parties to a contract therefore must ensure that their agreement is clear and complete.

Capacity

Generally everybody, be they natural persons, corporations or governments may enter into a contract. However there are certain categories of persons whose capacity to enter into contracts is either qualified by law or who lack total capacity under the law. Infants, minors, bankrupts and persons of unsound mind have limitations in law on their capacity. Corporations, co-operatives, societies and trade unions can only enter into contract according to what their constitutive document provides.

Minors

Under Kenyan law, a minor is described as a person under the age of 18 years. Incapacity is imposed by law upon a minor, based on a compromise between two principles, namely that the law must protect minors against their own inexperience and secondly that in pursuing this object, the law should not cause unnecessary hardship to adults, who deal with minors.

Some contracts made by minors are valid while others are voidable in the sense that they are binding on the minor unless he/she repudiates them. This means that if both parties are happy with the contract, then they must perform their obligations but if the minor changes his mind he is entitled to avoid the contract. He must do this while he is still a minor or within a reasonable time after becoming an adult otherwise the contract

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will be fully binding on him. Apart from these two groups, the general common law rule was that minors were not bound by contracts they entered into unless they ratified them after reaching majority age.

Two points are common to all kinds of minors' contracts namely:

- (a) a parent is not liable for his child's contracts, unless the child was acting as the parents' agent;
- (b) a minor's contract cannot be validated by the consent or authorization of his/her parent.

Valid contracts

(i) Contracts for necessities

The Common Law rules apply in this area. Necessaries may be goods or services. They are goods or services suitable for the condition in life of the minor and to his/her actual requirement at the time of sale or delivery. A minor is bound by a contract for necessities only if it is on the whole for his/her benefit; if not, the minor is not bound by it unless he/she ratified it after reaching his majority. He is not bound by one entire contract comprising necessities and non-necessaries.

Necessary services include education (both liberal and vocational) and medical and legal advice. If money is lent to a minor to buy necessities, the loan as such is not recoverable, but the lender can sue for the part of the loan as represents a reasonable price for any necessities, which have in fact been bought by the minor. A minor's contract for necessities is a valid contract upon which he/she can sue and be sued.

(ii) Beneficial Contracts of Service

A contract of employment in terms of training is binding on a minor if viewed as a whole, it is for his/her benefit. If a minor pays school or college fees, he would not be able to avoid the contract. If he has joined a firm for training in employment and has agreed to stay for a number of years, then he could be sued for breach of contract if he leaves. If however the infant runs his business, the contracts made are not enforceable against him. Consequently, this type of contract is often referred to as a Beneficial Contract of Service. A non-beneficial contract of service is binding on the minor if he ratifies it on attaining his/her majority.

(iii) Voidable contracts

These are contracts that the minor can repudiate before majority or within a reasonable time afterwards. The other party cannot repudiate. The most common of these types of contract are contracts to acquire shares in a company or to buy or rent land. When a minor repudiates such a contract, he/she is relieved of all liabilities which come after the repudiation, but he/she can be sued for liabilities which have already arisen. The minor can recover money which he/she has paid under the contract if there is a total failure of consideration even though caused by his/her own act.

Persons of Unsound Mind and Drunkards

Generally a person needs to be of sound mind to have capacity to enter into a contract. This is due to the fact that in a contract the parties will reach an agreement acceptable to themselves. One of unsound mind will not be able to appreciate the magnitude and effect of the agreements and as such the law denies him/her the capacity to enter into a contractual arrangement.

It is generally said that drunkards just like person of unsound mind do not have capacity to enter into a contract. This is because drinking tempers their capacity to make rational decisions. However if they enter into a contract for necessities, they will be bound. Any other contract with a completely drunken person is voidable at the instance of the drunken person.

Terms of A contract

Once it is proved that a contract exists between two parties, it must also be proved what the contract consists of. The exact terms of the contract must be determined in order to be clear about the obligations imposed on the parties. The contents of a contract may not be confined to what appears on its face, if it is written. The parties may have entered into the agreements against the background of accepted practice in the field, whose implications they were aware of and were willing to assume.

As a general rule, where the agreement is written, and the document has been signed, by one or both of the parties, the party signing will be bound by the terms of the written agreement whether he has read and understood them or not. However, a contract may also be partly oral and partly in writing. Some contracts may be fully oral and others may contain in various documents which are not signed by either party.

In such cases, it is necessary to prove which statements were intended to be part of the contract.

Secondly after proving the terms of the contract, not all the terms will be of equal importance. Some may be regarded of fundamental importance while others are not. This is where the distinction arises between those terms referred to as conditions and those referred to as warranties.

Conditions and warranties

Very simply put, a condition is a major or important requirement in the contract, the breach of which gives the other party a right to refuse to perform the contract according to its terms and to regard himself/herself as not bound by his obligations under the contract. A warranty on the other hand is, a minor term of the contract. A breach of a warranty does not give the other party the right to treat himself/herself as discharged from his/her obligations but gives rise to a claim for damages only. Hence, a sensible approach is to look at the end result of the breach of a term. The more drastic it is, then it is fair that the innocent party should be allowed to get out of the contract altogether.

A condition normally goes to the root of the contract and its violation defeats the very basis of the contract and makes the contract void while a warranty is only subsidiary, its violations does not affect the very foundation of the contract and can be remedied through an award of damages to the party offended by the violation.

Express and implied terms

A contract may be oral or written or a combination of both. What is said or written constitutes express terms. But at times the court implies certain terms into the contract even though the parties never mentioned them.

When both oral and written statements are made, the question arises whether both were meant to stand together or whether one has more weight. For example, a party with superior bargaining power may praise a particular object but omits this in the written contract. Can the court take into account the earlier statements? The general rule, subject to certain exceptions, is that oral evidence cannot be admitted to vary, add to or contradict the written contract. To strictly apply this rule could lead to injustice. In some cases therefore, oral evidence will be considered where the purpose is to show that the written contract does not truly reflect the intention of the parties. If for example, you were asked to sign a contract and on reading it were not happy about a certain term and asked that it be removed and the other party did not actually do so, you could give evidence to show that the written contract does not reflect the common intention of the parties.

Implied terms on the other hand may be divided into three groups namely terms implied in fact, that is, terms which were not expressly set out in the contract but which the parties must have intended to include; terms implied in law, that is terms which would have to be part of the contract because the law requires it, although the parties may not have intended to include them; and, terms implied by custom or long usage.

Faults in Contracts

A contract which has all the elements of offer, acceptance and consideration and whose terms are clearly discernible will be valid and capable of being enforced as against the parties. There are circumstances or faults that occur which make a contract not one which the law will respect and give support. These are called factors that vitiate a contract. These factors or elements are:

- mistake
- misrepresentation
- duress and undue influence
- illegality and voidability.

○ *Mistake*

Mistakes normally do not affect the validity of the agreement. It is not the court's duty to save a party from a disastrous economic agreement. It is possible, however, that the mistake may affect the validity or enforceability of the contract. This happens in limited circumstances. The law of contract identifies three types of mistakes which affect the validity of a contract. These are common mistake, mutual mistake and unilateral mistake. If a party can prove that they entered into the contract by mistake then the contract is void and unenforceable. The mistake must however be one of fact and not law. This is because ignorance of the law is not a defence. It must also be a fundamental mistake.

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(a) Common mistake

This is where both parties make the same mistake. Each knows the intention of the other and accepts it, but each is mistaken about some underlying and important fact relating to the agreement. An example is where the parties enter into an agreement unaware of the fact that the subject matter of their contract has already perished or no longer exists.

(b) Mutual mistake

The parties may be at cross-purposes with each other in which case there is mutual mistake. They misunderstand each other. In this context there is no certainty of expression, no meeting of the minds and hence no contract at all. This is because it is a requirement of the law of contract that the parties have a meeting of minds on the contract. If Onyango has two cars and offers to sell the older one and Mutiso thinks he is buying the newer one, there is no contract at all.

A problem arises when both parties make the same mistake about the quality of the subject-matter. Though this seems to be an example of common mistake, leading cases do not regard this type of mistake as sufficient to avoid the contract.

(c) Unilateral mistake

The normal rule is that where one party is mistaken, this is not sufficient to affect the contract except in two situations where the courts have held that a unilateral mistake may affect contractual validity. These are:

(i) Mistake in relation to the identity of the contracting party

The identity of the parties is usually of no importance in the formation of a contract. But if proved that identity was crucial to one party when contracting with the other, then the position is different. The party pleading the existence of a unilateral mistake to be successful must prove the following: -

- that he/she intended to deal with a person other than the one whom he/she has apparently made a contract with;
- that the latter was aware of this intention;
- that at the time of negotiating the agreement, he/she regarded the identity of the other contracting party as a matter of crucial importance; and
- that he/she took reasonable steps to verify the identity of that party.

Whether the contract is void due to mistake or voidable as a consequence of misrepresentation depends on how important the buyer's identity was, which depends on the circumstances of each individual case. Only in the very clearest of cases should it be considered important enough to render the contract void.

(ii) Document mistakenly signed

The common law rule is that a person is bound by his/her signature and cannot plead that he/she did not understand the document or that it was too technical and too difficult to understand. Two exceptions to this rule are as follows:

- where the contents of the document are misrepresented to the signatory by the other party;
- where the plea of it is not my deed or act is pleaded successfully. If it is shown that a party was mistaken as to the class or character or nature of the document and not merely as to some aspect of its contents, then he/she can avoid the contract. Where, for example, a party is asked to sign a document as a witness and the document turns out in fact to be an assignment of property, the person is not bound by their signature.

The effect of mistake in equity

The common law treatment of mistake is somewhat rigid and at times harsh in the interests of certainty in the law. To alleviate this unfairness, equity has attempted to introduce certain remedies where the common law failed to grant any, in the interests of justice. They include the following:

- (i) the equitable remedy of rescission. Where the mistake is not fundamental in the common law sense, so that the contract is valid at law, equity may nevertheless set the contract aside. In this way it relieves the party prejudiced by mistake from hardship; but it will only do so if he/she in turn does justice to the other party;
- (ii) refusal to grant a plaintiff's claim for specific performance of a contract (due to mistake) and leaving him/her only the common law remedy of damages;
- (iii) rectification of the contract where there is a mistake made by both parties in putting the terms of the agreement in writing.

o *Misrepresentation*

This is a false statement made by one party before the formation of a contract so as to influence the other party to enter into the contract. A person may be able to claim some form of relief on the ground that he/she was induced to enter into a contract by a misleading statement. They can also end such a contract or refuse to perform it.

To claim such relief the representee must show that the representation was of a kind which the law recognizes as giving rise to liability; this excludes mere puffs that is, salesman's talk which is so exaggerated that can have no meaning at all such as "This is the best bicycle in the world!" statements of law or of opinion, or representations as to the future. Secondly, certain general conditions of liability must be satisfied: the representation must be clear, and must have been relied upon by the representee. If these requirements are satisfied, the representee may be able to claim damages or to rescind the contract, that is, treat the contract as discharged or both.

What amounts to a misrepresentation?

- (i) The statement must be one of fact and not one of opinion.
- (ii) It must be shown that the statement of fact was intended to influence the other party and did in fact induce him/her to make the contract.
- (iii) If there is a time lapse between when the misrepresentation was made and when the person acted upon it, it is a question of fact in each case whether it can be said to have induced his/her behaviour.

There are three kinds of misrepresentation depending upon whether the maker of the statement is fraudulent, negligent or innocent.

False statement is fraudulent at common law only if it is made knowingly, without belief in its truth or made recklessly without whether it be true or false. If, for example Wario sells land to Kipkosgey claiming it is a one-acre piece when it is in fact a half an acre, this amounts to fraudulent misrepresentation.

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A fraudulent misrepresentation makes a contract voidable, that is, the misled party may accept the contract or affirm it and sue for damages or rescind the contract. If he/she sues for damages, he/she is not suing for breach of contract but in the tort of deceit. Damages must therefore be calculated according to tort and not contract principles.

There exists in common law, a duty of care in appropriate cases on the part of a person having dealings with another, even where there is no consideration. If one relies on the advice of certain persons with whom he has a special relationship such as a banker or advocate, they are assumed to be responsible for loss arising from their advice. In this case also, the case is brought under the tort of negligence and not in a claim for damages in contract. However, it is not completely clear when the relationship will allow a person to bring a successful action and hence all the circumstances of the case must be considered.

Innocent Misrepresentation

If A sells a car to B and claims that it has covered a certain mileage and yet C, the previous owner, had turned back the milometer to fetch a higher price from A, A is ignorant of this when selling the car to B. This is not fraudulent of A but it misleads B as to the true state of the car. This is innocent misrepresentation and the courts are more lenient in such cases.

Silence amounting to a misrepresentation

The question is, are there situations where silence might amount to a misrepresentation? The basic rule is that of caveat emptor (let the buyer beware). There is no duty cast on one party to disclose information to the other about the subject matter under discussion; hence when buying a car, one should inspect and test it first. Likewise once the misrepresentation has been made, the innocent party has no duty to investigate the truth of the statement in order maintain an action. There are however exceptions to the caveat emptor rule which are usually grouped under the heading of contracts uberrimae fides or contracts of utmost good faith where the law imposes a positive duty to make known to the party all material facts which are relevant and important. These are normally insurance contracts and contracts between persons in special relationships.

The person seeking insurance has all relevant facts concerning the risk he wishes the insurance company to cover. The burden is therefore placed on him/her to disclose fully all information that would be relevant to a careful insurer such as known illnesses when applying for medical cover. Failure to do this will allow the insurance company to avoid their liability under the policy. This is so even though the misrepresentation is innocent. The only exception to this position is that one cannot be expected to disclose something of which one is unaware.

There are also certain relationships that require the fullest disclosure between the parties. Examples are found in family arrangements, contracts between partners, principal and agent, advocate and client, trustee and beneficiary, guardian and ward.

- *Duress and Undue Influence*

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Since agreements depends on consent and willingness, it should follow naturally that agreement obtained by threats or undue persuasion is insufficient. Both common law and laws of equity have acted on the issue of duress with equity having a wider interpretation of the term than common law.

At common law a contract can be avoided if it was made under duress. Duress at common law was narrowly restricted to actual violence or threats of violence to the person. This narrow view was gradually objected to because it failed to give weight to the coercive effect of other illegitimate conduct or threats. This has, however, been accepted in later cases so that the question is no longer what was threatened, but whether the effect of the threat was to bring about a coercion of the will which vitiates consent that is, that the effect is such as to have forced the other party to contract against their free will. The threat must be illegitimate either because what is threatened is a legal wrong or because the threat itself is wrongful or because it is contrary to public policy. The forceful effect of such a threat must be considered. Even under this more flexible test mere commercial pressure will not suffice nor will a threat amount to duress merely because what is threatened is a legal wrong. This can be illustrated by reference to cases in which a party is induced to enter into a contract by a threat to break an earlier contract.

Equity gives relief if an agreement has been obtained through undue influence where the relationship between the parties to the contract is such that one party is in a position to dominate the will of the other and uses that position to gain an unfair advantage. There will be a presumption of undue influence where one party holds a real or apparent authority over the other or where he/she stands in a fiduciary relationship to him/her or where one party makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or bodily distress.

Where it can be shown that a person is in a position to dominate or influence the mind of the other party and the contract itself appears to be against the interests of the weaker party, then it is for the dominant person to prove that he/she did not unduly influence the other person. In other words, the presumption of undue influence is rebutted if the party benefiting from the transaction shows that it was the product of the free exercise of independent will. This is usually done by showing that the other party had independent, competent advice before entering into the transaction.

In special relationships, which require full disclosure during the formation of a contract, there is a legal presumption that there is undue influence. These relationships include parent and child, guardian and ward, religious adviser and disciple, doctor and patient, advocate and client, and trustee and beneficiary.

Illegality

These constitute cases where the objectives sought to be attained by the agreement are contrary the law. Contracts may be illegal by virtue of statute or by a rule of common law. A contract is illegal if it is prohibited or not allowed by a statute. Statute for this purpose includes delegated legislation, such as a statutory instrument, either expressly or

implied. These would include the many Acts, by-laws, legal notices and so on that form the Laws of Kenya. It is necessary to distinguish between a contract which is illegal in itself and a contract which becomes illegal in its performance. An example of the former is where for example a person has no licence, the contract to sell a product for example licensed oil, is illegal in itself. It cannot be performed in any way that would not be illegal. It is possible for a contract to be legal in itself, and yet to become illegal by reason of the way it is performed. This principle, applies only where the prohibited act is within the contract and not merely incidental to the performance of the contract.

There are seven kinds of contract that are illegal at common law. These include;

(i) A contract to commit a crime, tort or fraud.

A contract, which has as its object the commission of a crime, or of a tort or a fraud upon third parties, is illegal.

(ii) A Contract damaging to the country's safety.

The most important example of this class of contract is a trading contract between a Kenyan subject and an alien enemy in time of war. If such a contract is made during war, it is wholly illegal. If it is made in peacetime and then war comes, it can give rise to no further rights or obligations. But existing rights and obligations are only suspended; after hostilities cease they can be enforced.

(iii) A contract damaging to the country's foreign relations or prejudicial to public safety.

A contract, which jeopardizes good relations with a friendly country, is illegal.

(iv) A contract prejudicial to the administration of justice

The chief example of this class is a contract to stifle a prosecution or prevent a prosecution that has begun, from taking its normal course.

(v) A contract tending to promote corruption in public life is illegal

(vi) A Contract to defraud the revenue authorities is illegal

(vii) A contract to promote sexual immorality is illegal at common law

The effects of an illegal contract are broadly the same whether by statute or at common law but differ according to whether the contract is illegal in itself or illegal in its performance. A contract which is merely void (not illegal) may be subject to severance so that the objectionable part of a promise - or even the whole promise - is cut out leaving the rest of the contract valid and enforceable. The conventional view is that this is not possible with an illegal contract. If the contract is affected by illegality at all, the whole contract is void; it is all or nothing. This position however is changing.

Where a contract is illegal in itself

The consequences of a contract that is illegal in itself are as follows:-

Neither party can sue on it unless severance is possible. Property or other rights transferred under it become vested in the transferee. Consequently neither party can in general sue to recover back what he/she has paid or transferred under the contract. But there are three exceptions to this rule. These are:

(i) A party can recover money or property if he/she can establish his/her case without reliance on the illegal contract.

(ii) A party can recover money or property if he/she is not equally guilty.

(iii) A party can recover what he/she has transferred to the other party if he represents his complaints before the contract has been substantially performed.

(iv) Related transactions between the parties are also illegal

Where a contract is illegal in its performance

A guilty party cannot sue on the contract and he/she cannot, in general recover the money paid or property transferred. He/she can do so if he/she can establish his/her case without reliance on the illegal contract, and, possibly, if he/she is not as guilty as the other party.

An innocent party has full remedies. He/she can sue on the contract and he/she can, in appropriate circumstances, recover back money paid or property transferred.

Discharge of Contracts

After parties have entered into a contractual obligation, their relationship will subsist until it is discharged. This is the process by which the relationship between the parties end. There are several ways of ending or discharging a contract. These are:

- Performance
- Agreement
- Frustration
- Breach
- Operation of law

Discharge by Performance

A contract can be discharged by both parties performing their promises. If only one party performs he/she alone is performed and the other party can be sued for breach of contract. However, the parties through a concept called accord and acceptance can discharge the guilty party by entering into ma new agreement under which the party in default is relieved from his/her liabilities in consideration of a promise to do something other than the act he/she was bound to do by the original act.

Discharge by Agreement

A contract can also be ended by an agreement between the parties. Whether the respective obligations in this case are to be totally or partially discharged will depend on what the parties agree.

Discharge through frustration

This happens when after being entered into, a contract is discharged because a later event happens which renders the performance of the contract impossible or illegal. However if one party has been the cause of the frustrating event, they cannot rely on this avenue to discharge them of their obligations under the contract.

Discharge through Breach

When one party fails to perform their part of the bargain or performs them contrary to the agreement with the other party, the party will be said to have breached the contract. A breach entitles the innocent party to sue for damages. There are two circumstances where the innocent party can also treat the contract as discharged. Firstly when the defaulting party has also repudiated the contract. This is when by words or deeds the

defaulting party shows that he/she does not intend to honour the contract. Secondly, the innocent party can treat the contract as discharged if the defaulting party has committed a fundamental breach. This is a breach of a condition which goes to the very root of the contract.

Remedies for Breach of Contract

When a contract is breached the law provides several remedies for the innocent party. In certain instances payment of money will compensate the innocent party for the loss suffered due to the breach while in other instances the guilty party will be compelled to perform their obligation under the contract. The following are the remedies identified by law:

- Damages
- Injunction
- Specific performance
- Rescission

Damages

This is one of the remedies for breach of contract. An award of damages is intended to restore the innocent party to the same position they would have been had the breach not occurred. It should however be noted that money is not a complete substitute to the fulfillment of a contract. It only compensates the plaintiff and tries to put him/her as near as possible to the position they would have been had the contract been performed.

Injunction

This is a remedy which is issued requiring one party not to do something or requiring the party to perform a certain act. Those stopping a party from doing something are referred to as prohibitory injunction while those requiring the party to do something are referred to as mandatory injunction. Injunctions being equitable remedies are granted at the courts discretion and in situations where damages is considered not to be adequate remedy.

Specific Performance

This is an order that compels a party to perform their contractual obligation. It is granted where damages is an inadequate remedy. Examples would be in a contract for the sale of a very special house.

Rescission

This is a remedy which cancels a contract and restores the parties to their original position. This remedy mainly applies in cases where a party has been influenced to enter into a contract through misrepresentation.

Types of Contracts

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Through contracts parties may enter into several business relations. This section discusses some of the business relations that are created by contracts. These include:

- Hire purchase
- Insurance
- Employment
- Sale of goods
- Sale of land

Hire Purchase

This is a contract whereby the owner of goods hires them out to a hirer and gives him/her the option to purchase the goods. This option can either be exercised or not.

Under this contract the hirer pays a certain amount called the down payment and then takes possession of the goods. The hirer then pays an agreed periodic amount referred to as installments. This is done until the full purchase price agreed upon is completely paid. Only then does the buyer take ownership of the goods the subject matter of the hire-purchase agreement. The hirer however takes possession immediately the down payment is made.

The hirer has the right to terminate the contract by giving a written notice to the owner. When he/she does so the goods must be returned and any outstanding installments paid. When the hirer defaults the owner can repossess the goods save that where the hirer has paid more than two thirds of the hire purchase price the owner cannot repossess the goods save through a court order. These contracts are governed by the Hire Purchase Act.

Insurance

This is a contract whereby one person called the assurer undertakes in return for an agreed consideration called the premium to pay another person, called the assured, a sum of money or its equivalent on the happening of a specified event or loss. It is therefore a contract whereby one person assumes the risk of an uncertain event which is not within his/her control happening a future time, in which event the other party has an interest and under which contract the first party is bound to pay money or its equivalent if the uncertain event occurs. The event insured against must be outside the control of the party assuming the risk. Insurance can only be effected in cases where loss is accidental in nature or results from acts of negligence. Intentional acts are not compensated under insurance contracts. It is governed by the general rules of contract. In addition there is the insurance Act which contains special rules governing insurance contracts.

Employment Contract

Employment contracts are governed by the labour laws and are discussed in detail in the chapter on labour relations.

Agency

In addition to employment contracts there is also the relationship between principal and agent. This is called an agency relationship. It is created where a person acts on behalf

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of another or represents another in dealing with a third party. A principal is bound by the acts of the agent and can be sued or can sue on the basis of such contract. Where an agency relationship exists an agent has a duty to act with reasonable skill and care in the performance of his/her duties and further to perform such duties personally as an agent has no powers to delegate. The agent must also obey all lawful instructions and act in good faith. The principal on his/her part has a duty to reimburse the agent for any expenses incurred and losses suffered in the course of the agency relationship and to pay the agent for services rendered.

Sale of goods

This refers to a contract where the seller transfers or agrees to transfers the property in goods to the buyer for a money consideration called the price. If the transfer happens immediately then it is a sale contract while if it is to happen at a future time it is an agreement to sell. The goods the subject matter of this type of contract are moveable goods. Land is therefore not the subject of a sale of goods contract. In Kenya such contracts are also governed by the Sale of Goods Act. The Act implies several conditions into a contract for the sale of goods. The seller must have property in the goods he/she intends to sell, the goods sold must correspond to the description given, and the goods must be of merchandisable quality and be fit for the purpose for which they are being sold.

Sale of land

The requirements for the contract for sale of land have already been discussed in the section on land law. The buyer is required to conduct a search to ascertain that the seller has title to the property and that there is no charge or caveat placed on the land. Further for certain categories of land consent from the land control board will be required. Once the parties agree they will sign a sale agreement and the buyer will pay the sale price. The transfer has to be registered on payment of stamp duty.

Chapter 15

Land Law

Introduction

Land is a very important thing in the life of Kenyans. This is because it is the basis of livelihood for the bulk of people in Kenya, this being an agricultural country. Most people depend on it for their very survival. Land also has a social value. So important is land that even colonialism had as its central basis the control and taking ownership of Kenya's land and natural resources. Even the fight for independence was based on land control.

There is however not accurate awareness of what the legal definition of land is. To most people land basically is soil or the earth. However the legal definition of land is much wider. The different land laws that exist in Kenya define land to mean the soil plus any structure which is permanently affixed to the soil. Thus a permanent building on the soil is considered as part of the land. Strictly under law one never owns land. What they own is an interest in land. It is this interest in land that one transfers to another either through sale or as a gift.

Land is currently categorized into around four categories:

Namely Public land, private land, trust land and group ranches. The draft constitution however reclassifies land into only three categories namely private land, public land and community land. Therefore the two categories of trust land and group ranches are put into community land meaning land held and owned by members of a local community.

Private Land

This is land held by a private citizen or by a group of individuals or a company. A private owner usually has a leasehold or freehold interest in the land. Whichever of this the owner has, they must get registered and be issued with a title deed or a certificate of lease. Registration is conclusive proof of ownership.

The constitution of Kenya protects private persons from being deprived of their interest in land. Section 75 of the Constitution makes it clear that no person can be deprived of his/her privately owned land by another person or by the government. The small circumstances when this can happen in the public interest is closely limited by the constitution and can only be done after compensating adequately the private owner. The procedure for the government to follow when compulsorily acquiring private land required for public purposes is prescribed in the Land Acquisition Act.

Public Land

This category refers to land which does not belong to private citizens. It is land belonging to the public. Such land in Kenya is also sometimes referred to as government land. The title to all public land is vested in the state to hold in trust for all Kenya citizens. Such land is governed by the Government Lands Act. The President and the Commissioner of Land have powers to make a grant of public land to an individual.

There have been cases where public land has been allocated to private individuals without taking into consideration the interests of the public.

Trust Land

Trust land refers to the land which in colonial times was known as the 'reserves'. After the Europeans had taken all fertile land in Kenya in the so called 'White Highlands', the local people were moved into the reserves. The reserves were administered by the Native Land Trust Board. Upon independence the reserves were administered by county councils and later by all other local authorities. The reserves then became known as "Trust land." The land is called "trust land" because the respective local authorities hold it "on trust for the local inhabitants of the area." The law applicable to all trust land is the customary law of the respective areas in which the land is situated. The people who stay on trust land can lay specific claim to particular areas of that land. Their claim must be based on customary law. If their claims are ascertained and found to be valid, then they can be registered as freehold interests under the Registered Land Act. Upon such registration, the particular piece of land ceases to be trust land and becomes private land. There are three main stages through which trust land becomes private land that is, land adjudication, land consolidation and land registration. All that land which has not undergone the three stages remains trust land - and is governed by the Trust Land Act. It should be noted that while the local authorities administer trust land on behalf of the local inhabitants of the area, they can also "own" and do in fact "own" other lands which they can use for their purposes. They can also sell or lease their lands to private individuals.

Group Ranches

Group ranches are found in the arid and semi-arid areas of Kenya, commonly known as ASALs. The inhabitants of these areas, the Maasai, Samburu, Turkana and others lead mainly nomadic and pastoral ways of life. This means that they are always on the move in search of pasture and water for their animals and therefore traverse large tracts of land. It is in the areas inhabited by these communities that land ownership forms called "group ranches" are found. This is a form of ownership whereby all those people belonging to a clan or tribe can be registered as members of a particular ranch. To be a member of a group ranch, one must be a member of a particular group - by virtue of customary law. A group can have as many members as possible since there is no limitation in law. The law under which group ranches are registered is called the Land (Group Representative) Act. Under this law, not less than three and not more than ten people may be registered as representatives of a particular group. They become upon registration, the officials of a particular group ranch. Their duties are mainly to sue and be sued on behalf of the ranch in their corporate name; to administer and oversee the day to day affairs of the ranch in their corporate name; to acquire and sell property on behalf of the ranch and to maintain a proper, accurate and an up to date register of members of the group.

This mode of land holding is necessitated by the way of life of the inhabitants - where it is

difficult to own land privately in a situation of constant movement of people and their livestock.

Interests in Land

As stated earlier, it is more accurate to say that a person holds a specific interest in land instead of just saying that he/she "owns" the land. There are various interests that a person can hold in land in Kenya. The following are the main interests or types of ownership that exist in Kenya.

1. The Freehold

A freehold interest is the greatest interest that one can hold in land. It is the greatest in terms of scope and duration. A holder of a freehold interest in land holds it for as long as any of his /her descendants are still alive. This means that upon his/her death, the land passes to his/ her son or daughter, then to his/her grandson, and so on. This process can go on for centuries as long as anyone, however, remotely related to the original owner, is still alive and can inherit the land. That is why holders of freehold interests are said to own the land forever. They can do whatever they like with the land as long as the law allows it.

A freehold interest is sometimes called 'the fee simple' or 'the absolute proprietorship'. Most of the land in rural areas that are registered are owned as freehold

2. The Leasehold

The Leasehold is that interests in land that an individual or group of persons holds for a specific period of time. Such an interest is generally known as a lease or tenancy. For example, if Kiprop holds a freehold interest in land and allows (pursuant to a legal agreement) Jesicca to occupy either the whole piece of land or part of it for a specific period of time, say six months or two years, Jesicca will be said to have an interest of leasehold. The relationship between Kiprop and Jesicca is what is known as 'landlord and tenant' relationship. The tenant usually pays a sum of money to the landlord called rent. The length of time for a leasehold does not matter *but* such time *must be specific* in this case for six months. Leases can be created either between private individuals - or between the government and private individuals. Most of the land owned by individuals within Nairobi and other urban areas is held as leasehold interest. Most of these interests are government grants of 99-year duration. The government can also be a tenant where it leases land from a private individual for a specified period of time.

There are many types of leases namely agricultural, commercial and residential.

Controlled or Statutory Leases (tenancies)

The most common leases that affect the ordinary *mwananchi* are known as controlled tenancies. These leases are governed by the Rent Restriction Act and the Landlord and

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Tenant (Shops, Hotels and Catering Establishments) Act. The first of these two governs residential leases while the second governs commercial or business premises.

Any lease of a residential house where the rent payable by the tenant is not more than ksh. 2,500.00 per month automatically becomes a controlled lease under the Rent Restriction Act. Any lease of a business premises such as a shop, hotel or catering establishment for a period of not more than five years or which has not been reduced into writing by the parties, automatically becomes a controlled lease governable by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

The main characteristic of these leases is that they are heavily controlled by the government through the two Acts and special courts called 'tribunals'. The aim of this control is to protect the tenants from harassment by the landlords. It is assumed that tenants who cannot afford to pay more than 2,500.00 per month by way of rent must be poor working class people who are likely to be oppressed by their landlords and therefore require protection. What this means is that a landlord in a protected lease may not do some things without the permission of a tribunal. For example the Acts already referred to forbid the landlord from evicting the tenant or increasing rent without the consent of the tribunal.

These laws also provide for both civil and criminal penalties in the event of non-compliance by the landlord. Where a tenant fears that the landlord is acting in a manner that may be detrimental to his/her interests, he/she can file a complaint to the relevant tribunal for protection.

3. Licence

A licence is another form of interest in land which is not, strictly speaking an 'interest' in the terms earlier discussed. It is a kind of agreement between two people concerning land that is sometimes difficult to distinguish from a lease. A licence, simply defined is a permission, which is given by one person (an interest holder in land) to another person, to enter upon his/ her land and do something or perform an act on that land. Without this permission, such entry by that other person on the land would be unlawful and hence, a trespass.

This kind of permission passes no interest in the land to the licensee. It simply makes unlawful entry lawful. If one is allowed to occupy another person's land on the basis of friendship, blood relationship or benevolence such occupation will be treated as a licence.

There are many instances where we enter upon lands that do not belong to us under a licence without being conscious of that fact. Some of these are entry into a cinema hall to watch a movie, into a stadium to watch a football match, and into a hotel for lodging overnight. All these entries are of a temporary nature and as soon as the purpose for which the entry was made is over, then the licence expires. The main feature of this relationship is the permission, which legalizes the entry. Landowners would rather grant licences to people than enter into leasehold relationships because this way, they avoid the strict provisions of the law. Licences are also flexible in nature. It is not possible each

time one wants to allow another onto his/her land to enter into a lease agreement. Not all licenses however are temporary in nature. Some licences allow the licensee to remain on the land for a long time such that he/ she could acquire an interest in the land. It is this situation that makes it difficult for one to distinguish a licence from a lease. However, the distinction is important because different legal consequences follow depending on how the relationship is characterized by the courts. A lease gives the tenant very wide powers over the leasehold interest. As long as the lease has not expired, the tenant will have exclusive possession of the premises and the landlord cannot enter upon the premises unless the tenant or the law governing their relationship allow him. If a person is allowed to occupy another person's land because of friendship, blood relationship or generosity, the law will almost invariably regard that occupation as a licence.

4. The Mortgage/Charge

A mortgage or charge relationship arises where a landowner (or interest holder) who is in need of some money offers his/her land to a bank or other financial institution as security in return for a loan. This process is called mortgaging or charging.

The mortgage agreement usually has terms and conditions of repayment and final redemption or discharge. A landowner (borrower) who pays all the loan or mortgage installments plus interest has the right in law to redeem his/her land (get it back). This right cannot be interfered with by the bank or financial institution. But a landowner who fails to repay the loan risks having his/her land sold by public auction for the recovery of the money lent. If the land fetches more at the auction than what was actually borrowed, then the extra amount is to be given to the person whose land has been sold. The particular law under which the land to be mortgaged is registered Mortgage or charge agreements must be drawn in accordance with the particular law under which the land to be mortgaged is registered. Both the holders of freehold and leasehold interests can mortgage their interests in return for a loan.

History of Land laws in Kenya

The history of land, land ownership and laws is very much linked to the history of colonialism and the struggle for independence in Kenya. This is due to the central role of land and natural resources in the livelihoods of Kenyans. For most Kenyan communities land is also more than just a factor of production. It has social and spiritual value too.

When the British Colonial powers occupied Kenya one of their first tasks was the assertion of sovereignty and control over land before then occupied by Kenyan communities. In 1890 England passed the Foreign Jurisdiction Act, which stipulated the way the power of the Crown was to be exercised in a protectorate that is through orders-in-council. The British declaration of a protectorate however did not confer power to acquire land for British settlers. To ensure that this power existed and was exercisable in the case of Kenya, the government in 1897 passed an East African Order-in-Council by which they extended the application of the Indian Land Acquisition Act. This instrument was used to acquire land for the railway and for the ten-mile zone on each side of the railway for government buildings and other public purposes.

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The Indian Act did not provide for the resale of land so acquired. The East African (Acquisition of Lands) Order-in-Council of 1898 was promulgated and it provided that land acquired under the Indian Land Acquisition Act should vest in the Commissioner in trust for the crown, and permitted him to sell or lease it.

Around 1897, the protectorate authorities promulgated the East Africa Land Regulations in order to provide land for settlers. The regulations distinguished between land in the sultan's dominion where the Commissioner was empowered to sell the freehold of the Crown Land which was not the private property of the sultan and land in the rest of the protectorate where he could only grant a certificate of occupancy initially for 21 years before it was extended one year later to 99 years. The rights grantable were only licenses. However settlers were only interested in more secure rights. The question of land outside the railway zone was unresolved.

In 1901, the above issues were resolved through the East Africa (Lands) Order in Council, 1901, which defined Crown Lands as:

“All public land within the East Africa Protectorate which for the time being are subject to control of His majesty by virtue of any Treaty, Convention or Agreement, or of His Majesty's Protectorate, and all lands which have been or may hereafter be acquired by His majesty under The Lands Acquisition Act, 1894, or otherwise howsoever.”

To give effect to the East Africa Order -in -Council, the Commissioner promulgated the Crown Lands Ordinance of 1902. The Ordinance gave the Commissioner power to sell freehold estates in land and also for land, which was no longer occupied by African, he could sell or lease it as if it were “waste or unoccupied land” without seeking the consent of any tribal chief. Regard had to be heard to the rights and requirements of the African population in dealing with Crown land but these rights were seen in terms of actual occupancy only. The 1915 Crown Lands Ordinance repealed the 1902 Ordinance and redefined “Crown Lands” to include land in actual occupation of native tribes and land reserved by the Governor for the use and support of members of native tribes. By this ordinance the complete disinheritance of native populations was secured. The crown thereby had radical title to land.

The ordinance also achieved the desire for creating a property system tailored to the needs of free enterprise. Settlers' property unlike that for Africans was now free of state intervention. This policy of protecting private property except that for African continued well unto the independence period¹.

One of the consequences of the Crown Land Ordinances of 1902 and 1915 was the introduction of English property notions. Through the 1902 and 1915 ordinance, the British were able to acquire radical title to all land in Kenya. The remaining concern was to acquire political control and security over the land. The starting point was through the 1930 Native Lands Trust Ordinance, which provided for the creation of native reserves

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where the natives were guaranteed their security. However the government could grant leases of 33 years to Europeans within the reserves or set aside any part of them for public purposes. The Europeans also had set aside for them the white highlands where only they could own and occupy. It should be pointed out that the highlands were the richest part of Kenya.

Due to the problems that continued due to these policies, the colonial government appointed a commission in 1932. The Commission known as the Kenya Land Commission is headed by Morris carter. The Commission made several recommendation including that the reserves remain exclusively for Africans, further land be added to the reserves and Africans be granted leasehold interests like any other racial group. These recommendations were implemented in bits through four legal instruments.

The next major development was a comprehensive policy document developed by a Deputy Director of Agriculture known as RJM Swynnerton. The policy sought to modernize agriculture by creating a cadre of Africans who owned large tracts of land for large-scale agriculture. These policies led to the process of registration of land and extinguishing customary law. This process continued after independence and saw the adoption of the Registered Lands Act. This policy of individual ownership of land and conversion of African customary ownership through adjudication, demarcation and registration continued after independence.

Land laws in Kenya

There are several laws that govern land ownership, management and use in Kenya. Some of the most important of those laws are:

- **The Constitution**

The current constitution has several provisions that deal with land. Two of the provisions that stand out as far as land ownership and management go is the provision of section 75 of the constitution which protects private interests and property in land. The state cannot take away such interest unless through a process of compulsory acquisition and only after the owner has been adequately compensated. The constitution also vests ownership of public land in the state. The constitution also deals with the issue of trust land.

- **Statutory Laws**

Parliament has enacted several laws that govern several aspects of land. The laws are too many and this is one of the problems with the current land law regime. Some of the laws include the Government Lands act, Land Adjudication Act, Rent Restriction act, Registered Lands Act, the Survey Act, Physical Planning Act of 1996, Trust Lands act, Land Titles act and land Adjudication Act.

- **Common Law**

The common law of England also contains rules that regulate the ownership and management of land in Kenya. Their application was brought into Kenya by virtue of colonialisms.

- **Customary Rules**

Before the introduction of colonial rules, traditional African society had their own legal system. These legal system contained rules to regulate ownership and access to land. Land was owned by the community and individual members only had access to it. The enactment of most statutory laws especially the Registered Lands Act were intended to extinguish customary rights to land and thus customary law. However customary law has withstood all these pressures and still regulates ownership and use of land.

Systems of Land Ownership

There exist five different regimes and laws for registering land in Kenya. Due to this high number confusion sometimes arises in discussions on the land registration systems. It is important to discuss the different systems under which registration can take place.

These include:

- Registration of Documents Act
- The Land Titles Act
- The Government Lands Act
- The Registration of Titles Act
- The Registered Lands Act

Registration under the Registration of Documents Act

This law deals with registration of land by deed. The law was used when Kenya became a British protectorate. All land acquired by the colonialists when Kenya became a protectorate was alienated and any such interest registered by deed. This was the record that served as primary evidence that a transaction had occurred. It was the first system of registration.

Registration under The Law Titles Act

When the British took control of all land in Kenya as part of the colonial process, there was negotiation with the sultan of Zanzibar who retained ownership of ten miles of the coastal strip for the benefits of the inhabitants. In an effort to retain the traditional concepts of land held by the sultan, the colonialists established a way of registration of interests at the coasts. A court was set up to determine who had individual titles. These rights had to be adjudicated and recorded. The office of the recorder of Titles was set and a lands register of titles also established.

Registration under the Government Lands Act

This Act introduced a system of converting crown lands into Government Lands after independence. The system of registration was made more advanced with accurate survey and deed plans.

Registration under the Registration of Titles Act

This Law introduced a form of title registration for the grant issued by the government. It created freeholds or leaseholds and any interest in land had to be registered such as leases, charge transfer or caveat. The Law was enacted in 1919.

Registration of lands Act

This law came into being in 1963 as part of the reforms of land laws following the swynnerton plan. Before 1963, only the coastal strip had been documented in terms of land and title registration system. Transactions such as contracts for sale of land or leases were not recognized. The guarantee for title is the registration of the interest at the Lands Registry and the same is executed on the register on the register.

The RLA register has three different sections: a property section, an encumbrance section and a proprietary section. The property section provides general description of the land and any easements that has been granted on the land. The Encumbrance section, on the other hand deals with restrictions on the land. This is the section, which has details of any persons who have an interest in the land for example because the owner has used the land as security to obtain a loan from them. The section therefore contains details of charges, mortgages but also of leases, subleases, cautions and inhibitions. The last section, the proprietary section provides details of names, address, identity card number and an indication as to whether the land is held jointly or in common.

Those who have freehold registers have their names enter on a green register and they are normally issued with a “green card” while those issued with leasehold interests are issued with a white card and have their details entered into a white register.

When it was enacted the Registered Land Act was supposed to codify all existing land laws by creating a substantive law and registration system. It was therefore to provide an exhaustive, comprehensive and substantive code of land matters.

The RLA was seen as having several advantages:

- More accurate and reliable thus making surveying effective and process of placing boundaries much easier. A record of all transactions were also kept at the District and Inland registries
- Cheap and reasonable as the transaction costs were based on the value of the land, the location and developments on the said land
- Simple making the documentation easy to understand. There are forms at all District lands registries providing guidelines for most land transactions.

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- The land registries procedures are simple and the registries are located within easy reach of most people being at the districts.

However despite the above envisaged advantages the registration system under the RLA faced several problems. These included:

- High levels of illiteracy in Kenya preventing people from taking benefit of the RLA
- Due to poverty the costs are still prohibitive
- Unskilled manpower in most registries thus the public not able to be assisted in the registration process
- Corruption

Registration is important as it ensures that transactions in land are public. It also makes it easy to identify owners of the land. The only problem is that it does not appreciate customary rights. This has been an unending challenge to registration under the RLA and has led to many families being conned of their land through someone registering the land as his and not as a trustee on behalf of the family. Non-registration has the effect of making it difficult to transact in any land. In fact any transaction in unregistered land is unenforceable or invalid.

Ways of acquiring Interests in land

There are several ways of acquiring an interest in land. These include:

- **By way of sale**

This occurs where a person who owns an interest in land gives out the same to another person in exchange of payment normally in the form of money. The person who buys the land will have had an interest in the land through sale.

- **By way of gift**

This happens when the person who owns an interest in land gives it free of charge to another person. Such gift will be given and effective during the life of the owner of the land. To transfer an interest through gift, the owner must do so during their lifetime and not after they have died.

- **By way of inheritance**

This occurs when the owner of the land dies after stating his/her desire to pass over their interest in the land to particular person. This can be done through a will or when one's parent dies and under the law of succession they are entitled to inherit the said land.

- **By way of Grant from the state the State**

If the President or Commissioner of Lands makes a grant of freehold or leasehold interest in public land to a private citizen then the private citizen becomes the owner of such land upon registration. The land ceases to be public land.

Extinction of Rights in Land

Rights in land can be extinguished through various ways. These include:

- 1) **Termination of a lease.** A lease can be terminated through several ways. Firstly through **forfeiture**. This occurs when a lessee or tenant fails to pay rent or other dues and abandons the interest in the lease. They are said to have forfeited their interests and the same will be extinguished or terminated. Secondly, **Merger**, when interests become united in one of them will be extinguished due to the merger. Thirdly through **Expiry of term**. When the term fixed for the lease ends the same expires and the interest is extinguished. The other method is through **Notice**. One can extinguish an in a leases by issuing a notice of the intention to do so. **Surrender** is the other method. Since interests in land are acquired they can also be surrendered. Other includes **Disclaimer**, that is through abandoning or giving up; and frustration.
- 2) **Compulsory Acquisition-** the Constitution allows the government to acquire private land compulsorily if the same is needed for public purposes. The person whose land is taken away will have their interest terminated. The government has to pay adequate compensation every time it does this.
- 3) **Adverse Possession-** as discussed this occurs by operation of law when a titleholder lets someone else occupy their land for an uninterrupted period of 12 years. This person will then take over the interests in the said land.
- 4) **Transfer-** when one transfers their interests in land to another person then the formers interests will be extinguished

Transactions In Land

As discussed above there are various ways by which one acquires an interest in land. This section discusses the process to be followed when one has bought or otherwise agreed with the owner of land to have that interest transferred to him. The law lays down a procedure to be followed especially in a transaction involving sale and purchase of land. It should be pointed out that the procedure discussed here is also applicable even if the land is transferred otherwise than through a procedure of sale.

The first stage in the process of transacting in land is for the intending purchaser to establish that the person he/she is dealing with is the actual owner of the land or a duly authorized agent. To determine this it is necessary for the intending purchaser to conduct a search. The buyer will get the land reference number from the seller. With this information the buyer visits the appropriate land registry and makes an application for a search. The search is then undertaken by the land registry official. This involves consulting the master lands register to determine the details as per the register. Through this process the purchaser will then determine whether the intending seller actually owns the land and whether the land is free or if it has been used, for example to obtain a loan. Further the search will help the buyer determine if there is a dispute involving the land and for which someone has registered a caveat or caution.

However for an intending buyer an official search alone is not sufficient. It is important for the buyer to arrange to also visit the land and view it. Such visit will not only help the

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buyer to look at the land and also identify all the beacons but also to determine what stands on the land and if there are people who are staying on the land without the seller's knowledge or permission, like squatters.

The second process after the search and reaching an agreement on the sale price is to reduce this agreement to writing. This is the process of preparing and signing a sale agreement. Such written sale agreement, not only states the price but also spells out all the terms of the sale including mode of payment and details of the seller and buyer. This agreement must be signed by both the seller and buyer and be witnessed. In practice most sale agreements are witnessed by an advocate. Every party to the agreement should keep a copy of the signed agreement. The agreement is important as they help to solve problems when a dispute arises, as courts of law will consult them to determine the terms that the parties agreed to.

The process of transfer will then commence after the agreement. This will involve the buyer paying the seller as per the agreement and the seller availing the necessary documents and signing the required forms to enable registration of the land in the buyer's name. One such necessary document or process is that of obtaining consent from the relevant quarters depending on the nature and location of the land. If the land in question is an agricultural land then the consent of the land control board in whose area the land is situated is necessary. The Land Control Act provides that a sale, transfer, partition, lease or subdivision or other dealing in agricultural land will be null and void unless the parties to the transaction have obtained consent to the land control board. The parties therefore need to make an application seeking consent to transfer the land. Consent is also required if the land belongs to the Kenya Railway corporation. Land which is situated in a municipality can also not be sold without the consent of the relevant municipality which consent is necessary so as to evidence that the relevant land rates and rent has been paid. This will be done through the issuance of clearance certificates. For land where the seller only has a leasehold interest from the government the consent of the Commissioner of lands is necessary before the sale.

The next process is that of transfer of the land. This involves filling and signing of transfer forms according to the registration system under which the land is registered. Once these forms have been signed by both parties in the presence of an advocate it will be presented to the registrar for registration. Stamp duty will have to be paid before the registration is affected. The registration will be followed by issuance of a title deed in the name of the buyer which is conclusive proof that the buyer is the owner of the land in question.

Land Disputes in Kenya

There have been several disputes in Kenya over land. Some of the disputes have led to death and permanent hostilities amongst even very close relatives. Some of these disputes have found their way courts for adjudication. In this section we discuss some of the common land disputes.

(i) Dispute over trusteeship

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The first dispute is between registered owners and unregistered claimants. These disputes are very common especially in instances where land was originally held under customary law as ancestral land before a first registration. Under the provision of the Registered lands act a first registration is absolute and cannot be challenged even if the registration was obtained fraudulently. The reliance of the provisions of the Registered Lands act has led to many families losing their ancestral land after they have been registered in the name of one individual. The unending dispute has been because the family members consider the registered owner as holding the land in trust for the other members. The problem arises when this registered owner abuses this trusts yet relies on the Registered Land Act to protect themselves as the absolute owner of the land. The courts in dealing with problems between the registered owner and the unregistered claimants have mainly relied on the Registered land Act and ruled in favour of the registered person. The argument has been that when land is registered under statutory law, customary rights are extinguished. Although there are few occasions when the courts have ruled that such registered owners hold the land in trust, these have been few and far between.

It is a problem that efforts at land reform must address. In the meantime families must register their claims to ancestral land every time adjudication is done and when undertaking registration the land must be subdivide to individuals within the family.

(ii) Dispute over adverse possession

When a person enters into a piece of land and stays there without legal title, that person is referred to as a trespasser and can be rejected. For one to enter into and take possession of another's land they need permission or legal title like license or lease. In land law a person who takes possession of another's persons land without legal title is called an "adverse possessor".

The doctrine of adverse possession holds that if a person enters into, cultivates, builds on or otherwise uses land belonging to another for a period of twelve uninterrupted years without being told by the owner to vacate, that person who has occupied the land becomes the owner. The occupier is said to be in adverse possession of the land.

The doctrine is embodied in the law of limitations of actions. This law is in Kenya expressed in the Law of limitations Act. This law sets a period of time within which an action can be taken to court. As regards land, the Act provides that land owner has twelve years within which to evict a trespasser from their land.

An adverse possessor is entitled to make an application to court to be declared the owner of the land on the basis that he or she has acquired title to it through adverse possession. The adverse possessor is required to prove:

- o that he/she has entered the land without legal title, that is adversely;
 - o that the entry upon the land was open and not secretive, that is the registered owner was aware of the entry;
 - o that the stay upon and possession of the land was peaceful and uninterrupted;
- and

- the stay and possession was continuous for twelve years since the entry upon the land.

It should be pointed out that the doctrine is only applicable to private land.

The application of the doctrine has led to disputes with some losing land to adverse possessors and such possessors have made applications to the high court seeking to bar the registered owners from laying claim to the land question.

The dispute regarding adverse possession has manifested itself through the squatter problem. A squatter is basically one who stays on a piece of land to which they do not have legal rights over. They thus squat on the land. The squatter problem in this country is of very long history. Some of the squatters have lived on the land for well over thirty years and have no other place to move to. The situation is exacerbated by the fact that a few people own a lot of tracts of land. Solving the squatter problem therefore requires serious policy decision on the part of the government; some of this includes resettlement of the squatters.

Disputes over sale/transfer of land

The buying and selling of land takes place freely in the country. Several disputes have arisen in the process of sale or transfer of land. Such disputes arise for example due to people not following the laid down procedure for selling land. Due to the high demand and the limited amount of land available in the country, there are a lot of dishonest people who are out to con others in the process of selling land. Some of these people have sold land that does not exist or land that is owned by other people. When these matters go to the courts of law, courts will insist of following the laid down procedure. Disputes that have arisen include situations in which there are more than one buyer for the same piece of land. In such cases the person with the genuine transfer forms and who presents them first to the relevant registration authorities will be considered as the genuine buyer. Disputes also arise where a purchaser buys land that is encumbered. This is land with a caution or which has been used as security for a loan. If the land is encumbered as a general rule one cannot be registered as an owner until the caution is removed or the loan repaid. Problems normally arise when one purchases land without conducting a search.

A dispute can also arise when one purchases land without obtaining the necessary consents.

Disputes Relating to Inheritance

These arise when an owner of land dies without leaving a will. The dispute then arises because the members of the family of the deceased make conflicting claims about how much land they are entitled to. The law that deals with this dispute is the law of succession.

The dispute also arises where members of the extended family attempt to disinherit the wife and child if a deceased husband for example. Widows normally suffer at the hands of their in-laws who attempt to take away the land from them.

Disputes relating to unregistered land

These are disputes regarding land still held under customary law. Despite the intention of land laws to convert customary ownership of land to individual ownership there still exists land held in accordance with customary rules and regulations. To resolve such disputes a law called the Land Disputes Tribunal Act exists which provides for solving of such disputes through reliance on the institution of elders. Typical problems relate to:

- beneficial ownership of land;
- division or determination of boundaries to land;
- a claim to occupy or work on land;
- cases involving trespass in land.

Other Land Problems

(i) Grabbing of Public Land

There has been a proliferation of cases involving grabbing of public land. The situation has become so grave that as part of efforts of redressing the situation the NARC government in 2003 appointed a Commission known as the Ndungu Commission to inquire into irregularly allocated and acquired land so that the same can be repossessed and revert back to the public. The Commission submitted its report and the process of dealing with grabbing of public land through repossession is ongoing.

(ii) Informal Settlements

The problem of housing is most acute in urban areas. Due to the high cost of construction and increased poverty there are a lot of Kenyans in urban areas who live in shanties and dilapidated housing structures. Such structures are referred to as informal settlements and exist in slum areas. These areas are marked by temporary and poor houses made of iron sheets or cartons. There are normally no health and sanitation facilities in these areas. There is also the double problem of ownership of the land on which the shanties or informal settlements stand. It is a problem that requires critical thinking by the government.

In addition there also exist other problems relating to land. These include the politicization of land. Due to the scarcity of land, it is a potential source of conflict and in the 1990's due also to politics Kenya witnessed a spate of conflicts ostensibly started over land and land-based resources. Secondly, there is a multiplicity of laws governing land matters. This multiplicity makes the management of land fairly difficult.

Institutional Mechanisms for dealing with land disputes

There are several mechanisms for dealing with land disputes in Kenya. Firstly, as mentioned earlier the Land Disputes Tribunal Act of 1990 provides for resolution of certain types of disputes over land to be heard and determined by elders. The law establishes for every district a tribunal composed of local elders appointed by the Minister. They sit under the chair of the local district commissioner. Tribunals can only deal with civil cases concerning:

- Beneficial ownership of land
- Division of, or determination of boundaries of land
- A claim to occupy or work land
- Trespass to land

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Tribunals that purport to listen to cases outside the above will be going beyond their jurisdiction and their decision will be of no legal consequence. A case filed before the tribunal is filed through a claim containing a summary of the material facts relating to the dispute. The other party has to be served with the statement of the claim, and that party has thirty days to respond. A hearing date is then fixed. Each party is entitled to call witnesses and each party has a right to question the other the other's witnesses.

The tribunal is composed of people not learned in the law. Its decisions are based on customary law. The tribunal's decision is filed with the Magistrate's court and then the court enters judgment in accordance with the decision. There is a right of Appeal within thirty days to the appeals committee established for every province. A further right of appeal exists to the high court.

In addition to the institution of elders there exist courts. These listen to and adjudicate over most disputes over land. Such disputes can be presented to a court as civil dispute and will be dealt with as all other civil case in accordance with the procedure discussed under the chapter on court procedures. However the procedure of the court is too technical and matters take quite a long time to be finalized. Moreover most people with problems are unable to access justice due to a lot of reasons. For this people resort sometimes to administrative channels like use of mediation and arbitration to solve land disputes.

Land reforms

Due to the numerous land problems that the country has and continues to experience and the inadequacy of the existing land laws there have been a lot of pressure and efforts to reform land laws and land system in the country. Such efforts have been made both by the government and the civil society.

The government past notable efforts include the establishment of the Njonjo Land Commission to inquire into and make recommendations on Kenya's land law system. The government also in 2003 formed a commission to inquire into illegal allocation of public land and make recommendations. There is also been formed a process to prepare a national land policy.

The civil society has also for long agitated for comprehensive land reforms. This agitation led to the establishment of the Kenya Land alliance as a network to coordinate the efforts of civil society groups to ensure that there are comprehensive land reforms in the country.

The Constitution of Kenya does not address the issue of land ownership and use in a comprehensive manner. The process of reforming Kenya's constitution has thus sought to address the issue of land law system, land ownership and use.

Some of the recurring issues that the efforts at land law reforms have sought to address include:

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There is need to reform the system of land tenure. The current laws on land tenure are not only complex but are also largely inoperable. The reform should ensure that Kenyans can have equitable access to land. As a first basis it has been proposed that the constitution should vest the ownership of all land on the people of Kenya. Secondly, the law should address the issue of women's ownership and access to land so that they are assured of equal access. Many women have also been disenfranchised of their matrimonial property. The law should be reformed to protect matrimonial property and prevent unscrupulous husbands from denying their wives ownership of the said property.

Kenya's tenure regime has also tended to over-emphasizes private tenure over other tenure arrangements. This has especially been disadvantageous to land held under customary tenure. The situation is completely unfair to pastoral communities. Tenure reform must therefore ensure that communal and customary tenure regimes are protected and given equal emphasis as private tenure arrangements.

One of the problems mentioned above is the numerous land statutes. This makes the process of land administration complex. It is necessary that the numerous land laws be harmonized so that the number of laws regulating land are fewer and more coordinated.

The other issue is the process of land administration. The current system is not transparent and effective. It is necessary that a national land Commission be established to be tasked with the task of formulating a national land policy and holding and managing public land in Kenya.

There are communities that historically have had land claims and problems. As part of land reform process the historical injustices must be addressed.

The draft constitution already tries to address some of the land problems and hopefully when enacted together with the efforts to formulate a national land policy; the land law system will ensure equitable ownership and use of land.

Chapter 16

Family Relations and Succession

Introduction

The family is the core unit of society. Everyone has the right to marry and found a family. All over the world, it is a recognized fact that family stability is important for the progress of societies. Not only does it form the nucleus of society, but also provides children (if any) with security, provides a socially acceptable outlet for sexual satisfaction and fulfils the basic psychological needs of the husband and wife as well as parents and their children. There is a body of laws that regulates how families are to be created (through marriage), their break-up (through separation or divorce), maintenance of the wife and children, and determination of questions relating to property after break up of families and upon death of a spouse or other relative. In Kenya, there are two parallel family relations and succession systems: those regulated by customary laws and those regulated by statutory laws.

What is a Family?

The Concise English Dictionary defines a family as “a set of parents and children or of relations living together or if not the members of a household, especially the parents and their children”. In the traditional African context, the family was much wider and included distant relatives and other persons related through marriage. Members of one clan or even related clans were, in many instances, referred to as one family. Irrespective of what is said of a family, there are two legal requirements that must be present:

- There must have been a marriage ceremony of a certain kind or at least a situation that leads the law to presume a marriage, especially out of prolonged and continuous cohabitation.
- The marriage must have satisfied the legal requirements for a marriage. The family is an important unit in society hence the need for legal regulation.

Types of Marriage

There are five different types of marriage in Kenya. These are Christian, civil, African customary, Islamic, and Hindu marriages. In addition to general requirements such as the fact that both parties must be both biologically male and female, specific rules regulate the rights and responsibilities of people entering into marriages under each of these systems.

Christian Marriages

These are contracted under the Marriage Act or the African Christian Marriage and Divorce Act. They are conducted in church by an authorized church minister in a licensed place. Under the African Christian Marriage and Divorce Act, they are exclusive to Christians while under the Marriage Act even non-Christians can contract a marriage. The names of licensed church ministers and venues are published in the *Kenya Gazette* regularly. There is no requirement for parental consent. They are monogamous in nature. Anyone of 18 years and above can contract a marriage. Notice of intention to marry is given in accordance with the requirements of the particular church. For a certain number of worship days (Saturdays for the Seventh Day Adventists and Sundays for other

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Christians) the notice is read out in church (calling the bans), and anyone with an objection asked to lodge it. The ceremony takes place in a gazetted place between 8 o'clock in the morning and 6 o'clock in the evening, presided over by a gazetted church minister. Before conducting the ceremony, the minister asks one last time if there is anyone who has a reason why the two should not marry and, if there is no objection, proceeds with the ceremony. After the parties have been pronounced man and wife, they sign a certificate. The marriage must be witnessed by at least 2 people who must also countersign the marriage certificate together with the officiating church minister.

Once married, both parties have the right to each other's company and companionship. This includes the right to share a common matrimonial home, the right to sexual intercourse, the wife's right to use her husband's name, and the preservation of marital secrets. The wife also has a right to maintenance.

Civil Marriages

These are contracted under the Marriage Act, without necessarily involving a church minister. They may be conducted either at the Attorney General's Office or other authorized government registry of marriages, such as the District Commissioner's office. They are monogamous in nature. Anyone above the age of 16 years can contract a marriage. Anyone above the age of 18 years can contract a marriage without parental consent but those below this up to 16 must obtain parental consent. Notice of intention to marry is given 3 months before the date of the intended marriage. The registrar enters it into the marriage notice book, which is open for public scrutiny and publishes the notice by affixing it outside his or her door for the entire period of the notice, which is 3 months. Anyone with an objection is allowed to lodge an objection and the marriage cannot thereafter take place without the objection being lifted by the High Court. After the expiry of 21 days after the issue of the notice, the registrar issues a certificate authorizing the marriage. After the parties have been pronounced man and wife, they sign a certificate. The marriage must be witnessed by at least 2 people who must also countersign the marriage certificate together with the registrar.

Once married, both parties have the right to each other's company and companionship. This includes the right to share a common matrimonial home, the right to sexual intercourse, the wife's right to use her husband's name, and the preservation of marital secrets. The wife also has a right to maintenance.

Hindu Marriages

These are conducted under the Hindu Marriage and Divorce Act and are exclusively for people professing the Hindu faith. They are monogamous in nature. Marriages may also be arranged by the parents. The age of marriage is 18 for men and 16 for women. However, until the girl is 18 she can only marry with the consent of the parents. Once married, both parties have the right to each other's company and companionship. This includes the right to share a common matrimonial home, the right to sexual intercourse, the wife's right to use her husband's name, and the preservation of marital secrets. The wife also has a right to maintenance.

Islamic Marriages

Islamic marriages are conducted under the Mohammedan Marriage, Divorce and Succession Act. They are potentially polygamous except among the Shia Imami Ismailis who are monogamous. Most marriages are arranged by the parents and gifts exchanged during the agreement are returnable if the marriage does not take place. The age of marriage is the age of puberty, that is to say 14 for girls and 16 for boys. Under Islamic law, the wife is entitled to *mahar*, or dowry, from the husband; maintenance as long as she is obedient; and consortium.

African Customary Marriages

These are conducted under the customary law of the individuals in question. They are potentially polygamous. Some Marriages were arranged by the parents, known as *betrothals*. Payment of bride price follows after which the marriage is contracted. Amongst the Kikuyu, Embu and Meru, unless elaborate ceremonies such as *ngurario* are performed, there is no valid customary marriage. People are prohibited from marrying within certain prohibited degrees of affinity, and in certain communities marrying blood relatives is absolutely forbidden. Once married, both parties are entitled to consortium; the husband must provide a home for his wife and children; the wife has a duty to obey the husband; the husband has an unfettered right to sexual intercourse with his wife and it may not be denied except in instances when it is taboo; the husband can claim damages from any man who has sexual intercourse with his wife; the man must pay dowry to his parents-in-law; and the wife has a duty to tend the farm and to bear children and take care of them.

Legal Requirements for a Valid Marriage

Apart from lack of capacity, a marriage can be declared a nullity if the following things are proved:

- Where either the husband or the wife is permanently impotent and incapable of consummating the marriage through sexual intercourse;
- Where a spouse suffering from a physical deformity has willfully refused to have sexual intercourse with the other;
- If the spouses are within the prohibited degrees of relationship;
- If there is a previous subsisting marriage (where one of them is married under a system that does not allow polygamous unions)
- If one of the spouses is of unsound mind or subject to recurrent fits of epilepsy at the time of the marriage;
- If there is a mistake as to the identity of one of the spouses
- Where a party was suffering from a venereal disease in communicable format the time of marriage;
- If at the time of the marriage, the woman is pregnant by another man other than the man she eventually married.

Separation and Divorce

Separation is the temporary parting of a married couple either by order of the court or by mutual agreement. Divorce, on the other hand, is the legal dissolution of a marriage through procedures laid down in the law governing the marriage. Each system of marriage specifies grounds for separation and divorce.

Christian and civil marriages

Christian marriages may be dissolved by a resident magistrate's court while civil marriages can only be dissolved by the High Court. The party seeking the divorce files a special lawsuit called *divorce petition*, setting out the grounds for the divorce. The person petitioning the court is known as the petitioner while the person being petitioned against is known as the respondent. Before filing a divorce petition, the spouse seeking divorce must satisfy the following conditions:

- The parties must have been married for at least 3 years, unless he or she can show that the marriage poses certain exceptional hardships;
- Both parties must be ordinarily resident in Kenya, provided that where the husband is not ordinarily resident in Kenya, the wife may present a petition if she has been resident in Kenya for at least 3 years;
- The petitioner must show that he or she has not contributed to the commission of the matrimonial offence or turned a blind eye to it (for example by resuming sexual relations after adultery);
- It must be shown that both parties have not colluded to bring the divorce petition (it is against public policy in Kenya to divorce by agreement)
- It must be shown that there are no other pending petitions involving both parties in any court in Kenya.

Assuming the petitioner has satisfied these conditions, he or she can petition for divorce based on any of a number of grounds, normally referred to as *matrimonial offences*.

Adultery

Adultery is defined as consensual sexual intercourse between a married person and a person of the opposite sex, whether married or unmarried, other than the spouse during the existence of the marriage. It must be proved that sexual intercourse took place and that it was voluntary (and not through rape, for example). It is not necessary for both adulterers to be married. A person cannot be said to have committed adultery if at the time of the act, he or she was under the influence of drugs or alcohol as to have been incapable of understanding the nature of the act.

Cruelty

Any act that leads to, is likely to lead to, injury to the petitioner's health is an act of cruelty. But it must be conduct that is so grave that continued cohabitation between the spouses is impossible. It must be distinguished from the ordinary "wear and tear" of married life. Courts have held that an isolated incident of cruelty will not be enough, and that there must be a consistent pattern of conduct for some reasonable period of time.

Desertion

This may be defined as the unjustifiable withdrawal of one spouse from cohabitation with the other spouse without his or her consent with the intention of remaining separated permanently. It does not need to be physical departure: if a husband installs a mistress in the matrimonial home, this can also be taken to be desertion.

Incurable insanity

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The law allows a person to seek divorce on the ground that since, the celebration of the marriage, his or her spouse has been afflicted by incurable insanity. However, it must be proved that the mentally sick spouse has been undergoing treatment for his or her illness for at least 5 years before the filing of the divorce petition.

Sodomy, rape and bestiality

When a husband commits acts of sodomy, rape and bestiality against the wife, she is entitled to petition for divorce. If a person consents to these acts, however, they will lose their right to use them as grounds for divorce.

Presumption of death

If one has reason to believe that his or her spouse is dead, he or she may present a petition to the court to presume the missing spouse dead and dissolve the marriage. Such a petition can only be presented if the spouse has been missing for at least 7 years. The petitioner must also prove that he or she has done everything possible to trace the other spouse.

Despite all the foregoing, the court may refuse to grant a divorce even if a matrimonial offence has been proved if:

- the petitioner has himself or herself been guilty of adultery;
- the petitioner has been cruel to the respondent;
- the petitioner has willfully separated himself or herself from the other spouse;
- the petitioner is guilty of such willful neglect or misconduct as to lead the respondent to commit the matrimonial offence complained of; or
- the petitioner has taken an unreasonably long period before presenting the petition for divorce.

Islamic Marriages

Under Islamic law, there may be a judicial divorce or an extra-judicial divorce. The judicial divorces are heard by the High Court in accordance with Islamic law. The grounds recognized under Islamic law are:

- desertion by the husband for at least 5 years;
- failure by the husband to provide maintenance for the wife and children;
- imprisonment of the husband for at least 7 years;
- failure by the wife to perform marital obligations;
- impotence, insanity or cruelty of the husband;
- capture of the husband by enemies during wartime

Extra-judicial divorce is however the most common. Where the wife is on the wrong, the husband is supposed to warn her and guide her on the right path. If she persists in her conduct, he can divorce her. Before doing so, he may deny her some basic necessities to teach her a lesson or even inflict a symbolic beating without inflicting any serious injury. If it is the husband at fault, the wife should persuade him to change his behaviour. Where such attempts are not successful, each party is required to appoint an arbitrator and the two arbitrators should try and reconcile the parties. Where reconciliation fails, he or she may resort to divorce. This can be done by the wronged party pronouncing the

word *talak* 3 times at an interval of 40 days. Upon the third *talak*, the marriage is deemed dissolved.

Hindu Marriages

Under Hindu law parties may undergo judicial separation and, eventually, divorce if they fail to reconcile within two years. The grounds are the same as those of Christian and civil marriages. It is also possible for the parties to seek divorce without first obtaining the 2-year separation.

Customary Marriages

Divorce under customary law is rare because parties are only permitted to divorce when the marriage has broken down to such an extent that further cohabitation or reconciliation is impossible. Judicial divorce may be obtained by filing a petition in a magistrate's court. The court will decide on the petition based on the relevant customary law. The grounds for divorce include:

- refusal of either party to have sexual intercourse with the other without good reason;
- witchcraft by either party;
- habitual theft by either party;
- willful desertion, which is rare;
- incest;
- excessive physical beating either by the man or the woman;
- failure by the husband to maintain his wife and children;
- laziness, especially of the wife;
- adultery by the wife (the husband cannot commit adultery);
- impotence on the part of the husband;
- barrenness (in some communities)

Extra-judicial divorce may be obtained by:

- chasing the wife away and informing his family and her family;
- the wife running away without being chased away; or
- where the wife's parents take her away for one of many possible grounds (for example, that dowry has not been fully paid or where the husband has been excessively violent)

Custody of Children

Every system of marriage has rules that determine questions relating to custody of children. A child is a person who has not attained the age of eighteen years. It should be emphasized that while such rules are important, the conclusive criteria in deciding the custody of children is their best interests. The Guardianship of Infants Act, which is the applicable law, in particular section 17, overrides customary, religious, and other rules. It is to the effect that in determining the issue of the custody of children, the court should take into account the best interests of the children. As a general rule, children of tender years always go with the mother unless the father can prove that it would not be in their best interests to live with the mother.

Maintenance for the Wife and Children

Ordinarily, the husband has a moral and legal responsibility to meet the needs of the wife and children. If he fails to do so, he can be compelled by a court of law on the application of the wife. This is mostly before divorce: after divorce the courts prefer to sub-divide the property between the spouses.

If the parties are still married or separated, the court is empowered to make orders for maintenance as the justice of the particular case demands, paying due regard to the earnings of both spouses and the financial needs of the applicant. If the wife earns a salary, this will be taken into account in arriving at the order. If she earns more than the husband and has less responsibilities, the court will not make an award for maintenance. She may instead be ordered to maintain the man, although this is rare.

Where divorce is pending, a spouse may apply for interim maintenance (known as alimony *in pendente lite*). This maintenance lasts until divorce is granted. In such an application, the applicant must prove her needs and those of her children through a sworn affidavit, and state her income, if any. The court then makes orders as to the maintenance and the custody of the children as appropriate. Any party aggrieved by the orders may apply at any time for their variation. An example is if the husband loses his job.

Determination of Property Questions

Questions relating to property of the spouses may arise during or after marriage. The High Court has been given power by the Married Women Property Act of 1882 (an English Act of Parliament that has been applied to Kenya), to determine property disputes. In a suitable case, the court will order division of property between spouses.

As a general rule, marriage does not alter existing property rights. Women have as much right as men to own property and any property acquired before the marriage belongs to the person who had acquired it. Marriage does not, by itself, entitle a spouse to the property of the other. Nevertheless, if it can be shown that a spouse contributed to its acquisition either financially or through emotional and psychological support, she is entitled to a fair share of the property acquired in the course of the marriage and *vice versa*. A spouse who claims the property of the other has to show by evidence that he or she contributed substantially, directly, or indirectly (for example through paying for household expenses, preparing food, and enhancing the general welfare of the family), to the acquisition of that property. Over time, it seems that the courts have come to accept an equal distribution of property irrespective of the amount of financial contribution that the wife may have put in.

Succession

Historically, each community has had its own rules to regulate matters of inheritance. Colonization introduced western rules (for example, they could choose to write wills). Africans who did not opt to be governed by Western rules were regulated by applicable traditions and customs. The enactment of The Law of Succession Act in 1972 changed and consolidated the law of succession and inheritance applicable to Kenyans as a whole. It became operational in 1981. While the right to choose to be governed by either

traditional or statutory rules was retained, the law nevertheless introduced some mandatory changes to customary rules on succession.

Testate succession

Testate succession occurs where a person makes arrangements while he or she is alive about how his or her property should be disposed of after he or she dies. These arrangements are made in a document known as a *will*. Any document made in accordance with the law may take effect as a will so long as it is shown that it was intended to take effect after the death of the maker. It is important to make a will because:

- early provision about disposal of property minimizes squabbles over property after one's death;
- it gives the maker of the will the freedom to decide who should take what instead of leaving it to those who remain after he or she dies;
- it is better to use it rather than leave the management of one's affairs to the impersonal provisions of intestate succession;
- it gives the maker an opportunity to decide who will run the affairs of his or her estate instead of the management falling in the hands of people in whom he or she would probably have had little confidence
- the executor of the estate derives power from the will and can begin managing the affairs of the estate earlier than an administrator who has to wait until letters of administration are granted; and
- it reduces uncertainty that may delay making decisions about the property while a will is being looked for.

A will is only valid if, and will be invalid unless:

- the person making it had the capacity to make a will (infants and persons of unsound mind are excluded);
- it is written in accordance with the laws of the country in which the maker of the will resides (oral wills must be made in the presence of 2 or more competent witnesses and the maker dies within 3 months of making it while written wills must be signed by the maker and at least two competent witnesses who saw the maker signing the will);

A will can be invalidated if it is proved that the person making it lacked the capacity to make it at the time when it was made. If a will also lacks the validity requirements required for either an oral will or a written will, it will also be invalidated. If it can be shown that a will was made under circumstances that raise suspicion of fraud or undue influence on the maker, it may also be invalidated. So too will a will in respect of which it can be proved that a clause or word was introduced by mistake. The same will be the case if it is proved that a will was written for the maker but it was not read to him or her before he or she signed it.

Wills, once made, can be revoked or altered. The circumstances in which a will may be revoked are:

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- if the maker marries, unless it can be proved that it was made in contemplation of the marriage with a specified person;
- if the maker writes another will or *codicil* (an amendment or addition to the will);
- if the maker destroys it, through tearing, burning or otherwise, showing a clear intention to revoke it;
- if it is known that a will was written but cannot be found after the death of the maker; or
- if he or she did not make reasonable provision for his or her dependants (including children that he was taking care of before he died, even if they were from a bigamous union or if he or she was not married to their mother or father).

A will that has been revoked may be revived by re-executing it or by a codicil that shows a clear intention to revive the revoked will.

Even if a will appoints an executor, it is necessary for the executor to apply for a formal document of recognition from the court. This document, known as *probate*, will not be granted where the will is being contested, or if it appears to the court that the document attached to the application for probate is not a valid will. If it is proved that probate was granted through fraud, it will be revoked.

Intestate succession

Intestate succession arises where someone dies without making arrangements on how his or her property will be disposed of after his or her death. It may be partial, where a person fails to include all or his or her property in a will, or full in the case of a person who does not make a will at all. In the case of partial intestacy, the property not covered by the will should be governed by the provisions of the law relating to intestate succession.

Where a person dies without leaving a will, the law makes provision for both monogamous and polygamous unions. Where the intestate leaves a spouse and a child or children, the spouse is entitled to the personal and household effects plus an interest as long as he or she lives in the remainder of the estate as long as she remains unmarried. Upon death or remarriage of the surviving spouse, the property is divided amongst the surviving children equally. She may also distribute the estate while she is still alive or unmarried, so long as it is done fairly and reasonably. Any aggrieved child is entitled to petition the High Court for a variation or redistribution. Where the deceased had more than one wife, the personal and household effects and the rest of the property is divided between the various houses in proportion to the number of children in each house. The spouse in each house has a life interest as long as she lives and does not remarry as well as the personal effects and household items. Her children inherit from her upon death or remarriage. Where a widow has not children, she will be entitled in the same manner as a widow whose husband has died intestate.

Administration of estates

Upon the death of a person, if he or she had left a will, the executor (if one was appointed) should apply for probate. In the case of intestate succession, the most well-placed person in the succession line should apply for grant of letters of administration.

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Temporary letters are always issued and are conformed after some time. It is an offence punishable under the law for anyone to administer an estate without letters of administration or to make false statements in the application for letters of administration. Where it is proved that a grant of letters of administration was obtained through fraud, it will be annulled and the property will revert to the rightful person in the succession line. If there is no one, the property will revert to the state.

Chapter 17

Crimes

Introduction

It is the duty of the state to protect its citizens from wrongs committed against them. To do so the state has developed criminal law as that branch of the law that deals with wrongs against individuals which the state has outlawed and which are punishable by the state. Criminal law therefore comes to the aid of individuals who have been wronged by others. It is the state's duty to prosecute and ensure that those who commit crimes are charged (or accused) in court and punished if found guilty.

What is a Crime?

A crime, also known as an offence, is an unlawful act or omission which is against the law of the state. It is an offence which even if targeted at an individual is an offence against the state as it is against the state's laws. Generally crimes are punishable by fine or imprisonment. Other punishments for crimes are discussed in the section on court procedures. Examples of crimes include theft, rape, assault and robbery. Prosecution of crimes are normally commenced in the name of the state (for example, *Republic vs Okunda*). This shows that although a wrong like theft was committed against an individual, the offence is against the state.

Crimes are categorized into felonies and misdemeanors. The classification is based on the seriousness of the crime. A felony is a serious offence and will attract a term of imprisonment of more than three years while a misdemeanour is an offence that attracts a term of imprisonment of not more than three years. The Penal Code defines the offences that are felonies and those that are misdemeanours. Examples of felonies include manslaughter, murder and bigamy. Examples of misdemeanours include perjury and false pretences.

Principles of Criminal Liability

Before a crime can be said to have been committed, there are a number of principles that apply. One of them is to the effect that there must be both an intention and an act. A cardinal maxim of the law is that the doing of an act does not make a person guilty unless he or she has a guilty mind (*actus non facit reum nisi mens sit rea*). Because of this maxim, it is said that a crime consists of the *actus reus* (the commission of the prohibited act) and the *mens rea* (the intention to commit the prohibited act).

While the first element is easy to prove, the second one sometime presents problems but it not too difficult. It can be proved by showing that the act or omission was done voluntarily and that its consequences could reasonably have been foreseen. If X fires a gun at Y, he is assumed to know the consequences and cannot say that he did not know that a bullet will come out of it and injure Y. If the accused was also so reckless as not to care whether the consequences would be brought about or not, he or she will be similarly liable. The law assumes that every person is presumed to understand the natural consequences of his or her acts. Needless to state, no act is punishable if it is done involuntarily. For example if, as sometimes happens, armed carjackers force male

passengers of vehicles that they carjack to perform sexual acts with the female passengers, the male passengers cannot be charged with rape even if all the ingredients of the crime of rape are present. There are nevertheless certain offences where liability is strict. An example is licensing offences under the Traffic Act.

General Defences in Criminal Law

Every person is responsible for his or her actions. When one commits an offence they will be responsible in law for the offence and will after being proved guilty be convicted and punished. However one can escape liability if they are able to prove one of the general defences available in criminal law or a special defence that is applicable to the crime they have committed. Examples of some general defences for crimes are infancy, insanity, intoxication, mistake, compulsion, self-defence, and a previous acquittal or conviction.

Infancy

The law assumes that a person under the age of eight years is not criminally responsible for doing or failing to do anything. Thus anybody under eight years cannot be charged and convicted with committing a criminal offence. A person under twelve years is not criminally responsible for any act or omission unless it can be proved that at the time when the act or omission occurred, the person had capacity to know that he or she ought not to have committed the act or omission. Further a male person under the age of twelve years is presumed to be incapable of having sex. Immature age is therefore a total or partial defense to a criminal charge.

Insanity

Insanity is a state of mind. It is a disease of the mind that impairs the judgment of a person. For purposes of criminal law, insanity makes one unable to understand what they are doing or of knowing that what they are doing is wrong. Thus when one suffers from a disease of the mind and the disease makes them unable to either know what they are doing or that the act is wrong they will not be responsible for any crime they commit. It is important to note, however, that although insanity is an offence, it is not a total offence: when insanity has been proved, the verdict of the court is not “innocent”; rather, it is “guilty but insane”. The convicted person is then detained at the president’s pleasure.

Intoxication

In common language this is referred to as drunkenness, although this may be mistaken to refer to alcohol only. Intoxication is generally not a defense, especially if the act or omission is voluntary. You can therefore not go and drink and then proceed to beat up your neighbour with whom you have had a longstanding dispute only to go to court and expect to succeed in escaping punishment for the assault on the basis that you were drunk and therefore intoxicated.

There are however certain circumstance in which intoxication will be a defense.

- Intoxication is a defense if it is involuntary. If one is either tricked or forced into being intoxicated then they would end up not knowing what they were doing. In this situation they can escape criminal liability

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- When intoxication causes temporary insanity. If one can prove that due to the drink, they were so drunk that they did not know that the act or omission was wrong or they did not know what they were doing.

Mistake

A mistake as to the law is usually not a defence to a criminal charge as ignorance of the law is not a defence. However, where there is a mistake of fact, the decision will depend on whether or not the person seeking to rely on the defence would still have been reliable had the facts been as he or she thought them to be. If Josephine shoots Francis dead, thinking that it is Henry, she will not be excused from her criminal liability because she still shot a human being anyway. But if she shoots Francis in the dark thinking it is an approaching wild animal, she will not be guilty of murder.

Compulsion

Sometimes it is possible for someone to commit a crime under duress. If a person is forced to commit a criminal act because he has been threatened with physical harm or death, and if the act is committed only because during the whole time in which it was being committed the person was compelled by such threats, then that person is not criminally responsible. Threats of future injury will not be a sufficient defence. If the act is murder or attempted murder this defence does not apply.

Self-defence

The law allows a person, in defending himself or herself or his or her property to use such force as is reasonably necessary. To pass the test of reasonableness, the means of defence must be compatible with the means or degree of force being used against him or her. If a burglar is trying to get into a house, whose owner pursues and kills the burglar, the house owner will have committed murder. If, however, the house owner shoots one of a number of armed robbers who are trying to gain entry into his or her house, then this is not murder.

Prior acquittal or conviction

A person who has once been tried by a competent court for an offence and either acquitted or convicted cannot be charged again with the same offence based on the same set of facts. Just as there must be an end to civil lawsuits arising from the same facts, there must be an end to criminal cases arising out of the same facts. This protection against perennial prosecution is also protected by the constitution.

Parties to Offences

Whenever a crime is committed, there may be different degrees of participation. There is the principal offender who actually commits the offence and may be charged with actually committing it. However, the following may also be principal offenders:

- Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
- Every person who aids or does anything to facilitate another person in committing the offence; and
- Any person who counsels or obtains the services of another person to commit the offence.

For example, if Tom lends his car to Tim to rob a bank, which is later used for a bank robbery he is as guilty as Jerry who drove away the car carrying the loot and Jennifer who persuaded Jerry to help Tom. All of them are liable to same punishment as if they had been in the bank ordering the staff to open the safe and running out with the money. In the same vein, if a mob forms the intention to kill a suspect, they are all guilty of murder even if the prosecution cannot tell who delivered the fatal blow.

Selected Offences

Kenya does not have common law or customary law offences. Accordingly, all offences are defined in various written laws, most of which are found in the Penal Code. Besides the Penal Code, there are a number of other statutes that create offences. The crimes defined in this section are by no means exhaustive but are the ones that are most obvious if not most prevalent.

Treason

Of all the offences against public order, this is the one that is the most serious. It consists of an attack on the safety of the state, usually taking the form of technical assistance to the enemies of the State at a time of war, or an attack on the President or trying to overthrow the government by unlawful means, for example, through a *coup d'état*. Any person found guilty of treason is supposed to be sentenced to death. The court does not have the option of fining him or sending him to prison for a prison term of whatever length.

Prohibited Publications

Under the law, the Minister for the time being responsible for such matters may prohibit the importation, printing, supply, sale, distribution, reproduction or possession of certain publications, known as prohibited publication. The reasons for prohibition may be preservation of morality, public health or public security. Once such a prohibition is made and published in the *Kenya Gazette*, anyone found importing, printing, supplying, selling, distributing, reproducing or in possession of such publications is guilty of an offence. Dealing with the prohibited publication in the manner prohibited by law is enough to constitute an offence: the accused does not have to know the contents of the publication. From the 80s to the early 90s there were quite a lot of publications banned in this manner. They included publications like *Beyond*, *Society*, *The Nairobi Law Monthly*, *Pambana*, and *Playboy*. Most of them were prohibited mostly on political grounds in the period when there was very high intolerance for political opposition in Kenya, which coincided with the period when the KANU was, by law, the only party allowed to exist in Kenya. Although the law has little significance in a multiparty setting, it is still in the statute books.

Sedition

This was almost the natural twin to the offence of dealing in prohibited publications in the 80s to early 90s. Sedition is defined as conduct which threatens or excites disaffection against the government. Whereas the law even goes to the extent of defining the seditious intention as any intention “to overthrow by unlawful means the Government of Kenya as by law established” or “to bring into hatred or contempt or to

excite disaffection against the person of the President or the Government of Kenya as by law established” this was interpreted so widely as to even cover people whose only crime was to aspire to political leadership! Those who were arrested were brought to court at odd hours after long torture sessions in the infamous Nyayo House Chambers or Nyati House and swiftly convicted to long terms of imprisonment. In the current multiparty setting, it is doubtful if this offence has any meaning but it is still in the statute books.

Unlawful Assembly and Riot

The offence of unlawful assembly is committed when three or more people assemble with intent to commit an offence or being assembled with intent to carry out some common purpose conduct themselves to conduct themselves in such a manner as to make any people in the neighbourhood of their meeting to develop a reasonable fear that those assembled will cause a breach of the peace or that they may provoke other persons to commit a breach of the peace. It was usually backed up by a requirement that all public meetings must be licensed, which licence was not easily granted! When an unlawful assembly takes steps to accomplish its purpose, the assembly is called a riot and the persons participating in it are said to be riotously assembled. Originally thought to be a useful device for maintaining public order, this offence also was used to stifle opposition and continues to be used against campaigners for a new constitution and anti-World Trade Organization (WTO) activities alike.

Perjury

Perjury is committed when a person gives false testimony on anything which is material to court proceedings. It is also committed if a person makes false statements for the purpose of instituting court proceedings, such as in an affidavit. The offence is committed so long as the two situations above apply, whether or not the false testimony was given under oath or affirmation (see Chapter 18: Court Procedures). If an interpreter, in the course of his work also materially misrepresents the evidence being given, he or she can also be guilty of perjury. A person who facilitates the commission of perjury is said to have committed the offence of *subornation of perjury*.

Bigamy

Any person who is married under a system of law that does not contemplate a polygamous marriage commits bigamy if he or she marries another person while the previous marriage is still in existence (See Chapter 16: Family Relations and Succession). If the previous marriage has been declared void by a court of law or if the person was separated from the spouse for over seven years (during which the other spouse can be presumed to be dead) before the subsequent marriage. It follows therefore that someone married under Islamic law or customary law in Kenya cannot be charged with bigamy.

Murder

Murder is the offence of killing another person with malice aforethought. There is malice aforethought if either of four things can be proved. One is that there was an intention to cause the death of or to do grievous harm to any person, whether such a person is the person actually killed or not. One cannot therefore argue that “I intended to kill Owino but the bullet accidentally killed Makomere”. The second situation in which the court will

decide that there was malice aforethought is if the person committing the offence knows that the act or omission that caused the death was likely to cause death or grievous harm. If Kimutai sets fire to Choge's house and Choge is burnt to death in the ensuing conflagration, Kimutai is guilty of murder even if his original intention was to "merely scare him". There will also be malice aforethought if it can be proved that there was intent to commit a felony at the time when the act causing death was committed. If, in the course of a violent robbery the owner of the property being taken by force is shot dead, the attackers are equally guilty of murder. Finally, there will be a finding of malice aforethought if the act causing death was committed in furtherance of a felony. If an escaping robber shoots a police officer to death, the robber is equally guilty of murder. Murder is also a serious offence that attracts a mandatory death sentence.

Manslaughter

In any other instance, where someone causes the death of another, he or she is guilty of manslaughter. A person can commit manslaughter in either of three ways. In the first, he may be provoked. For provocation to be proved, it must be shown that the act causing death was committed when the accused was "in the heat of passion" and before there was time for his anger to cool down. The law takes into account circumstances in which the accused is so enraged as not to be in control of his or her mind, and therefore incapable of exercising self-control. However, there must be a reasonable relationship between the act causing death and the act that caused the provocation. For example an attack with fists may not justify the use of a deadly weapon, but if death is caused by a punch in return this may be excused. If the accused found his or her spouse having sexual intercourse with another, this may also be an excuse although the courts have held that this will not be the case if the accused was previously aware of the adulterous relationship that the spouse had with the third person. In the second instance, a person can cause manslaughter if he or she is the surviving member of a suicide pact. The third way in which manslaughter can be committed is committed if a person intended to cause personal harm but not grievous harm. If death occurs as a result of procuring an abortion, it is possible to charge the person who performed the operation with manslaughter. Involuntary manslaughter can also be committed through acts of recklessness or negligence. For example, if a drunken motorist can be charged with manslaughter.

Rape

If a person has unlawful sexual intercourse with a woman or girl without her consent, or if the consent is obtained by force or by means of false pretences as to the nature of the act or through fraud, he is guilty of committing rape. Two factors are important: it must be proved that there was penetration and that there was no consent. Courts have held in various cases that where a choir master persuaded a pupil to have sex with him "to improve her voice", or where the accused crept into bed and the woman thought it was her husband, or where a doctor lied to a young girl that it was a medical operation, were all cases of rape.

Defilement

If a person has sexual intercourse with a girl below the age of fourteen years, he is guilty of defilement even if there was consent. The law presumes that girls below fourteen

years of age do not have the capacity to give consent for sexual acts. However, it is a defence if the person charged has reason to believe that the girl is above the age of fourteen years or if the girl is his wife.

Indecent Assault

Any person who unlawfully and indecently touches any woman or girl is guilty of the offence of defilement. Although the assault must be accompanied by indecency, it does not have to necessarily be by touching the private parts. English courts have for a long time held that even a kiss could, in some instances be indecent. Recently, a Kenyan court also upheld the sentence of a *matatu* tout who had indecently kissed a school girl. It is also indecent if it is accompanied by utterances suggestive of sexual intercourse. While rape and defilement can only be committed by men, a woman can also be charged with the indecent assault of a boy below the age of fourteen years.

Incest

Any male person who has sexual intercourse with a female person who is to his knowledge his granddaughter, daughter, sister or mother is guilty of the offence of incest. As in defilement, consent is not a defence to a charge of incest.

Theft

A person who fraudulently and without any claim of right takes anything capable of being moved, or fraudulently converts to the use of any person other than the general or special owner of the thing in question is said to have stolen that thing. A person is said to have acted fraudulently if he intends to permanently deprive the owner of the thing in question. It is no defence for the person to say that they intended to repay the money at some stage. Taking a car without the owner's knowledge is not an offence if it was only intended to be temporary but it may constitute an offence under the Traffic Act.

Handling Stolen Goods

A person is guilty of the offence of handling stolen goods if he or she handles goods which he or she knows or has reason to believe have been stolen. The test of whether the accused knew or should have had reason to believe turns on reasonableness. If, for example, someone's school going son or daughter turns up at home with a brand new car and they do not ask where it has come from, they may find themselves faced with a charge of handling stolen property if they are found in possession of the stolen car.

Obtaining by False Pretences

Any person who obtains any goods or services from another by falsely pretending that he or she can pay for them or by some other means, is guilty of the offence of obtaining goods or services by false pretences. The pretence must relate to a present or past fact, and for the offence to be committed, the complainant must have actually parted with the goods or delivered the service in question.

Burglary and Housebreaking

Any one who unlawfully breaks into a house commits an offence. The offence is deemed to have been committed even if there is no actual damage to doors or windows, such as if the person enters into a house by lying that he or she is a Telkom engineer.

Robbery

Any person who steals anything and, at or immediately before the time of stealing it, uses or threatens to use actual violence to any person in order to obtain or retain the thing that he or she has stolen to prevent or to overcome resistance to it being stolen or retained is guilty of robbery. In order for one to prove the offence of robbery, it must be shown that there was violence or the threat of violence against some person or his or her property. This requires the use of physical force. Armed robbery (also referred to as robbery with violence) and attempted robbery with violence now carry a mandatory death sentence.

Malicious Damage

This offence is committed when a person willfully and unlawfully destroys or damages any property. There are various categories of this offence depending on the type of property that is destroyed or damaged.

Sentencing Considerations

In all cases, the law which defines an offence also prescribes a punishment for it. In many of these cases, the punishment is prescribed by law but only as a maximum sentence. It is in very few instances, for example in cases of murder, treason, robbery and robbery with violence, that the law prescribe a mandatory sentence. It is also possible for the law to prescribe a minimum sentence but this is equally rare. An example is stock theft which was first increased to a minimum sentence of seven years before a further increase to a minimum of fourteen years together with corporal punishment. In the vast majority of cases, however, the courts get to determine what sentence to give: whether to give the maximum allowable or something below. It is usually a term of imprisonment or a fine or both such a fine and imprisonment. Besides these two, it is also possible for the court to order that the convicted person serve a probation sentence or a community service.

The capital sentence is usually implemented in prison. It involves death by hanging. For over ten years now, no person convicted of a capital offence (one on which the death sentence has been imposed) has been hanged. There is a possibility of this punishment, which is seen a cruel and degrading by human rights groups, to be removed from Kenyan laws altogether.

Imprisonment normally involves serving a period of time in prison. Where the person convicted is a foreigner, the court may also order his or her deportation immediately or after serving the sentence. A person under the age of fourteen years cannot be sentenced to imprisonment and must be taken to a Youth Correctional Centre.

Many punishments usually include corporal punishments as well. In recent times, this has also been opposed by human rights groups on account of the fact that it is cruel, inhuman and degrading.

Fines are often provided for as a form of punishment. Minimum fines also exist, for example under the Narcotic Drugs and Psychotropic Substances Act. Whenever a fine is

imposed, the court also makes an order that the person in question should serve a prison term if he or she cannot pay the fine.

Under the Penal Code, the court can order that a person who has assisted in the commission of a felony forfeits any of his or her property which has been obtained through his or her crime. Under the Narcotic Drugs and Psychotropic Substances Act, property acquired with the proceeds of drug money or on which drugs are grown or kept may also be forfeited to the state.

A person who has been convicted of an offence may be required to deposit security for keeping the peace. This may take the form of a solemn promise, with or without securities, of a definite sum to be forfeited if he commits an offence.

Children may also be sent to youth correctional facilities. An order committing the person to such a facility cannot remain in force beyond the date on which such a person will be twenty years of age. It cannot remain in force longer than three years at a time, except when extended by the court upon review.

An offender, upon the recommendation of a probation officer, may also be sentenced to serve probation for a period of not less than six months and not more than three years. The offender must indicate willingness to comply with the terms of the probation order and the probation officer, a trained social worker, must supervise his or her probation. A court has power to amend or cancel a probation order depending on the conduct of the convicted person.

Under the Criminal Procedure Code, a person who has been convicted for a second time for an offence punishable by imprisonment for a term of three or more years may also be ordered by the court to be reporting to a certain police station for not more than five years from the date of his or her release from prison. In the case of robbery, attempted robbery, getting armed with the intention to commit a felony, and handling stolen goods, this is mandatory.

In recent times, because of congestion of prisons and other factors, there has been increasing debate and another type of sentence has been established under the Community Service Orders Act. It is possible for the court to order an accused person to serve a period of time in any government institution or other institution in the community free of charge. Probation officers supervise the implementation of these orders as well.

Security and the State

There is no society in the world without crime. Because of this, every state owes its citizens a duty to protect their lives and property. When there is a high degree of crime, especially violent crime, the citizens cannot realize their right to live and move about freely without hindrance. Recently, there has been concern about the rising wave of crimes, fuelled by the collapse of the economy some time in the 90s and the resultant poverty. The government is duty bound to put in place measures to improve security so that citizens can go about their business without fear.

Chapter 18

Court Procedures

Introduction

Although there are several types of cases that one can take to a court for resolution, the common types and which this manual deals with can be categorized into criminal and civil cases. The court procedures for these differ and it is these that this chapter will highlight. Procedures are an important part of the law as it is through them that the substantive rights and rules like the ones discussed in this manual get enforced.

Criminal procedure

Criminal law usually deals with laws and regulations that the state employs to discharge its obligations to protect all citizens generally from wrongs committed against them. Crimes are generally wrongs against the entire society and as such their punishment is normally at the instigation of the state. Although the wrong is usually committed against an individual or group of individuals, the individual only notifies the state about the wrongful act. The individual is referred to as the **complainant**. The person against whom a wrong has been committed, the complainant has a right to report to the police who then will take action to arrest and charge the offending party in a court of law. The person who is charged in a court for committing an offence is called an accused person.

The rationale for the accused person being charged by the police is due to the fact that crimes are considered as offences against the whole society. The law however has provisions to ensure that the accused person gets a fair trial. There is a presumption in law that everybody is innocent and presumed innocent until that person pleads or is proved guilty by a court of law. The law therefore has provisions to ensure that this presumption is held. It is also the duty of the police and prosecution department to prove a case against an accused person beyond reasonable doubt.

Rights of an Arrested and Accused Person

Under the law several people have the power to carry out arrests. Citizens, police officers and magistrates all have the power to arrest suspects.

Citizens Powers of Arrest

A citizen can carry out arrests against a person who:

- Who commits a serious offence in his or her presence. A serious offence includes such offences as rape, murder, theft, sexual assault and burglary.
- Has already committed a serious offence; and
- Has destroyed his or her property

Once they have arrested a suspect, citizens are required to promptly transfer that person to a police officer. Failure to do so is a criminal offence of unlawful detention. Police will find out the reasons for arrest and make a determination as to whether the person should be arrested or released.

Police Power of Arrest

The law gives police officers the widest powers of arrest. So much so that sometimes ordinary citizens confuse the fact that only police officers have the powers of arrest. While this is not true, the reality is that they have very extensive powers of arrest.

Police officers are authorized to arrest a person who:

- Commits a serious offence in their presence;
- Obstructs them during their work;
- Tries to escape from custody;
- They suspect of having committed a serious offence;
- They suspect of having committed a serious offence;
- They suspect has run way from the armed forces;
- They suspect has stolen property; and
- Has a warrant of arrest issued against him or her

When police arrest a person without a warrant of arrest, they should promptly take the suspect to magistrate or police station or release then altogether. If the person is arrested pursuant to a warrant then the person should be taken to the magistrate who issued the warrant of arrest but in the meantime they can held at a police station.

Magistrate's Power of Arrest

A magistrate has powers to arrest a person who commits a crime in their presence within their area of jurisdiction. Suspects arrested by a magistrate should be handed over to a police officer, taken to a police station or garnet bail.

Procedure of Effecting an Arrest

Rules exist to regulate the manner in which a suspect should be arrested. This is to ensure that the rights of an arrested person are not violated. Every person who is about to be arrested should ensure that the procedures are followed and should this not happen they can make a complaint to the relevant authorities including taking legal action.

- *Identification:* Those carrying out an arrest are required to identify themselves. A police officer is required to produce a police identity card, even if the officer is in uniform. When in uniform, the serial number of the officer must also be visibly displayed.
- *Reasons for arrests:* the person carrying out an arrest must also give sufficient reasons why they are effecting an arrest even if the suspect does not ask for the reasons.
- *Touching or Confining the Person to be Arrested:* The law requires that the arresting person actually touch or confine the body of the person to be arrested unless the person willingly submits to an arrest. Handcuffs are allowed to be used in the process of arrest.
- *Search of Person Arrested:* the law allows an officer who has carried out an arrest to search the arrested person and place in safe custody all articles except

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necessary wearing clothes. The officer should issue receipts for the items. A woman can only be searched by another woman.

- *Use of Force:* an officer is allowed to use reasonable force in carrying out an arrest. Force is only to be used, however, to prevent the escape of an arrested or convicted person or if the police officer has reasons to believe that his or her life is in imminent danger. The force to be use is only to prevent the escape of the person and not to kill. When police use unreasonable or excessive force then they will be liable and the person on whom the force has been used or their relatives can sue for compensation.
- *Mob Justice:* members of the public are allowed to arrest a suspect and take them to the police station but not to take the law into their hands and start punishing the suspect. Mob justice as this practice is often referred to is both illegal and also immoral. To do so is to presuppose that a suspect is guilty and deny them the opportunity of being proved guilty through the process of administration of justice. Anyone who engages in mob justice should be arrested and charged.

The Rights to Bail

When an arrested is taken to the police station they will be searched, there belongings taken and kept and a receipt issued for it. The person's details including reasons for arrest will then be recorded by a police officer in the Occurrence Book (O.B.). The suspect's statement will also be recorded.

According to the law an arrested person should be taken to court or released within twenty-four hours of arrest excluding weekends. However if they are arrested for committing a capital offence (these are murder, robbery with violence and treason) then they can be held for up to fourteen days.

When one has been arrested, they have a right to be granted bail while awaiting appearance in court unless they are being investigated for a capital offence. The bail should be reasonable. Bail can also be granted while waiting for the trial to be started. In granting bail the court will have to seek guarantee that the accused person will be able to attend their trial when required to do so.

Recording Statements and Confessions

Suspects routinely record statements while in police custody. There are two types of statements suspects can be required to record. The first is a statement under inquiry. This refers to statements that suspect can be required to write during the course of investigations on what they know about the offence being investigated. This statement is recorded when the police have not made up their mind to charge a particular person. The second type of statement is a statement under charge. This is a statement recorded once the police have decided to charge one with an offence.

A confession, on the other hand, is a statement made by a suspect in which directly or indirectly he or she admits having committed the offence in question. For a long time confessions could be taken at police stations. However due to the complaints that police

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were coercing people to confess to crimes they never committed, the law was amended so that for a confession to be admissible in addition to the requirement that it must be voluntary, it also has to have been recorded before a magistrate. No confession recorded at a police station is admissible in court.

Contact with the Outside World

When one is in police custody they do not lose their rights. They still have a right to have contact with the outside world. One is entitled to a phone call from the police station to inform relatives and friends about their arrest. One is also entitled to receive visitors during daytime.

Constitutional Protection

The Constitution at section 77 contains several provisions which protect arrested and accused persons. This shows the importance attached to the fundamental rights of arrested or accused persons. The protection include the presumption of innocence, the right to be informed of the offence one is charged with, right to be given adequate time to prepare one's defense, right to be represented by a lawyer of one's choice and right to an interpreter if one does not understand the language being used in court.

The existence of these provisions in the constitution gives an arrested person adequate provision and entitles them to sue for their enforcement in situations when there is a threat to violate their rights.

Pre-trial Process

When the accused has been arrested and taken to a police station, the process of preparing a charge sheet will be undertaken and their statements also recorded. The police will then be ready to take the suspect to court. However before the trial proper commences certain procedures must be done first. These are what are referred to as pre-trial procedures.

- **Plea taking:** when the accused is brought before court, the charge he or she is being accused with will be read. She will then be required to respond to the charge. This is the process of plea taking. An accused can either plead guilty, not guilty or in certain cases the accused refuses to plead or challenges the charge. When an accused pleads not guilty the magistrate will record the plea. A hearing date is then set so that the trial can commence. If they pleaded guilty, then they are admitting to the charge and will then be sentenced. After the accused has pleaded guilty the prosecution will present the facts on which the charge lies. Courts are required to convince themselves that an accused person is making a guilty plea and that the plea is unconditional and unequivocal. In certain circumstances an accused can refuse to respond to a charge. In this situation a not guilty charge should be entered. In other circumstances, an accused may challenge a charge before a plea is taken. A challenge may be on the ground that it is based on a wrong section of law, is not based on any known law, or he or she has previously been convicted or acquitted of the offence or such other legal reason.

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- Application for Bail: After a plea is taken, the next stage is the trial proper. However due to the court's schedule not all cases will proceed to trial immediately. Time will normally elapse from the day a plea is taken to when the trial commences. Due to this normally applications for bail are entertained after that of plea. Bail is the conditional release from custody of an accused person pending the hearing of his or her case. Except for capital offences, bail is a constitutional right. The courts will consider several factors in granting bail. The main reasons for bail is to enable the accused enjoy freedom while waiting for trial but also to guarantee the court that they will attend they trail. The grant of bail is at the discretion of the court. Other factors to consider include the seriousness of the offence one is charged with, the accused's past behaviour, the strength of the evidence against the accused person, whether the investigations are complete or the stage they are at, the accused's standing in society and the heath of the accused. Bail can either be cash or through a bond with or without surety. A bond is an undertaking to appear in court signed by an accused person while a surety is one who stands witness that the accused will actually attend their trial.
- The other issue that needs to be dealt with is setting a hearing date. In the meantime the accused will also attend court for the mention of their case. The mention date is when the accused can also renew their bail application, variation of bail terms or even change their plea.

Trial Process

The trial proper commences with the prosecution presenting their case. This is normally led by either police officers or state counsels. The prosecution will give evidence against the accused person. They will call witnesses. The first stage after the witnesses have been sworn in they will be asked questions to extract evidence from them. This is called examination in chief. The next stage is for the accused or their advocate to ask the prosecution witnesses questions. This is called cross-examination. The purpose of cross-examination is to discredit the witness. After cross-examination the prosecution will then re-examine the witness. The purpose is to clarify issues that may have arisen during cross-examination. After this the prosecution case will end and the court will make a ruling as to whether the accused has a case to answer or not.

If the court rules that the accused has a case to answer, then the next process is for the defence case. The accused has three options. The first is to say nothing and wait for the courts judgment, secondly to give unsworn evidence on which they will not be cross-examined or to give sworn evidence and then be cross-evidence. If they chose the latter two, then they will be entitled to call witnesses have them examined in chief, be cross-examined and then re-examined.

After the close of the defense case each side will then make submissions. This is an opportunity for each side to summarise their case and seek to convince the case as to what judgment to give. The court will then give its judgment. If they find the accused not guilty that is the end of the matter. If they find the accused guilty, the next stage is

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mitigation and sentencing. Mitigation refers to the opportunity for the accused to plead with the magistrate for leniency. Typical examples is to show the court that they are remorseful, highlight a medical condition they may have say if they are the sole breadwinner.

As regards sentencing, there are different types of sentences. For capital offences the mandatory sentence is a death sentence. The other sentence is imprisonment. The term will depend on the type of offence. As regards sentences these can run either concurrently or consecutively if one is convicted of more than one offence. Concurrent sentences are those that are served at the same time while consecutive are served one after the other. So for example is one is convicted for two offences and the first is for three years while the second is five years then if the two sentences are concurrent the person will serve a maximum of five years yet if they are consecutive they will serve eight years.

The Prisons Act provides that those imprisoned are entitled to remission or reduction of their term up to a third of the total term. The right to remission can be lost if one misbehaves. However one has to be given a hearing before the right is lost. Courts also have the power to give a suspended sentence. This can happen when one is waiting for an appeal. If the appeal is lost the original sentence is lost or where one is given a sentence suspended on condition that they do certain things like keeping peace for a number of years failure to which the original sentence stands.

The other sentence is that of corporal sentence. This is caning. It exists for certain offences. There has been debate as to whether corporal punishment is humane or not. There is also fines and forfeiture. Fines are normally the payment of money. In addition courts can require the forfeiture of certain property the subject of a criminal case.

A convicted person can also be ordered to pay the complainant compensation. This is normally in the form of money. This can be in addition to or in place of other punishment.

Probation is the other sentence that a court can issue. This is normally issued on the recommendation of a probation officer and subject to certain conditions.

The last type of sentence is that of Extra Mural Punishment or community service. This is where the convicted person is required to undertake certain menial duties like slashing or collecting garbage. It is recommended for minor offences.

Appeals

The law gives the convicted person a right to appeal to a higher court against conviction or sentence. A right to appeal is based on the ground that courts can and do sometimes make mistakes in their judgment. Once a judge or magistrate has delivered his or her judgment, he or she must also inform the convicted person that they have a right to appeal against the judgement.

An appeal has to be filed within fourteen days from the date of conviction or sentence. If this period lapses, an appeal will only be allowed with the permission of the court where

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it is to be filed. An appeal will always be allowed out of time if the delay is caused by a failure to obtain the court's proceedings and judgement in good time or for other good reasons. Lack of money is not regarded as a good reason to allow an appeal out of time since there are procedures for the poor to appeal as paupers.

An appeal against conviction or sentence from a decision of the District Magistrate's Court of the Third Class goes to a Subordinate Court of the First Class (District Magistrate Class One, Resident Magistrate, Senior Resident Magistrate, Principal Magistrate, Senior Principal Magistrate or Chief Magistrate). There is a right to a second appeal to the High Court. A third appeal to the Court of Appeal is not automatic: the Court must consent to the appeal being brought.

Appeals from a District Magistrate's Court of the Second Class or a Subordinate Court of the First Class go to the High Court with a further right of appeal to the Court of Appeal. The Court of Appeal hears appeals from decisions of the High Court. As the Court of Appeal is the highest court, its decisions are final.

An appeal is filled by presenting in court a written and signed document called a Petition of Appeal. The petition summarizes the reasons for the appeal and should be accompanied by a copy of the charge sheet, proceedings, and judgement of the lower court and contain an address where the appellant can be reached. Only those reasons given in the petition of appeal can be argued at the hearing. Those in prison can present the appeal through the officer in charge of the prison, who is required to forward it to the appeal court's registrar.

Unlike a trial court, an appellate court does not listen to witnesses. It reviews the evidence recorded by the trial court, listens to arguments by all sides and arrives at its own decision on the matter. The appellant is entitled to be present at the hearing.

Before an appeal is allowed to proceed for hearing, a judge has to peruse the documents and if satisfied that the appeal should proceed, admit it for hearing. In very limited instances, the court may reject or allow an appeal without hearing the parties.

An appeal court has wide powers. It can:

- uphold the conviction and dismiss the appeal;
- set aside the conviction and acquit the appellant;
- reduce, alter, or enhance the sentence; or
- order a new trial.

The appellant has a right to apply to the High Court, or the court that sentenced him or her, for bail or suspension of the sentence awaiting or after the filing of an appeal. If the lower court refuses the application, another may be made in the High Court. This right is important because appeals take long and often by the time the appeal is heard and determined, the appellant may already have served the sentence. Courts are reluctant to give bail pending appeal or stay sentences due to the high risk of the accused absconding. Only when the appeal has a probability of success will bail or stay of sentence be granted.

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The Government has no legal obligation to compensate the accused if he or she is acquitted by the trial or appeal court. This applies even when by the time the appeal is heard and determined, part or the whole of the sentence has been served (but a fine paid is returnable). The accused can however obtain compensation in a civil case against his or her accusers if the allegations that led to arrest and trial were unfounded and they were made out of a desire to harm. The Government could only be sued and ordered to give compensation if the prosecutor was part of the plot.

Rights of a Convict

Once a person has been convicted and imprisoned they become a convict. The Prisons act contains provisions as to how they should be treated. A medical officer should be stationed at every prison to take care of the health needs of prisoners. Prisoners are not to be tortured. Prisoners are however subject to prison discipline. This does not mean that they should be mistreated or tortured. Male and female prisoners are either to be kept in separate prisons or in separate parts of the same prison. In the case of a prisoner detained in a prison without suitable accommodation, the officer in charge, on advice of the medical officer in charge may order for the removal of the prisoner to a hospital. However even when in hospital they shall still be deemed to be in prison. Immediately upon being entitled to be released prisoners shall be immediately released. Convicts may by industry and good conduct earn remission of their sentences. Those who are sentenced to a short period of time can be ordered to perform community service in place of the imprisonment term.

Prisoners are also human beings. The intention of imprisonment is also to give them a chance to reform. Once a prisoner has served their prison term the society should assist them when they are released so that they can integrate in society.

Civil Procedure

The procedure in civil cases is governed mainly by the Civil Procedure Act. The procedure in civil cases differs from the criminal process in certain fundamental respects. Firstly, the parties to a civil case are the two legal persons. The one who claims that a civil wrong has been committed against him is called a **plaintiff** while the one who is alleged to have committed the wrong is called the **defendant**.

The procedure is normally that the person who alleges that a wrong has been committed against him/her will draw a plaint containing the nature of the wrong committed, the particulars of the act and also the remedy they are asking the court to grant them. The remedies that are normally capable of being granted include damages and restitution and also in cases of contract specific performance. Another remedy includes injunction and restraining orders. These latter two are orders to prevent the defendant from doing something which offends the plaintiff.

In addition to a plaint, a civil action can also be commenced by several other procedures. These include an originating summons, an originating motion, a notice of motion or a petition. For example in cases of divorce the normal procedure is through a petition. The law will usually state which form the complaint of the plaintiff should take. The form of

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placing the complaint in court is normally referred to as a **pleading**. To be sure pleadings include all the documents the parties file in court in support of their cases. It therefore includes the plaint or other document filed by the plaintiff and those filed by the defendant.

Usually after the plaintiff has filed their case in court through either of the documents mentioned above, the court will normally notify the defendant of the case. The usual way is through the issuance of summons. These are then attached to the filed papers by the plaintiff. A competent person called a process server will then serve these papers on the defendant. The summons will tell the defendant that a case has been filed against him/her and require them to enter appearance that is acknowledge that he/she is been made aware of the case. The defendant will then within a specified time file a defense to the case. Should the defendant accept liability for the complaint, judgment will be entered by the court and the defendant will then settle the case as per the plaintiff's request. If the defendant denies the case then the case will go for hearing.

There are two types of hearings in civil cases. The first type is where the parties will attend court and give oral evidence in support of their cases and also call witness. The second type is where the parties go to court and orally plead their case. They will also rely on documents that they had already filed in court. However they will not call witnesses. The choice will normally depend on the nature of the case. Except for applications within the main case most civil case are heard through oral evidence and calling of witnesses. Unlike criminal cases in civil cases the burden of proof is on balance of probability and not a very high standard. The court will listen to both sides and decide which side is more believable

After the hearing the court will enter judgment either on behalf of the plaintiff or the defendant. Where judgment is entered in favour of the defendant and the defendant ordered to do something or make some payment to the plaintiff the next stage is that of execution. In such cases the plaintiff may seek the services of a court broker or auctioneer. These are professionals who are recognized by the courts and who assist successful parties to recover what they have been awarded by courts or to enforce directives of courts.

A party may be unsatisfied with a judgment of the court. In such circumstance they can request the court to review its decision or appeal to a higher court. If the judgment was delivered by a magistrate's court one can appeal to the high court and if it is in the high court one can appeal to the court of appeal.

Judicial Review

In the course of day to day activities there are numerous administrative bodies that make decisions that affect the lives of people. Some of these administrative bodies are government agencies, school boards or tribunals like the liquor licensing tribunals. they do so under powers conferred on them either by law or by their statutes or constitutions. Some of these powers are even said to be final.

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The law however recognizes that in the process of arriving at these decisions the administrative bodies might exercise powers they do not have, might exceed their powers and might exercise their discretion in a biased manner. A branch of law called Judicial review therefore exists to provide an avenue for people who are aggrieved by the decisions of an administrative tribunal to question those decisions. This branch of law is a unique branch, it is neither criminal law nor civil law. It is distinct branch of law.

Orders

Under judicial review there exists four orders or tools that can be used to challenge decisions of administrative bodies. These are:

- Mandamus: this is derived from a Latin word which means to command. It is issued in cases where a public body has a duty of a public nature or a duty imposed by statute and that body ignores or fails to perform that duty. The order of mandamus can then be issued by a court of law to compel the agency to perform its public duty. Therefore if the department of civil registration fails to issue one with an identity card for a long time after one has applied for the ID card, they can seek an order of mandamus to compel the issuance of the cards.
- Prohibition; just like the word implies, this is an order issued to prohibit. It is issued to prohibit an agency from assuming or exercising jurisdiction or powers that it does not have or from exceeding its powers. It is also issued to prevent the implementation of orders that have been made by an agency in situations where the agency lacked powers to make the order. Thus when a tribunal orders a person to be evicted from a premise yet it did not have the powers to make those order then the court can issue a prohibition order to stop the eviction.
- Certiorari; on the other hand is an order that requires that the decisions of semi-judicial bodies or inferior courts be transferred to a higher court for the purposes of being examined or certified for their validity and if found to be invalid will be quashed or set aside. Thus when a tribunal has made a decision the order of certiorari can be issued to bring the order within the control of the court so that its validity can be tested by the court.

Procedure

The procedure for applying for the orders of judicial review are contained in both the Law Reform Act and the Civil Procedure Rules at order fifty-three. To apply for the order of judicial review one must have sufficient interest in the case complained about, that is one must have *locu standi*. Secondly one must bring their complaint to the courts promptly. For example if the order one seeks from the court is one of certiorari, then the case must be brought within six months of the decree, order, proceeding or conviction being issued failure to which one will be time barred.

The procedure for applying for the orders of judicial review is that one day before one intends to bring the case, they must prepare and submit to the registrar a notice that they intend to bring an action for judicial review. The applicant will then go through the first stage of the application. There are two stages in the process of applying for judicial review, these are the leave stage and the main application.

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The leave stage is also known as the threshold or sieve stage. The applicant will file a chamber summons applications, supported by a statement of facts on which the applicants intend to rely and a verifying affidavit sworn before a Commissioner for oaths confirming the truth of the issues stated in the statement of facts. With these documents the applicant will go before a judge alone or through their advocate but without notifying the administrative authority whose decision they are challenging. The court will look at the documents to determine whether they disclose a case worth pursuing. If the court is convinced and also that the applicant has sufficient interest, and that there has been no delay in coming to court they will grant leave. At this stage the court also has powers to determine on application of the applicant whether the leave should act to stop the acts complained about until the main application is heard.

After granting of leave, the applicant moves to the second stage. At this stage the applicant makes a formal application by way of notice of motion seeking the relevant orders of judicial review they want be it mandamus, certiorari, prohibition or a combination. This must be done within twenty-one days of getting leave. Further it must be served at least eight days before the date of hearing.

On the date that the courts determine after the notice of motion has been filed and the administrative body has filed its reply through a grounds of opposition and a replying affidavit, the case will go on to be heard in court. The hearing will be done with both parties present and/or represented. There are normally no witnesses to be called. The parties rely on the documents they have filed. The court then makes a ruling and either issues the orders for judicial review or refuses to issue them. One who is not happy with the ruling can appeal to the court of appeal.

Limitations of Action

The law requires that when one is aggrieved they bring their complaints to courts within a given time. The aim is to ensure that matters are resolved when they are still fresh in people's minds and when the witnesses are still available. It discourages people from waiting until a very long time has passed before bringing their case in court. We have seen already that in judicial review cases this is even one of the factors that the court will consider when determining whether to allow a case for judicial review to proceed or not. For criminal cases. However there is no time limit. A criminal case can be brought at any time even after twenty or more years has passed.

However for civil case there exists the Law of limitations Act which provides for a time frame within which the cases must be brought. If one brings their case after the time stated in the law has elapsed that case will not be listened to because it will be time barred.

There are different periods for different types of civil cases. For land the period is twelve years, for contract it is six years from the time of breach of contract, for tort it is three years for defamation the period of limitation in cases of slander is twelve months, it is six years for labour cases, for debt it is six years.

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When the limitation period has expired such a case cannot be brought to court. However the law allows for extension of time to bring a case in certain situations. In action for personal injury the period can be extended where the facts relating to the cause of action are outside the knowledge of the plaintiff. The period will be extended to one year from the time the facts are discovered. In cases where an action is concealed by the fraud of the defendant the period of limitation does not begin to run until the plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it. Where the person who is claiming is under a disability then the period of limitation will be six years from the date the disability ceases.

Conclusion

As a paralegal one is expected to be aware of both the criminal and civil process and the difference between the two. Secondly one should be aware of the basic documents that are required in both criminal and civil processes and be able to draw basic pleadings like a plaint, an affidavit and a memorandum of appearance and statement of defence. This way they will be able to help the community to enforce their rights.

Chapter 19

Alternative Dispute Resolution

Introduction

Conflict is a fact of life. For as long as there are human beings in the world, there will always be conflict. In his sense, it has both positive and negative effects. The positive effects of conflict are not always easy to see. Indeed, it takes some reflection to see this aspect. An example of the positive effect of conflict is when it enables us to see that things are going wrong and remedial action is needed. Understandably, the negative effects of conflict have many and ready examples, such as violence and death. This is the most common and visible understanding of conflict. It is important to remember that conflict is not necessarily a bad thing; its management is what determines its good or bad effects.

Disputes and Conflicts

One might wonder whether there is a distinction between a dispute and a conflict, or whether the two terms refer to one and the same thing. In ordinary usage, this is the case and the two words are commonly used interchangeably. However, in the study of conflict, a distinction actually exists between disputes and conflicts.

Disputes refer to disagreements over interests. By nature, interests are matters that are easily resolved and are rarely deep-rooted. Though they may be part of a conflict, they do not go to the root of it. Interests are therefore easily negotiable with the consequence that parties can bargain and have them settled. Thus disputes are invariably capable of being settled. For example, a dispute regarding the ownership of a particular bus is one that is capable of being settled by determining the owner of the bus.

On the contrary, *conflicts* involve disagreement about values and needs. These are things about which we cannot easily negotiate. Conflict exists where people have incompatible goals, with each person believing that his position is the right one. The views of other people are neither accepted nor even entertained. The end result is disagreement. This disagreement can either be violent or non-violent. The consequences of violent disagreement are usually injuries, loss of lives and a breakdown of public order. Due to the negative consequences of violent disagreements, people can opt to deal with their differences and disagreements peacefully.

Conflicts usually arise when all or some of the needs of human beings are denied or not recognised. Needs are inherent in human beings, and their non-fulfilment leads to conflict. Needs should be addressed separately from interests. They should be analysed mutually by the parties, so that eventually the needs of each are satisfied, thus removing the underlying cause of conflict. This is a process of resolution rather than settlement.

Settlement, Resolution and Management

Just as conflict has been in society since time immemorial, human beings have been seeking ways of living in harmony and peace for an equally long time. This has given rise to a number of approaches in dealing with conflict. In formulating ways and means of dealing with the root causes of conflict and achieving lasting peace, there has been a long running debate on what aims these processes are meant to serve. There are those who have adopted a settlement approach while others have adopted a conflict resolution approach.

Conflict settlement is informed by the idea that society is naturally disorderly amidst a mix of power relationships. Those who support this idea argue that, in this kind of world, the best that can be done is to determine solutions which parties to a conflict must just live with. Instead of addressing the causes of the conflict, they propose to change the power relationships underlying it. The problem with this winner-take-all approach is that the outcome is only good as long as the supporting power balance exists. It cannot endure and will crumble if there is a change in power relationships.

Unlike conflict settlement, *conflict resolution* is not power based. It seeks to achieve a solution that will last not because of some force or power relationship but because the parties to the conflict find it legitimate. It does this by addressing needs and values and identifying ways in which these can be fulfilled for all the parties. This mutual satisfaction approach results in a win-win situation that is both non-coercive and self-sustaining. The solution arrived at is therefore an enduring one, which will outlive changes in power relationships.

From the foregoing, it is possible to conclude that resolution and settlement of conflicts are different aspects of managing conflict. However, the two approaches seem to perceive conflict as something negative, which must be done away with. This need not be. There are certain conflicts that, by their very nature, are difficult to resolve. In England, for example, the Welsh have passionate debates about the degree of autonomy they should have from England. It is unlikely that they will go to war soon, but these competing needs and values will continue to exist. Therefore, *conflict management* is concerned with the positive aspects of conflict, which must be handled constructively to energize social change and improvement. This is important because, the world is increasingly faced with intractable conflicts that are not easily resolved. In this book, there is a general shift from thinking about the idealism of *resolution* to the pragmatism of *management*.

Different Mechanisms of Managing Conflict

The process of managing conflicts begins with prevention. *Conflict prevention* is the process by which situations that are bound to lead to conflicts (and here we refer to the violent and harmful aspects of conflicts) are identified and avoided early. Thus situations, which are wont to blow into violent and harmful conflicts, are identified early and steps taken to ensure that they do not actually lead to fully blown violent conflict. An essential and interrelated concept in the process of conflict prevention is *early warning systems*.

All conflicts usually develop over time. Signs will exist of the imminent occurrences of a conflict. Take the example of a family situation. Before the relationship between husband and wife degenerates into a fully blown conflict where neither talks to the other and where divorce seems the only option, invariably early symptoms will have been evident. For example, the man will come home late and the woman will be uncommunicative. To prevent conflicts therefore, it is essential that we take cognisance of such early warnings and seek to nip the conflict in the bud before it erupts. Thus recognising the early warnings of a conflict and taking preventive steps is an essential component of conflict management.

Should the conflict eventually erupt, the next stage in the management process will involve either settlement or resolution. Two avenues exist for this. One is violence though resort to war or fighting. However, this is an undesirable method of managing conflicts. The other is through peaceful means, either in the form of adjudication through the courts or through arbitration, negotiation, mediation or problem solving workshops. These are methods of settlement and resolution of conflicts. Methods of settlement include judicial settlement and arbitration while resolution involves negotiation, mediation and problem-solving workshops.

Judicial settlement, also known as litigation, is the process by which parties pursue their claims in a court. The court will normally listen to both sides to the conflict and then deliver a judgement. The party aggrieved by the decision may appeal against it up to the highest court in the land after which the decision must be enforced.

Arbitration on the other hand involves parties to a conflict willingly and voluntarily submitting it to a neutral third party or third parties chosen by them. The parties also agree in advance to be bound by the decision of the arbitrator, usually referred to as an award. The parties specify the issues that they wish the arbitrator to decide and also the procedure to be adopted in the arbitration process.

The other method of conflict management is through the process of *negotiation*. This involves the parties to the conflict sitting down and sorting out the differences between them. This method does not involve a third party. The parties discuss with a view to reaching an amicable solution to their conflict themselves.

Parties to a conflict can also resort to mediation. *Mediation* has been defined as the continuation of negotiation by other means. The need for mediation arises when the parties to a conflict have attempted negotiation, but have reached a deadlock. The help of a third party is sought by the parties in the process of negotiation when they are unable to resolve the conflict between themselves. This third party is often referred to as a *mediator*. This the role that Mr Washington Jalango Okumu played in the process of resolving the conflict between the various factions in the run-up to the first all-race elections in South Africa in 1994. Mediation differs from arbitration in a very essential way. In arbitration, the decision is arrived at by the arbitrator(s) after having listened to both sides. Arbitration is only voluntary to the extent that the parties choose the arbitrator(s) themselves. In mediation, on the other hand, the mediator does not arrive at any solution. Instead he/she only helps the parties reach a solution themselves. This

is done by talking to both sides and steering them towards reaching a solution to their conflict. Unlike arbitration, the final decision is still arrived at by the parties voluntarily.

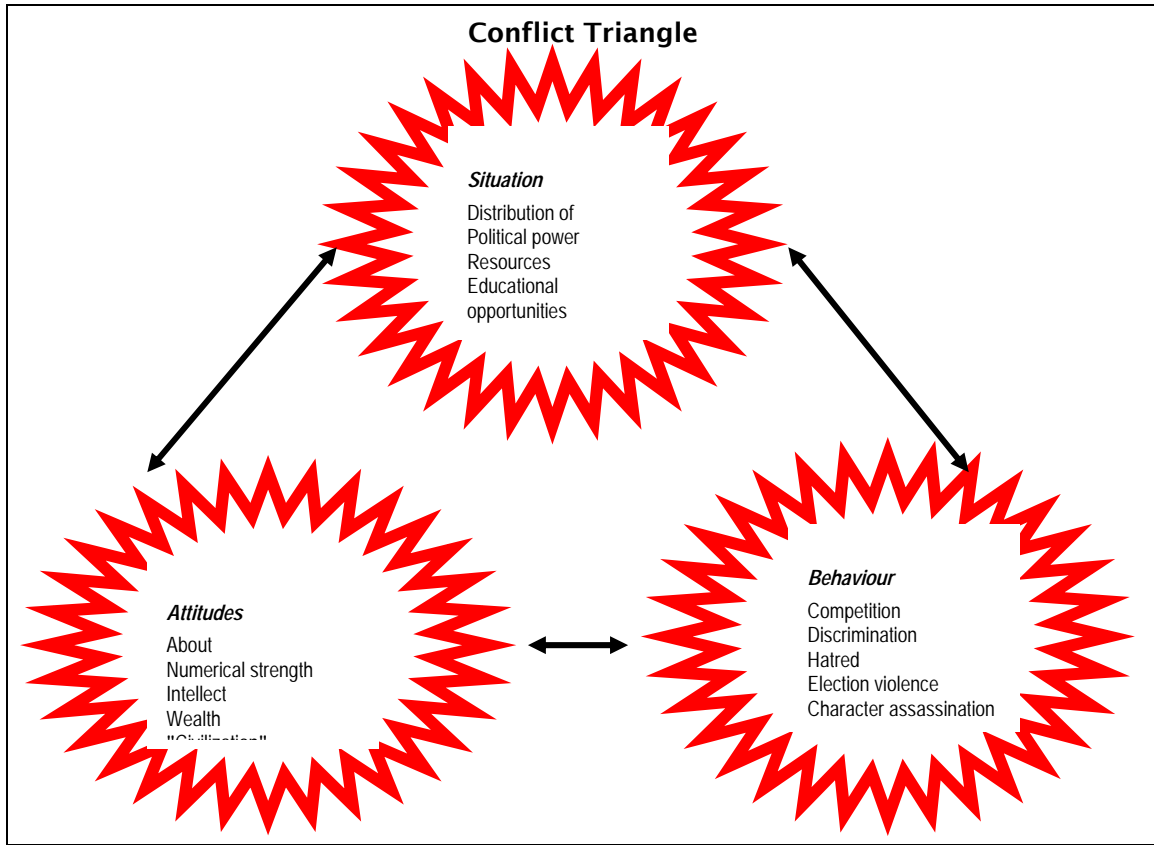
Though they are a form of mediation, *problem-solving workshops* are a novelty in the sense that they shift involvement from the representatives of the parties to the conflict (sometimes referred to as the principals) to the parties themselves. With the aid of a *facilitator*, they bring out their deep-seated feelings about each other, talk about them openly, accept responsibility for any harm they have caused each other, mourn their losses and agree on the manner in which they should co-exist in future. This sets off a healing process, which ensures better sustainability than if only their elders, for example, were involved in the management of the conflict.

Conflict Analysis

From the foregoing, it is evident that the study of conflict and its management brings up a number of important issues, which must be borne in mind for successful conflict management. The process of dealing with these issues in a coherent manner, comparing relationships between parties and applicability of solutions is what is referred to as *conflict analysis*. It involves understanding the nature of a conflict, its context, complexity, parties and so on. This is the only way the correct intervention can be made for the management of whatever conflict.

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Chapter 20

Community Mobilisation

Introduction

To be able to perform their roles in society well, paralegals need to be able to mobilize the community. Mobilization serves to bring the community together so that they can achieve the results they desire faster and collectively. The paralegal needs to know what community mobilization is, the different ways of mobilizing the community, strategies for lobbying and advocacy and the role of community mobilization in society.

Community

A community can be defined as a group of people who can be identified by others, but also, who are aware of themselves as forming such a group. Normally, a community has certain characteristics. These include: -

- having a common culture: language, belief system, ethics, norms,
- values, traditions and a common way of "looking at things";
- living in the same geographic area;
- sharing close social contacts and ties at the grassroots level; and
- having short, medium or long-term common objectives and/or interests.

A community can exist depending on either of these characteristics or a combination of two or more of them. However, a community's sense of togetherness is increased whenever more than one or all of them are found to exist in the given community or when the community is conscious of its existence as a "community". This is very important because it greatly determines the success or failure of "community development". The question that then needs to be answered is the meaning of the term community development.

Community Development

The term community development is composed of two terms, community and development. We have already defined community as a group of people with common interests and characteristics. Development on the other hand is the process of moving from a condition of ignorance, powerlessness, non-improvement of the environment, to a condition where life is more comfortable, livable. To develop is also to advance from a social condition of being abused, misused, dominated, exploited, and oppressed by others towards a condition of being more knowledgeable, of enjoying a life of self-sufficiency based on an equal access of resources among community members, and a good management of the environment.

Traditionally development has been mistakenly equated to economic growth. This has contributed to the belief that a community is seen to be "developed" when it looks like Europe, North America and Japan that is countries where development has taken place at the great cost of others and the environment.

Community development has to do with the total improvement of the quality of life in a given community through the active participation of its members. The aim of their

participation is to change the quality of life for the better. The motive for their participation is driven by the knowledge of their relative disadvantage. From this perspective, community development is always effected whenever a sector within its structure gets improved. It could be in the sector of social services, economy or legal matters.

Community development therefore consists of the actual practical efforts, which are put in place to ensure that a given community moves from a lower quality of material and social life to a higher level in the development process through sectoral or inter-sectoral transformative projects. These efforts must have the capacity of starting other projects in different but related sectors. Unfortunately, the popular meaning of community development associates this with activities embarked upon by the economically weak and politically marginalized. Normally, these people are found in our rural areas and urban slums and many of them are women and children. As a result, community development has become synonymous with activities, which involve women, the youth and the poor only.

Arising out of this tradition, community development has come to be viewed as an intervention whose main goal is to solve a problem whose victims are incapable of solving without assistance from outside. Of late, such an intervention is justified through activities aimed at empowering the underprivileged. It is under this tradition that the Paralegal practitioner derives his/her ideological license for practicing in communities.

On the other hand, community development could be viewed as a process of sharing so as to rehabilitate those who have fallen through the "safety net". Yet at another level, community development demands self-reliance and the making use of available local resources and skills

Community Mobilisation

The resources of a community are always limited when compared to the demand for them. There is need therefore to ensure that a balance is made between the demands and the resources available so that there is equitable access and distribution amongst the competing uses and users. Unfortunately this does not always happen. Certain dominant sections of the population always seek take control of the people's resources and use them primarily for their own benefit without considering the interests of the other members of the community. Once the dominant class in a society succeeds in controlling and dominating the use of and access to a community's resources, it usually seeks to gain and control political power in order and perpetuate its position.

The result is a continuing and unending struggle between the few who control the resources of the community and those who seek to reclaim them for the common good. This struggle normally and invariably takes political connotations between the haves and governors on the one hand and the governed and the have-nots on the other.

For the have-nots to succeed in their quest, they must pool together and unite. This is where the skills of community mobilization comes in. paralegal workers in the course of performing their tasks will be called upon to perform tasks of community mobilization.

The term community mobilization might mean different things to different people. It can mean for example organizing people or bringing them together for a meeting or to perform a certain task while some see it as a process of development. It actually encompasses both of these aspects. At a basic level community mobilization refers to the process by which a community identifies its needs and objectives and develops the confidence to take action and in so doing develops cooperative and collaborative attitudes and practices.

Why community mobilization?

Community mobilization is an important task. Most people live in a situation of hopelessness and powerlessness. They feel oppressed and downtrodden. At the same time they feel that their situation is permanent and only a miracle can help them get out of their predicament. Community mobilization helps to provide this miracle. Through the process, weak and oppressed members of society come together and are able to use their collective energies and strengths to solve their problems and get out of their situation. For example, for a long time Kenyans used to complain about the misrule of KANU but they felt that they were powerless. However through a process of mobilization and education Kenyans were able to use their power of voting to vote KANU out of power. The use of such power at the local level through community mobilization will help local community to get out of their state of hopelessness.

The other example of community mobilization is the experience of the Kenya National Union of Teachers (KNUT). KNUT has successfully mobilized, teachers who are its members to boycott classes and press for salary increase. So successful have these efforts been that whenever the union threatens to go on strike, they are taken seriously and efforts made to negotiate with them to avoid the strike.

Paralegals and community mobilization

A paralegal worker can play a very important task in the process of mobilizing communities for their development. The paralegal worker can act as the mobilizer and organizer. In essence they will act as the catalyst to spur the members of the community into action. However to be able to do this the paralegal worker needs to be aware of and take into account the following factors:

- *History*

A paralegal practitioner must always ensure that the community concerned has attained its own way of development and that this achievement has been done from within the community. The achievements of the community must be appreciated in order to bring an understanding of its history; a history which has been influenced by internal and external factors. The trends and strands for change for the better are normally influenced by these historical factors. The point of effective intervention is usually determined by the understanding of these factors' relative impact within a community. The paralegal worker to ensure success of the community efforts must understand and appreciate the history of the community.

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o *Social structure*

Every community has a social structure, which its members regard as stable, relevant and which works well. Although some of these social structures are discriminatory giving prominence to the male gender, the paralegal worker must be aware of the social structures that exist as these will affect the work that the paralegal will do with the community.

o *Culture*

Every community has a culture which is both unique and relevant to itself. All cultures spring or are derived from the collective creation of a community throughout its history. Culture therefore serves to bind its members together, offers them a common identity and determines one's social roles and status. Culture can imprison those who subscribe to it, thereby serving as the last bastion to change. An appreciation of this reality by a paralegal practitioner is important to ensure his/her work is effective.

In other words, this appreciation should make one come up with the best ways for programme implementation since according to those who are outside a given culture, it is easier to blame failure in effective implementation on a community's culture than on one's own incompetence.

o *Administration*

Another factor likely to influence the outcome of paralegal intervention concerns the informal and formal administrative structures that exist in the community. In community development, the character and culture of the administration has had a telling influence. The informal male dominated structure of power relations is reinforced by the formal administrative structure and together have constrained the scope for free initiative and spontaneity. This element has tended to reduce community development into becoming an ideological and technocratic arm of the administration instead of being a people's basic civic right.

Crucial to community development, is group dynamics that is intensive personal interactions within a group and between groups. The prevailing administrative set-up does not encourage such dynamics because of the existence of legal structures which inhibit free association. The paralegal practitioner will have to expose such structures, show how they impede community development and suggest ways of overcoming them. In so doing however the paralegal worker must recognize and learn to work with the existing administrative structure in the community for it is only through such a cooperative process that the work of the paralegal will be smooth and more effective.

Stages of Engagement with the Community

There are four stages the paralegal program will have to address at the community level. These are: the entry point, mobilization, the target group and withdrawal.

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To get a foothold in a community, an entry point has to be consciously chosen. A wrong entry point can create a credibility gap and thereby make the work to become an uphill task since it will take long to be accepted by the community. The paralegal worker therefore has to build and gain the trust of the community. This enables the worker to gather information about the community. At this stage the paralegal worker should then gather information about the factors that influence community life in the area.

Once a foothold has been achieved, the next stage is mobilization of the community. Mobilization ensures the community identifies itself with the project. Once this is achieved, the community will get involved by making its resources available to the paralegal worker and cooperate in project implementation.

It is the chosen target group which will decide the success or failure of the whole program. A thorough analysis on existing conditions which might impede the group's full participation has to be carried out. The group also should clearly be told the goals of the program, its benefits at the personal and community levels and the envisaged time it will take. The paralegal worker should always remain vigilant in order to forestall possible misrepresentations, distortions and misinformation by potential detractors.

The critical test in community development is at the withdrawal or final stage. This is where the program's budget and time frame have expired. This is the stage where meaningful and sustainable change should be seen to have either taken place or not. A program will have contributed to a community's development when it becomes sustainable once withdrawal has taken place.

Unfortunately the history of community development is replete with backward sliding once the experts have been withdrawn. The paralegal program will have to keep this in mind. An emphasis on the integrative approach might help in sustaining the programs at the grassroots level. Here the concern should be to show how the law affects people's lives on a day-to-day basis and hence the necessity of having in the community a permanent program of assisting in the identification and solution of legal problems. The issue of sustainability after the withdrawal phase is one that the paralegal worker should discuss openly with the community so that they can jointly find a way out.

Conclusion

In conclusion a paralegal worker's tasks extend beyond solving the legal problem of the community. The worker's task includes helping the community develop socially and economically. It is however important that the limits of what a paralegal worker can do and achieve be clearly spelt out to the community so that the expectations are made realistic. The paralegal and the community should understand that the paralegal is not the solution to all problems in society. Yes they can assist the community to overcome some of their challenges but there is a limit to how much paralegals can achieve.

Chapter 21

Rights of Children

Introduction

Children form an important part of our society. There are some who hold the wrongful notion that children are there to be seen but not be heard in decision-making processes. Such people also think that children are only entitled to privileges at the convenience of adults. This is not only morally wrong but also a position that is against the law. The law recognizes children as important human beings with rights just like other human beings. Due to their special status they are entitled to specific rights.

This chapter discusses the status of being a child, highlights the legal regime governing children's rights and proceeds to discuss the rights guaranteed children under the law.

Who is a Child?

In Kenya, the notion of a 'child' differs from one community to another. In most communities, there is a rite of passage from childhood to adulthood. A person ceases to be a child after undergoing the rite: Undergoing the rite of passage is important because adulthood confers new rights and privileges, for example the right to marry or be married. The age at which the rites of passage are performed varies from one community to another. A thirteen-year-old may be a 'child' in one community but his or her age-mate could be an adult in another community.

In 2001 the Government of Kenya enacted the Children's Act to provide a standard definition of who a child is. The Children's Act (2001) provides that a child is a human being under the age of eighteen years. This definition corresponds with that of the Convention on the Rights of the Child (1990). Similarly, The Age of majority Act, Chapter 33 of the Laws of Kenya also provides that a person shall be of full age and cease to be under any disability by reason of attaining the age of eighteen years.

Before the enactment of the children act, there existed several laws that defined a child differently. Although all the laws used the age- limit as the basis of definition, the cut-off age when one stopped being a child and became an adult differed. Unfortunately even with the passing of the Children's Act, the definitions in these other laws continue to be part of Kenya's laws. This creates confusion. For example, under the Employment Act, a child is a person under the age of 16 years. The Hindu Marriage and Divorce Act puts the age at which a person can marry at sixteen years for girls and eighteen years for boys. The Mohammedan Marriage and Divorce Act puts it at nine years for a girl and thirteen years for males. The Kenya Citizen Act on the other hand states that a person under 21 years is still a minor. It goes on to provide that where a woman marries even if she is under the age of 21 years, she is immediately deemed to be of full age. It is important to note that the terms "*infant*", "*child*", "*young person*", "*juvenile*" and a "*person of tender years*" are used interchangeably in the Kenyan statutes.

The upshot of the previous discussion is that there is need for harmonization of the different age limitations for a child under the various statutes to ensure uniformity.

Generally a child will be under the care and supervision of an adult. They have special needs and require protection and care. This care is normally given to children by their parents and guardians. The law however guarantees them rights so that parents in the exercise of their parental responsibility do not violate the rights that children are entitled to as human beings. This is because in certain societies there was and sometimes still is the misconception that children are the property of their parents and are incapable of making their own independent contribution to society. Children are also very vulnerable to exploitation and abuse than adults. They also lack a forum to express themselves adequately lacking economic and political power and opportunities. It is therefore important that the law provides them with adequate and special protection for their healthy development is crucial for the future of any society.

The age-bound criterion for defining a child assumes that the attainment of eighteen years marks a fundamental step in the process of growing up. At that age, a person becomes 'mature'. While this is generally true, the physical social, cultural, and political environment in which one grows has a strong influence on the precise point in time when 'maturity' is attained

In the Philippines, the definition of a child includes persons over the age of eighteen years who are not able to fully care for themselves or protect themselves from abuse, neglect, cruelty, exploitation or discrimination because of physical or mental disability. This definition is good because it allows for the care of persons over the age suggested in the UN Convention but are not able to care for themselves

Children's Rights as Human Rights

The discussion on human rights has clearly shown that human rights belong to all human beings. All human beings irrespective of age, sex, nationality or socio-economic status are entitled to respect and enjoyment of human rights by virtue of the fact that they are human. This is equally true for adults and children. This was clearly stated by the 1948 UN declaration on Human rights. The rights guaranteed in the Declaration are to be enjoyed by both adults and children. These include for example freedom of expression, right to life and freedom of movement.

Specifically related to the special requirements of children is the guarantee of the right to education and special care and assistance. However children's rights were not expressly addressed by the declaration as a distinct category of rights. Children's rights refer to those rights which are guaranteed specifically to children and that are important to children due to their status in society.

Following the adoption of the Universal Declaration of Human Rights, work began on the development of a binding convention. This resulted in two conventions in 1966, one on civil and political rights and another on economic social and cultural rights. Subsequent developments have seen the adoption of human rights instruments addressing specific aspects of human rights or of society. It is in this light that in 1990 the Convention on the

Rights of the Child was adopted. In Africa, the African Charter on the Rights and Welfare of the Child was also adopted in 1990.

Children's' rights are therefore part of human rights. In addition children are also entitled to the bulk of human rights that adults are entitled to.

Sources of children's rights

The sources of children's rights are conventions and statutes. These are international conventions, regional conventions and national constitutions and statutes.

- *The Convention on the Rights of the Child.*

This is an international convention. It is the main source of children's rights at the international level. Almost all states have signed the convention. It was adopted by the UN General Assembly in 1989 and came into force on 2 September 1990. It was the first instrument to identify distinct rights of children. The Convention comprehensively deals with civil, political, economic, social and cultural rights of children throughout the world.

- *The African Charter on the Rights and Welfare of the Child*

Within the African continent, this is the convention that deals with rights of the child. It approaches issues to do with child rights from an African Perspective. It was passed in 1990. Unlike the Convention on the rights of the Child that deals exclusively with child rights these gives the child both rights and obligations. The charter emphasizes protection and strengthening of the family unit as a basis of protecting children. Cultural and traditional practices that violate the rights of children are outlawed while those that protect children's rights are encouraged.

The African Charter in certain respects provide wider protection than the Convention on the Rights of the Child. The Charter, for example raises the age at which a child may be recruited into armed forces or take direct part in hostilities from 15 years as provided in the Convention to 18 years. In sum the document addresses children's' rights from an African perspective and complements the Convention on the Rights of the Child.

- *National Legislative Framework*

At the national level the first foundation for human rights protection is the constitution. The constitution of Kenya contains at chapter five the Bill of rights which are available to all human beings. The constitution does not however contain specific provisions geared towards the rights of children exclusively. This is one of the areas that hopefully a new constitutional dispensation will address.

As concerns laws, in 2001 the Childrens' Act was enacted to comprehensively address the rights of children. Before then the law dealing with children issues were scattered in various sources. The children rights in addition to consolidating the Children and Young Persons act, the Adoption Act and the Guardianship of Infants Act also provides new rights. The new law also addresses the role of the government in the protection of the rights of the child. The Act domesticates, or brings within

Kenya's legal framework, the International UN Convention on the Rights of the Child and the Regional African Charter on the Rights and Welfare of the Child. The Act explains the general roles and responsibilities of parents in ensuring the well being of the child and provides for the establishment of institutions and guidelines for child protection. It in the process deals with aspects like legal assistance, custody and care of children, foster care, guardianship and adoption.

Principles Underlying Child Rights Protection

The following are the principles, which inform the protection of the rights of children.

- Non-discrimination: children should not be discriminated against on their own basis or on the basis of their parents or legal guardians race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability birth or any other status.
- Best interests of the child: in all decisions and actions that affect children, primary consideration has to be given to the best interests of the child.
- Survival and Development: children have a right to survival and development in their physical, emotional, psychological, cognitive, social and cultural aspects of their lives and these need to be guaranteed.
- Participation: children must be allowed to actively participate in all decisions that affect them and where their opinion matter.

The Rights of Children

The rights that are guaranteed children can be classified into

- I. Life and survival rights
- II. Protection rights
- III. Development rights
- IV. Participation rights

○ **Life and Survival Rights**

This category deals with the preservation of the rights of the child from conception onwards. The rights that fall under this category include

- (i) *The Right to Life*: The right to life is the most fundamental life. Without life, the other rights are meaningless for a child will not exist to enjoy the other rights if their right to life is not guaranteed. A child's life should be protected before, during and after birth. Children need to be protected from situations that may take away their life. The right to life means that, with very few exceptions, life should not be taken away. The International covenant on Civil and political Rights obligates states who retain the death penalty not to impose it a person under the age of 18 years. This is the same position under Kenyan law. One of the challenges to the right to life of children is the numerous abortions that take place in Kenya without adequate efforts to prosecute those who facilitate them.
- (ii) *Right to Medical Care*: Children have the right to the highest possible standard of healthcare. Section 9 of the Children's act provides that "every child shall have a right to health and medical care the provision of which shall be the responsibility of parents and the government." A similar provision on the right to health is found in article 24 of the Convention on the Rights of the Child. It

should be noted that under the Children's Act, failure to facilitate the immunization of children is a criminal offence on the part of parent or the guardian. It is evident that the responsibility of ensuring that this right is fulfilled rests on both parents and the government. There is therefore need for concerted efforts from both quarters to overcome some of the challenges including lack of sufficient medical facilities and failure by parents to take their children to hospital due to religious or cultural reasons.

- (iii) *Right to Nutrition*: access to adequate and nutritious food is important for good health. The Convention provides for the application of readily available technology for the provision of adequate nutritious foods and clean drinking water. Both the state and parents have to participate in ensuring that children are well nourished. Nutrition support programmes by government and non-governmental organizations, like the school feeding programmes in arid and semi arid areas play an essential role. Nutrition awareness programme that educate parents on how to supplement staple foods with easily available nutrients are also important.
- (iv) *Right to Shelter and Clothing*: access to quality shelter is a human right for all. Although the Children's act provides no specific right to clothing, children are entitled to adequate and appropriate clothing. It is however difficult to enforce this right in practice for it is not expressly provided for in the Children's act. Moreover, it would require numerous resources on the part of government to monitor its implementation. This right is however in the best interest of the child and parents and in certain instances the state need to do their absolute best to guarantee it.

- **Protection Rights**

These categories of rights protect children from harmful activities and vices in society.

- (i) *Protection of a Child without Family*: Children have a right to live with their natural parents and their families. Children who do not have a family should be protected by providing alternative family care or institutional placement. All efforts taken to meet this obligation must pay due regard to the child's cultural background and best interests. Where adoption is necessary, it should only be carried out in the best interests of the child and only with the authorisation of competent authorities and safeguards for the child. Parents are also encouraged to arrange for guardianship of their children in case of their absence. The convention provides that measures be put in place for the re-unification of children who are separated from their parents.

- (ii) **Protection from Child Labour**

Child labour is the engagement of children under the age of 16 years in the labour force to the detriment of their mental, physical, moral and social development. Child labour is widespread in developing countries, including Kenya because of poverty. It is perpetrated under the cover of supplementing family income, supporting self, undertaking practical learning, or fighting the enemy in armed conflicts. Each of these 'reasons' is unjustifiable. Section 10 of the Children Act provides that every child shall be protected from economic exploitation and work that interferes with the child's education or is harmful to the child's health, physical, mental, spiritual, moral or social

development. Examples of child labour are cattle herding, child prostitution, child domestic work (house helps), hawking, car washing, matatu touting, ferrying and selling illicit brews and child factory workers.

However not all forms of labour are harmful to the general well being of children. There are some which are permissible even in law. In majority of Kenyan traditions, children of tender years have been working and continue to work for and with their parents at home or on the family farms forming part of their household production. This category of labour is excluded from child labour because it is not considered exploitative and ought not to interfere with the child's education, health or social and other development.

(iii) *Protection from Torture and Deprivation of Liberty:*

A child should not be subjected to torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty. These rights are contained in the Convention, the Constitution of Kenya, and the Children Act. Under no circumstances should a child be subjected to capital punishment or to life imprisonment. Even in instances where a child is convicted for a capital offence, they cannot be punished using capital punishment. Where any child is deprived of liberty, he or she must be separated from adults unless it is considered in the child's best interests not to do so. The child must be allowed contact with the family as well as legal and other assistance.

To guarantee this right it is essential that the practice In Kenya of holding children in police custody for long be done away with as it is unlawful and a violation of their rights. The conditions in prisons should also be improved and children prisoners should not be mixed with adults.

- (iv) *Protection From abuse and Neglect:* Children also have a right to be protected from physical and psychological abuse and other forms of child abuse. They should be protected from mistreatment by parents or other responsible for their care. The convention provides that appropriate programme shall be established for the prevention of abuse and treatment of victims of abuse. Further the children's Act requires the relevant minister to establish appropriate treatment and rehabilitation facilities.
- (v) *Protection from drug abuse:* in most cases adults use children to transport and sell drugs. Children also sometimes get influenced to start abusing drugs. This not only interferes with their health but drug abuse is also illegal. Both the Children's Act and the convention provide that children have a right to protection from production, trafficking or use of drugs and substances that are not allowed by the law. These are normally referred to as narcotic and psychotropic drugs.
- (vi) *Protection from Sexual Exploitation and abuse:* children have the right to be protected from sexual exploitation and abuse including prostitution and involvement in pornography and also to be protected from obscene literature. This is provided for both in the Convention and the Children's Act. The Penal code also reinforces this right by making it an offence to commit offences against morality like rape and abduction of girls below 16 years, indecent assault, defilement of girls below 14 years, incest and procuring for abortion. The sum total of these is the protection of children against sexual abuse and exploitation. Unfortunately the rate of child abuse and exploitation is still very high in the country. This has necessitated parliament to pass a motion seeking to enhance the penalties against sexual offenders.

(vii) *Protection of the law:* Like adults, children are entitled to protection of the law. The provisions of the current constitution at section 77 guarantees protection of all to protection of the law and this guarantee includes children too. The protection of the law is also included in the children's act. In a nutshell the provisions on protection of the law relate to the following:

- . The accused should be informed promptly and directly of the charges he or she faces in a language he or she understands well;
- . The matter should be dealt with immediately;
- The accused should be presumed innocent until proved guilty;
- The accused is entitled to defend himself or herself in person or have a lawyer;
- If required, an interpreter should be availed free of charge;
- The accused should not be required to incriminate him/herself;
- Children should not be subjected to corporal punishment;
- Children should not be punished with imprisonment;
- Cases relating to children should be heard in private so as to protect the identity of children before the courts;
- Children are entitled to legal aid at public expense where they are not represented. In the alternative, the court should appoint a guardian to protect the interests of a child.

The Children's act also establishes Children's courts as specialized courts to hear cases regarding children. There is a right of appeal from these courts to the high court and then to the court of appeal.

(viii) *Protection from Discrimination:* The Children Act provides that children have a right not to be discriminated against on ground of origin, sex, religion, custom, language, opinion, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection. This provision is a reiteration of the constitutional provision on non-discrimination, with emphasis being put on children. The political affiliation of their parents or guardians should not be the basis for treating children differently. In many African societies, children are discriminated against when they are disabled, adopted and when orphaned by HIV-Aids. This is against the law and should not occur.

It has been argued that the constitution is discriminatory because it does not specifically outlaw the discrimination on the basis of age therefore implying that persons can be discriminated against on that basis. This situation needs to be corrected as Kenya adopts a new constitution.

(ix) *Protection in Disaster Situations:* Children need special protection in hardship situations such as war, famine, poverty and other natural calamities. Where children are victims of armed conflicts, torture, neglect, maltreatment or exploitation, the government has a responsibility to ensure that they receive treatment for their recovery and social reintegration. For instance in Kenya, during tribal clashes and frequent clashes both in urban and rural areas, children need special protection.

(x) *Protection from Armed Conflict and Enlistment as Soldiers:* Children should not take part in armed conflict. They have a right to be protected from recruitment in armed conflict as soldiers. No child under the age of 15 years should be recruited into the armed forces according to the Convention. However, according to the African Charter,

the age limit is set at 18 years, which is also the limit set by the Children Act. Very many children below this age are enlisted in African states. Enlisting children in armed conflict is a form of abuse because they do not understand the cause they are fighting for. In the end, they are socialised into violence and cannot ever live peacefully in society.

The Convention urges governments to take all feasible measures to ensure that children have no direct part in hostilities. The Optional Protocol on the Involvement of Children in Armed Conflict states that "no person under the age of 18 shall be subject to compulsory recruitment into regular armed forces," and imposes an obligation on states "to raise the minimum age for voluntary recruitment to at least 16 years". Kenya has signed and ratified this protocol, which came into force in February 2002.

- (xi) *Special Care Children with Disabilities:* In most developing countries, children with disabilities are in a vulnerable position. They receive the least access to health care and education and in some societies; they are shunned and locked up. Children with disabilities are entitled to enjoy fully all the rights of children. They are particularly entitled to be treated with dignity and should be accorded appropriate medical treatment, special care, education and training free of charge or at reduced cost wherever possible. This is provided for in the Children's Act.

There are more homes that are run by churches or private individuals to deal with children who have special needs than there are that are run by the government. However, the Ministry of Education through the Kenya Institute for Special Education (KISE) provides for the training of teachers who handle children who have special needs. This demonstrates that the state acknowledges the need to equip people who care for children with special needs.

- (xii) *Protection from Harmful Cultural Rites:* Children should not be subjected to cultural practices that are harmful such as female circumcision and early marriage. These and similar rites, customs or traditional practices are likely to negatively affect the child's life, health, welfare, dignity or physical or psychological development. The African Charter requires states to abolish customs and practices that are harmful to the development, welfare and normal growth of the child. Customs and practices discriminative to the child on grounds of sex and other status should also be abolished.

Case Study

Nyabuto is a resident of Tabaka in Kisii District. He is married to Moraa and has three daughters aged between nine and fourteen. The circumcision period is approaching and there have been fights in the house as to whether the girls ought to be circumcised. Nyabuto is opposed to the practice because he has attended a talk on Female Genital Mutilation and is convinced that even if the daughters want to go through the rite, they should make the decision when they are older. Moraa supports the practice because she says that her daughters will get husbands more easily if they are circumcised and the whole community knows that they went through with the rite. The girls want to go through the rite because all their friends will go through it and do not want to be the only ones in school who have not gone through the cut.

The above case demonstrates what still happens in certain societies in Kenya. All of us need to be aware that the children's act outlaws female genital mutilation and we should all assist in educating people on the illegality and dangers of female genital mutilation.

○ **Development Rights**

(i) *Right to Education:*

Access to education has a significant influence on the quality of life that children will lead as adults. Education also improves the ability of children to enjoy other rights, such as health care and access to a livelihood. The right of children to education is well elaborated in the Convention as well the Children's. Section 7 of the Children Act states that 'every child shall be entitled to education the provision of which shall be the responsibility of the Government and the parents'. Both the Convention and the Act emphasises that basic (primary) education should be compulsory and free. Secondary and higher education should be made available and accessible.

None of these standards criminalises failure to take children to school. The education offered should develop a child's personality, talents, mental and physical abilities to their fullest and prepare them for active adult life in a free society. The education should also encourage the child's respect for his or her family, cultural and artistic activities and enable them to enjoy their culture, profess their religion and practice their language. The government has a responsibility to ensure that the education that is afforded to students is not of inferior quality and therefore the education system that is developed must be one that ensures full development of the human personality. This is done by the Ministry of Education in collaboration with the Kenya Institute of Education that develops the curriculum. Further when the NARC government came into power after the 2002 general elections, it implemented a policy of free primary education in line with the international requirements. This policy has gone along way in ensuring that children have access to education.

(ii) *Right to Parental love and care:* Living in a happy family that offers parental love and care is important in the growth of children. For this reason, children have a right to live with their parents, unless this is not in the best interests of the child. In case the parents are separated, the child is entitled to maintain contact with both parents. Parents have joint primary responsibility for raising the child. The government cannot enforce this right directly, it is the parents' responsibility to care for their children and ensure that they do not neglect them. If they did, the government would then have a role to play in the enforcement of the right.

(iii) *The Civil Rights and Freedoms of Children:* Every child has the right to a name, nationality and protection from deprivation of their identity. At birth, parents have an obligation to facilitate the acquisition of a birth certificate and when they reach the age of majority, to get an identity card to prove their citizenship as Kenyans.

This right is interfered with where the child is born of a Kenyan mother and a non-Kenyan father because the child takes the nationality of the father according to citizenship laws. The citizenship laws are discriminatory against such children because they are automatically denied Kenyan citizenship. Lack of a birth certificate may prevent a child from receiving health care, nutritional supplements and social assistance. A birth certificate may also assist in protecting children against early marriages, child enlistment in the armed forces or prosecution as an adult if accused of a crime. The government can enforce this by making the process of registering births easier than it is presently.

○ **Participation Rights**

(i) *Right to Access Information*

It is well now that information is power. With information one is able to make choices in life that are well informed. This is true for children as well as adults. The quality and quantity of information a child has influences how the child enjoys his or her other rights. Children have a right to access information and material appropriate for their age from a diversity of sources, including the Mass Media and the Internet. However, parents or guardians and the State have an obligation to protect children from harmful information, e.g. pornography.

(ii) *Freedom of Thought and Opinion*: The government should respect children's right to freedom of thought, conscience and religion subject to appropriate parental guidance. Children have a right to express their opinion freely and to have that opinion taken into account in any matter affecting the child. These rights are protected by the Convention, the Constitution, and the Children' Act. All suggestions that are made by children on matters that affect them should be taken into consideration when making decisions on the children.

The Duties and Responsibilities of Children

The rights described above that children are entitled to exist side with side with duties and responsibilities that children. The Children Act includes provisions on the duties of children. These include:

- Duty to respect parents, other members of the family, community and elders at all times and assist them in times of need;
- Children have a duty to work for the cohesion of the family. They should not make the family unit a difficult one for the other members of the family. They should thus obey their parents, those in authority and abide by the set rules and regulations;
- Duty to assist people with special needs in society such as the sick and physically challenged;
- Responsibility to place their physical and intellectual abilities at the service of the state so that they can serve national interests;
- Strive to learn and appreciate positive culture that is embraced by their community. They however, must shun any negative practices that are practised and should not to be ostracised for airing their views on the negative practices;
- Children have a duty to preserve and strengthen social and national solidarity; and
- Duty to attend school and acquire skills for their benefit and for the benefit of family and community

○ **Custody and Maintenance of Children**

(i) *Custody of Children*

When both parents are living together in a marital relationship, they ordinarily live with their children until the children are old enough. When one parent dies, the other continues to live with the children. Parents normally have the joint custody of their children. This is not always so. In several cases, decisions have to be made regarding whom a child should live with. The person whom a child lives with is said to have the

custody and control of the child. In situations, for example when a marriage has problems necessitating the parents to stay separately a decision has to be made on who will have the custody of the children. A similar decision can also arise if the child has been staying with relatives for a long time and they are reluctant to let the child go back to the parents. Children's courts established by the Children's Act have the power to decide disputes regarding custody e.g. between the mother and the father of a child, between one parent and in-laws, or between parents and in-laws. In deciding such disputes, courts take into consideration the following; - the conduct and wishes of the parent or guardian of the child, the wishes of the relatives of the child, the wishes of the child, the customs of the child's community, the child's religion, etc. The decision to be made must however at all times be in the best interests of the child.

In the case of custody disputes between parents, the person who is denied custody of the child nevertheless has rights over that child, other than the right to live with the child e.g. rights to visit, right to provide religious instruction, etc.

(ii) Maintenance of Children

The financial burden of raising up children is normally shared amongst both parents (whether or not they are living together). If the parent or parents who are able refuse to contribute reasonably to cost of bringing up the child, they can be compelled to do so by a court. Parental responsibility to maintain children continues until they reach eighteen years but a court can extend it if person is still in school, disabled, or ill.

An order by a court that a parent contributes to the cost of bringing up a child may be reviewed if there is a change in the circumstances of the child or parent, e.g. loss of employment. An order for maintenance is enforceable, that is, the person against whom it is made may be compelled by the court to pay. Consequences for deliberate failure to pay may include attachment of one's salary or other income, imprisonment, or attachment of property. When one is a single parent, they have to bear the responsibility of maintenance of their children on their own as there is no parent to share the responsibility with.

○ **Parental Responsibility and Guardianship of Children**

(i) Parental Responsibility for Children

According to Children's Act, both parents have the joint responsibility to promote the overall development of the child by affording him or her the necessities of life, such as adequate diet, shelter, clothing, medical care including immunisation, and education and guidance. It is the duty of parents to protect the child from neglect, discrimination and abuse. Because of their responsibilities as parents, they are entitled to give moral and religious guidance to the child, determine the name of the child, and upon the death of the child, to bury it.

(ii) Guardianship of Children

A guardian is a person who has been given parental responsibility over a child. Upon the death of one parent, the surviving one assumes guardianship. Either of the parents can during their lifetime appoint a person who, upon their death, will act as a guardian together with the surviving parent. Such an appointment can be made through a valid oral or written will, or a written agreement. There are situations where both parents of a child dies without appointing a guardian and one of the surviving relatives takes over

parental responsibilities of the child. This is very common on most communities. This relative will then be a guardian of the child. A court of law can also appoint a guardian if the parents are no longer living or they cannot be found. Guardianship can be terminated by a court if there are reasons for doing so, e.g. if the guardian is no longer acting in the best interests of the child.

Guardianship responsibilities last until the child is eighteen years, after which he or she is regarded to be an adult who can take care of him or herself. Before the Children's Act came into operation, guardianship was governed by the Guardianship of Infants Act now repealed.

○ **Adoption of Children**

For different reasons, a person may want to adopt the child of another person and make that child his or hers. For example, a couple may be unable to bear children of their own yet they want to raise a family or they may want to have additional children. Sometimes the motivation for adoption is to take parental care of the child of a friend or a relative or even a child who is abandoned. There are registered organisations allowed to keep children that are available for adoption; they are called adoption societies.

According to the Children Act, those who want to adopt a child have to make an application to the High Court. Either one or two persons jointly may make a request for adoption. Proceedings are held in chambers (in private). The identity of the child and the applicants has to be confidential. Before the Children Act came into force in 2002, adoption was regulated by the Adoption Act, now repealed.

Because adoption is an important issue, the Children's Act establishes an Adoption Committee to formulate policy in matters of adoption, effect liaison between adoption societies, the Government and NGOs, monitoring adoption activities in the country, etc.

○ ***Prerequisites for an adoption order***

The child must be at least 6 weeks old and available for adoption. Those above eighteen years are no longer children and cannot be adopted. The applicant for adoption has to satisfy at least one of the following requirements:

- He and/or she is at least twenty five years old but not more than sixty-five years old and the age difference between the child to be adopted and the applicant is at least twenty one years.
- He and/or she is a relative of the child and is not over sixty five years old;
- He and/or she is the grandparent of the child and is not over sixty-five years old.
-

○ ***Denial of an adoption order***

Except for special circumstances, an adoption order will be denied in the following circumstances:

- When the applicant is a sole female applicant for a male child or When the applicant is a sole male applicant for a female child; In these two instances, the persons would not be considered to reduce the risk of sexual exploitation.

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- Joint applicants who have not attained the age of 25 years or are above the age of 65 years; these age brackets are considered too young and too old respectively to be able to keep up with the energy that children exude.

Adoption must be refused if the applicant, or one of the applicants;

- Is not mentally sound.
- Has been convicted with offences such as rape, murder, prostitution abduction, etc.
- Is a homosexual.
- Is a sole foreign male applicant.
- Are not married to each other

This list is not exhaustive. However, the reasons that are provided is that the above category of people do not provide good role models or lack the capacity to care for the child.

○ **Consents**

For adoption to be effected written consent is necessary from the following persons:

- The parent(s) of the child if the parent(s) is/are over eighteen years old.
- If the mother of the child is unmarried and has not reached eighteen years, by the grandparents of the child;
- If the applicant is married, the other spouse.
- The child if it is over 14 years old.

The consent of the parent or grandparents can be dispensed with if they have abandoned the child.

○ **Legal Implications of Adoption Order**

An adoption order has the effect as if the infant was born to the adoptive parent(s) in lawful wedlock. The right of the adoptive parent then becomes superior to that of the biological parent. An adoption order permanently deprives the biological parent or guardian of his or her parental rights.

-Violation of children's Rights

Child Abuse

Despite the existence of legal provisions at the international and national level situations still arise in which children's rights are not respected and in which children are abused. Child abuse is violation of the rights of the child. It can be defined as conduct that violates or infringes on the rights of the child physically, socially, emotionally, psychologically or economically. It includes any act which degrades, demeans or lowers the worth and dignity of a child and also includes unreasonable deprivation of the basic needs of the child.

Child abuse occurs in various forms. Some of the common forms of child abuse include:

- Child labour
- Neglect of children
- Sexual abuse
- Early marriages

- Female genital mutilation
- Corporal punishment

Neglect of Children: parents have a duty to take care of their children. However there are numerous examples of cases when parents have abandoned or neglected their children. Such parents fail or refuse to take care and provide for the needs of the children. The street boys and girls who roam in major towns are examples of those who have been neglected and abandoned by their parents. Parents are not expected and are prohibited from abandoning their children. In cases where the government finds that a child has been abandoned, the government can trace the parent and compel them to take care of the child or take the child into a home for children who have been abandoned.

Child labour: As already discussed this is the engagement of children under 16 years in the labour force to the detriment of their social, mental, physical and social development. Child labour is outlawed by the Children's Act. It is illegal for one to employ children below the legal age or for parents to force their children into being employed at an age when they should be in school and still developing socially and psychologically. Anybody who engages in hiring child labour or promoting it not only interferes with the welfare and development of the child but also commits an illegal act.

Sexual Abuse: this refers to taking sexual advantage of and molesting children. The Penal code prohibits offences against morality including raping and, defilement of minors and sexual assault amongst others. Sexual abuse has become so prevalent in society and is committed by people who are close to children including their relatives. This is a traumatizing experience for the children psychologically and interferes with their future development. Secondly, it is harmful and a threat to children's health as they expose children to risk of sexually transmitted diseases including HIV/AIDS. This can result even in the death of such children. The law therefore outlaws sexual abuse of children and puts in place mechanisms for preventing sexual abuse from occurring and punishing the violators when and if such violations are committed.

Early Marriages: certain communities encourage and sometimes compel their children to be married at a very tender age and below the legal age for marriage. At such age children have not matured to be adults. They thus are not in a position to make an informed decision as to whether or not they want to be married and to whom. The situation is compounded by the fact that in most instances of early marriages, the children are not even given the leeway to make a choice as to whether they would like to be married and to whom. Instead the discussion is amongst the parents who engage in all the negotiations. On completion the child is siphoned to the prospective partner who invariably is the age of their father or mother. Such children are not ready to enter into the marriage institution, give birth to and rear and support their own children. This is not only immoral, it is also illegal.

Female Genital Mutilation: there are communities who circumcise their girls as part of their rite of passage into adulthood. This practice has been proved to be detrimental to the sexual development and dignity of the girl child. It is a destruction and mutilation of the female sex organs. The practice for along time was considered morally reprehensible and wrong. It is since 2001 been declared illegal too by the coming into force of the Children's Act. Communities who are still intent on the rite of

passage should be encouraged to look for other symbolic process or act which does not involve the mutilation of the female sex organs as is currently the case with female circumcision.

Corporal Punishment: the corporal punishment of children through mechanisms like caning although a mechanism for correcting children who disobey rules is too harsh and has been misused by adults. It hassled to paralysis and even death of certain children. Children who make mistakes need to be punished. However the punishment should be reasonable and necessary for correcting the behaviour of children. Meting out corporal punishment to children also turn them to hardcore criminals for their get resistant to such form of punishment and grow up as rebels. Corporal punishment used to be meted out by parents, teachers and other adults. Corporal punishment is also meted out by courts. The law has outlawed corporal punishment in schools. Parents can still discipline their children through caning. The caning must however be reasonable and corrective. Secondly the law prohibits a sentence of corporal punishment from being given to child offenders. To punish child offenders the law has developed a juvenile (children) justice system to ensure that children offenders are treated differently from adults by the legal and court system.

○ **Children Justice System**

In society children do commit wrongs. They are also wronged. Whether it is the children who have committed an offence or one has been committed against them, the normal court system does not offer them fair treatment in the process of resolving the dispute and seeking remedy for the offences committed. It is for this reason that there is a well established system, refers to as the juvenile justice system specifically to deal with cases regarding children and offences committed by or against them.

For children accused of committing a crime, they will be governed by the general laws on crimes, criminal responsibility, criminal procedure, and rights of an arrested or accused person, contained in the Constitution, Penal Code, the Criminal Procedure Code, and the Evidence Act. Some of the provisions have however been modified by the Children's Act and other legislation. In addition the UN Standard Minimum Rules for Administration of Juvenile Justice suggests that institutional and judicial proceedings in public be avoided unless they are absolutely necessary. It is imperative that all necessary mechanisms be put in place so that such proceedings are avoided.

The Penal Code provides that a child of less than 8 years is not liable for any crime, i.e. they are deemed incapable of committing a crime. A person less than 12 years is presumed incapable of having sexual intercourse and cannot commit an offence related to sexual intercourse. A girl aged below 14 years cannot consent to indecent assault or sexual intercourse, and thus any form of indecent assault and sexual intercourse is always a crime.

Some of the crimes created by the Penal Code that are particularly relevant to children are rape, abduction of girls below 16 years, indecent assault on females, defilement of girls below 14 years, incest, facilitating prostitution, detention of females for immoral purposes, conspiracy to defile, abortion, indecent assault, and unnatural offences like acts of homosexuality.

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The Evidence Act states that the evidence of a child of tender years can only be taken into consideration in a criminal case if it is corroborated (supported). This means that an accused person cannot be convicted on the evidence of a young child unless other evidence is there that supports that of the child. It takes more than the evidence provided by a child to convict an accused. This creates difficulty in the conviction of sexual offenders since it occurs in and there are no other witnesses.

The Children's Act restates the law on crimes and criminal procedure relating to children and expands it. The Children's Act requires that when a child has been arrested, the parent should be informed promptly. An arrested child is entitled to bail. When held in custody, they should be kept separate from adults. The parent, guardian, or an advocate should be present when a child is being interviewed. In the absence of a parent or guardian, an authorised officer has to attend the interview. A child should not be held in custody for a period of more than 24 hours upon arrest and pending court processes.

The Convention stipulates that a child who is in conflict with the law should be treated in a manner that promotes his or her sense of dignity and esteem. The law should take into account the age of the child and ought to re-integrate the child into society. The Children's Act in keeping with the Convention requirements has established special courts, called Children's Court, to deal with issues related to children. These courts are empowered to hear the following:

- . Criminal cases against children (with the exception of murder or when the child is charged with adults);
- . Cases under the Children's Act concerning parental responsibility; children's institutions e.g. rehabilitation homes and remand homes; custody and maintenance of children; guardianship of children; judicial orders for protection of children; children in need of care and protection; and child offenders.

The Trial Process

When a child is arrested, he or she shall be informed promptly and directly of the charges against him or her. They must be brought before the court as soon as practicable, however, this must be within twenty four hours of the arrest. The police must inform the parents or guardians of the child. The parents/guardians must be present or an advocate when the child is being interviewed and where the child is not able to get legal assistance, the government shall help the child prepare his/her defence. If the child is to be detained at the police station, he or she shall not be kept with adult offenders. If it is a girl, she must be in the care of a female police officer.

Children's courts sit separately from other courts dealing with other issues. Members of the public are excluded from Children's Courts. The child's privacy should be fully respected throughout the proceedings and at no time shall the names of the child or the pictures be published in the press or reports carried that refer to the child's identity. If the child does not understand or speak the language of the court, an interpreter will be provided. The child should not be compelled to give testimony or to confess guilt by use of threats or intimidation. The case shall be determined urgently. If found guilty, there should be a right to have a higher court review any measure imposed. If disabled, the

child should be given special care and treated with dignity in the same manner as a child with no disability.

There are additional guarantees. Children's courts should sit in a child-friendly environment. Children in custody or remand should promptly be taken to a doctor if they fall sick. Children's courts should always take into consideration the best interests of the child in accordance with the principles informing child rights protection.

Certain punishments cannot be inflicted on children. A child cannot be sentenced to imprisonment, sentenced to death, or if under ten years sent to a rehabilitation school. The child can only be dealt with in the manner that is set out below. A child cannot be subjected to corporal punishment.

Where a child is tried of an offence and the court is satisfied of his or her guilt, the court may deal with it in one of the following ways:

- Discharge the offender under the Penal Code
- Discharge the offender upon entering into a recognisance with or without sureties
- Make a probation order and have a probation officer monitor the offender until the court is satisfied that the child is reformed sufficiently to be integrated into the community. Here the child will stay at home but will be monitored closely by the probation officer
- Commit the offender into the care of a fit person
- If the offender is over ten years, send him or her to a rehabilitation school which is suitable for his or her needs
- Order the offender to pay fine, compensation or costs. This responsibility lies with the parents or guardians of that child
- If the offender is over 16 years, committing him or her under a Corrective institution established under the Borstal Institutions Act. These institutions give the inmates educational, industrial and agricultural training. The court however must consider the character, previous conduct, circumstances around the offence as well as whether sending the offender to the institution would reform them
- Placing the offender under the care of a qualified counsellor
- Order him or her to be placed under an educational institution or vocational training programme
- Order that the child be placed at a probation hostel. The difference between this and the child being put under probation is that here, the child is in a hostel with other children who are in the care of a probation officer while in the previous case, the child lives at home and interacts with the officer alone
- Make a community service order that requires the offender to carry out some services for the benefit of the community. This order is considered one of the best ways of reforming the offender because when they commit the offence, it is very likely that they have acted against the community in general or some members of the community. By carrying out community service, the offender is seen to be making up to the community for their errors.
- The parent or guardian can also be ordered to give security for good behaviour. The parent will be required to appear in court and failure to do means that the court can make an order against that parent. In such an event, the parent or

guardian will be given an opportunity to be heard. The guardian or parent can appeal against such order at the high court

o **Different Mechanism of child protection Enforcement of Children Rights**

(ii) *Nature of the Convention and the Charter under Kenya Law*

The protection offered under the Convention and the Charter cannot be directly enforced in Kenyan courts. This is because, under the Kenya legal system, international treaties and Conventions that Kenya has signed, do not become part of Kenya's laws until Parliament has passed laws giving the Convention local legal status. Even then, it is the local law, rather than the Convention as such, which is enforced.

The Convention has established a supervisory mechanism. States that have signed the Convention, including Kenya, are required 'to periodically prepare and submit reports showing the extent to which the rights in the Convention are respected. An independent panel called the Committee on the Rights of the Child reviews the reports. Non-governmental organisations are given an opportunity to respond to the report. They sometimes do so by submitting their own reports, called 'shadow reports', which seek to show the real picture, as they understand it. The Kenya government has not submitted any reports.

(ii) *Domestic legislation on Child Rights*

The constitution contains a Bill of Rights that guarantees fundamental rights and freedoms. Although it provides that there shall be no discrimination of any person, there is no specific provision for nondiscrimination based on age. This exclusion suggests that there can be discrimination against people based on their age.

The Children Act (2001) attempts to domesticate the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of the Child. It came into operation on 1 March 2002

The Children Act has created Children's Courts, which adjudicates both criminal and civil matters that concern children. This is one way of enforcement of child rights besides the methods that are enumerated after each sub-section dealing with rights.

It also establishes the National Council for Children's Services, which is a body corporate with powers to sue and be sued. The Council is established to exercise general supervision and control over the planning, financing and coordination of child rights and welfare activities as well as advising the government.

Under the Children's Act, the Director of Children's Services working with Children's Officers has been given a wide range of powers on issues pertaining to children to ensure that the rights of children are protected.

Chapter 22

Environment and Natural Resources Management

Introduction

The environment is a key component of society and societal life. How it is used and managed determines the quality of life that people enjoy. Paralegals in their day to day activities will be confronted with situations of environmental degradations and conflicts over the use and exploitation of the environment the component natural resources. It is therefore essential that they be aware of the appropriate method of and requirements for sound environmental management.

This chapter therefore discusses the environment and environmental management. It also highlights some of the key environmental challenges that paralegals may meet. The chapter then discusses the laws and institutions that exist to help in ensuring that the environmental is managed in a sound and sustainable manner. The section then discusses some of the natural resources in the country, the laws for their management and some of the conflicts over their use. Here the case study of human-wildlife conflicts is used to illustrate the competing demands in efforts to ensure sustainable use of natural resources.

Environment and key terms

The term environment may mean different things to different people. When one talks about environment to some the issue might be about trees while to others it might be about cleanliness or pollution. Others may say it has something to do with reforestation, water pollution, and wildlife protection. These statements actually mention certain things about the environment. The environment is however much wider than trees, wildlife, fish or rivers. The term environment can be commonly defined as the surrounding of human beings. It refers to nature and natural resources including air, water, soil, plants, animals, surroundings or ecosystems, land, physical feature, cultural heritage and the interaction between these organisms and non-living organisms. One therefore sees that the environment is a very expansive concept including both natural and man-made components.

Due to the fact that the environment is very critical for man's survival how it is use and managed is very important. During the old ages there was massive exploitation of the environment and its components. However over time there was the realization that most of the resources of the world are limited and as such their exploitation must be done in such a manner that they do not become depleted. It was at the same time realized that for the survival of human beings they had to use these resources. The challenge was therefore to balance the needs of human beings to use the resources with the requirement to ensure the resources are available for all both in the current generation and those still to come. This led to the development of the term of environmental management. This refers to the process of ensuring that the balance within the environment is maintained. The concept that helps in environmental management is that of sustainable development which requires that in the process of development, human beings should use the environment and natural resources in a sustainable

manner to ensure that the needs of the present and future generations is not compromised in the process.

Key environmental challenges

In efforts to ensure environmental management society is faced with several environmental challenges. The common ones that paralegals and members of local communities will encounter almost on a day to day basis include:

- **Pollution:** this refers to the release of harmful materials into the environment making it unhealthy. The parts of the environment that suffers most from pollution are water, air and land.
- **Deforestation:** the wanton felling of trees is another challenge facing society
- **Desertification:** this is a natural consequence of deforestation and reduction of forest cover. The clashes at Mai Mahiu over Water and the removal of people from Mau forest are partly problems that have flowed from reduction of forest cover and desertification leading to lack of adequate water resources
- **Landlessness:** the lack of adequate land is a serious challenge with grave environmental consequences. It leads for example to people overpopulating little land or settling in fragile ecosystems
- **Poor waste disposal** is also a serious challenge

Legal framework for environmental management

Due to some of the above challenges and the need to address them adequately, Kenya has developed a legal and institutional framework to ensure sound management of the environment. There exists the Environmental Management and Coordination Act (EMCA), which came into force in January 2000. This is a comprehensive law that governs the management of the environment in a comprehensive and holistic manner. Before the enactment of EMCA the legal regime for managing the environment were scattered in over 77 pieces of legislation. These were sectoral based. Secondly most of the legislation were initially only concerned with allocation and exploitation of natural resources. When conservation components were crafted onto these legislations they were done piecemeal and not in a comprehensive manner.

The laws were only concerned with specific sectors of the environment. Thus you had a water Act to address the water sector, A Forest Act to deal with forestry issues, while the Wildlife Management and Coordination Act dealt with the wildlife sector. The other highlight of this period was the existence of jurisdictional overlaps and conflicts between the various institutions dealing with various aspects of the environment. When one harmed the environment, the laws had provisions for punishment which were typically in the form of fines and jail sentences. The sentences were generally very lenient too.

The enactment of EMCA dealt with most of these problems. EMCA is a framework legislation that governs all aspects of the environment. The sectoral legislations still exist but EMCA gives general principles on environmental management. EMCA also establishes a clear institutional structure to coordinate all bodies that deal with the various aspects of the environment.

EMCA provides at section three that every person in Kenya is entitled to a clean and healthy environment. The section also provides that in addition to the right to a clean and healthy environment every person also has a duty to protect the environment. The right to a clean and healthy environment is therefore not just an entitlement but also a duty that every person in Kenya bears.

Section three of EMCA contains provisions to ensure that the right to a clean and healthy environment is protected. When one alleges that the right has been, is being or is likely to be contravened in relation to him or her then the person has a right to go to the high court and seek redress. It should be noted that before the enactment of EMCA many people who sought to enforce the right to a clean and healthy environment were denied the opportunity on the ground that they had no *locus standi*. The courts invariably held that the persons seeking to enforce the right to a clean and healthy environment had not suffered any special and personal injury over and above the other members of society. This is the fate that befell Professor Wangari Maathai when she went to court seeking to stop the construction of a multi-billion Complex at Uhuru Park.

EMCA has liberalized the rules of *locus standi*. One seeking to enforce the right to a clean and healthy environment no longer needs to show that the act they are complaining about has caused them personal injury and that they have suffered special harm over and above the other member of the public. All that is required is that their action should not be frivolous, vexatious or an abuse of the court process.

EMCA also contains several principles to govern environmental management. These include the principle of sustainable development already discussed earlier in this chapter. Other principles include that of intergenerational and intragenerational equity. The first of these refers to the need to balance the interests between present and future generations while the second refers to the need to balance interests of different individuals within the same species. There is also the principle of polluter pays that is he or she who causes pollution must bear the cost of cleaning up the environment and also the principle of taking account of the knowledge of local communities. These and other principles contained in EMCA provide the basis of environmental management in Kenya.

Institutions for environmental management

EMCA has established a number of institutions for purposes of ensuring a coordinated management of the environment. The most important of these institutions is the National environmental Management Authority (NEMA). NEMA is established a body corporate capable of suing and being sued. It is headed by a Director General and also has a Board. It has the powers and authority to exercise general supervision and coordination over all matters relating to environment and is the principal instrument of the government charged with the implementation of all policies relating to environment.

NEMA's tasks include coordinating all agencies charged with managing the various aspects of the environment. It therefore coordinates the activities of all those institutions which used to have jurisdictional overlaps with each other and ensures that the overlaps are done away with.

In addition to NEMA there are other institutions created by EMCA. These include the National Environmental Council, chaired by the Minister for Environment whose task is policy formulation. There are also established two key institutions to ensure that local communities participate in the management of the Environment. These are the Provincial environmental committees and the District Environmental Committees. Both of these are organs of NEMA and have the mandate to ensure management of the environment at their respective level. Both these institutions have by law a mandatory representation from local communities. DECs for example must have four representatives of youth, women pastoralist and farmers. In addition they are to have representative so of NGOs and CBOs. Paralegal workers should therefore make the community aware of the existence of these bodies and work with members of their local communities to ensure that they are represented in the committees.

The other two useful committees established by EMCA are the Public Complaints Committee and the National Environmental Tribunal. The Public Complaints committee investigates cases of alleged violations of the environment and makes recommendations for their redress. It is an environment ombudsman. It is empowered to receive complaints from the public.

Natural resources, their use and management

Resources are the means of supplying or meeting a need. Every human being needs some resource to be able to meet his or her needs. Water is an example of a basic resource that is needed by every human being. Kenya is endowed with a lot of natural resources. Indeed natural resources are at the root of Kenya's economic mainstay. The manner in which they are owned, accessed and managed is therefore critical to communities as it determines their livelihoods.

The key natural resources discussed in this section includes land, minerals; water, forests and wildlife. Each of these issues is affected by the different rights of men and women in terms of perception, needs, interests, access, use, ownership and benefits in the traditional, colonial and post-colonial period. These issues need to be addressed in the right way.

Land was discussed substantively in a previous chapter. The point to note here is that it is an important natural resource. It is in limited supply. There is need to ensure its equitable distribution.

Traditionally, women did not own land in most Kenyan communities. Though the land was communally owned, it was men who controlled the land. Women were, however, allowed to use land for the cultivation of food crops. Women were for a long time disadvantaged as they could not use land as security to obtain a loan from a bank or a financial institution, as most banks needed a land title deed as security before they could give a loan to an applicant.

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Today, however, women are allowed to own land and many have title deeds to land. In practice, it is mainly educated women who have taken advantage of this. The traditional and especially rural women still believe that land belongs to men only. Many of them still cannot get a loan using a land title deed. The law, however, does not stop any woman, rural or urban, from owning land.

Kenya has a number of minerals and precious stones. These include gold, uranium, and fluorspar. Some of these are mined on a commercial scale, while others are not. The Mining Act governs the exploration and management of minerals in Kenya. The Act came into force on 1 October 1940. There has been criticism of the law that it is a colonial piece of legislation and efforts are underway to comprehensively amend it.

Generally all minerals are the property of the Government of Kenya. This is provided for in Section 4 of the Act. It is the Government, through the Commissioner of Mines, that can authorise an individual or company to prospect or even mine minerals. Details of how this is to be done are provided for in the relevant Sections of the Act.

When a mineral is discovered on a private piece of land and the Government decides to have the mineral mined by the Government or given to private company or individual prospecting rights, the original owner of the land is entitled to compensation. For purposes of good governance, the owner is consulted and agreement for payment is arrived at between the parties.

Water is one of Kenya's most important natural resources. Fortunately, the country has a lot of water resources. They include, Lake Victoria, which is the second largest fresh water lake in the world. Other major lakes include lakes Nakuru, Elementaita, Turkana and Nyabola. The country has also many permanent rivers such as the Nzoia, Yala, Miriu and Tana Rivers.

The Government has also built a number of dams in the country. These lakes, rivers and dams provide water for fishing, irrigation and production or generation of hydroelectric power. They are also used for other domestic purposes. In addition, the country has underground water. In some places the water table is quite high, while in some areas it is quite deep. Ground water is reached through the sinking of boreholes. Institutions, such as schools, hospitals and hotels, use ground water to supplement other sources of water.

The management of the country's water resources falls under the Water Act. The new water act came into force in 2002 and established several institutions to manage water resources in the country. The aim was to improve efficiency in the management of water resources.

Kenya has several forests. The Forests Act cap 385 of the laws of Kenya that came into force on 1 March 1942, governs the use and management of forests in Kenya. This includes the establishment, control and regulation of central forests.

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Section 6(1) of the Forest Act empowers the Minister responsible for forests, to declare a forest area or a central forest to be a nature reserve for the purposes of preserving its natural amenities and its flora and fauna. The forest areas cannot be used for putting up buildings or the cultivation of crops.

Forests are important as they provide trees for both domestic and commercial or industrial use. Forests are also important for rain reserves. For these and other reasons, it is necessary to save and protect forests. Logging can only be undertaken with the authority of the relevant Government officials, led by the Chief Forest Officer.

Destruction of forests also destroys the environment and this has adverse consequences for development generally. The Environmental Management Act also helps in the preservation and conservation of forests in Kenya.

Efforts are underway to pass a new and comprehensive Forest Act. The first Bill was rejected by parliament for political reasons and one hopes that soon it will be passed when the Minister for environment re-introduces it in parliament.

Wildlife is one of the greatest natural resources in Kenya. Kenya has some of the best wildlife in the world. The wildlife attracts tourists who earn the country foreign exchange. However wildlife is also one of the resources in danger of extinction as increased populations and animals fight for limited space.

The Wildlife (Conservation and Management) Act provides the legal framework for managing wildlife resources in the country. It creates The Kenya Wildlife Services which is responsible for the management of the country's wild life.

The Law's framework for managing wildlife is based on the creation of national parks and game reserves. Thus the government has set aside certain parcels of land as game reserves or national parks. These areas are set aside for purposes of wildlife

One of the challenges facing wildlife management in the country is poaching. Poaching of wild animals has been one of the major threats to Kenya's wildlife. It is a problem that the Government, through the Kenya Wildlife Service, has struggled with for many years. To help stop the problem the Government went as far as burning tons and tons of ivory that had been recovered from poachers. The action was meant to discourage trade in ivory that caused the killing of elephants. The government's efforts have also included seeking for international collaboration in banning trade in ivory.

Human-Wildlife Conflict

One of the major issues facing the management of wildlife is the conflict between communities and wildlife. Communities living around National Parks and Game Reserves have numerous conflicts with wildlife. The conflicts arise due to competition for land and other resources and also due to the threat that the wildlife pose to the lives and property of these communities. The problem is further compounded by the fact that invariably local communities are not involved in the management of the wildlife and neither do they share in the benefits derived from wildlife.

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The law mainly gives ownership of wildlife to the government. When the government sets aside land as a national park for conservation purposes, the local communities are thereafter excluded from that national park. The wildlife however normally stray from the parks onto the land and homestead of communities living nearby. They end up destroying crops of these local communities. They also injure and even kill human beings whom they come across as they stray from their conservation areas.

The Law provides that when property or lives are destroyed by wildlife the affected members of local communities are entitled to compensation. However, there is compensation for loss of property while that for loss of lives is only Kshs. 30,000. This is arguably very low. The end result is that the current law fails to adequately address the issue of human-wildlife conflicts.

Communities due to the fact that they are excluded from the management of wildlife, yet it is them who have to be evicted to create the reserves and parks and also who have to bear the effect of the conflict view wildlife as a liability and a threat. This is not conducive to sustainable management of wildlife resources.

There is need to amend the law to ensure that the issue of human-wildlife conflict is addressed and that local communities are given a bigger role in the management of wildlife resources and that they do share in the benefits derived from wildlife.

Efforts are underway to review the Wildlife Act to deal with these issues. In 2004 Parliament passed an amendment which had been moved as a private Member's Bill by Honourable G.G. Kariuki but it did not get the approval of the president.

Conclusions

This section has discussed the law and policy on environmental management in Kenya. From the discussion it emerges that local communities have a critical role to play in the management of the environment and other natural resources. They can participate in the conservation of natural resources, they should use natural resources wisely and also as members of the various bodies established under EMCA they can contribute to sound management of the environment. In situations where the environment is being degraded they can take measures to prevent or stop the pollution and also measures to ensure that those who are causing the pollution are reported to relevant authorities including courts and other administrative tribunals.

Chapter 23

Human Rights Institution Building

Introduction

Involvement in human rights work is very often a matter of personal decision. Ultimately, the shared goal is that of making that human right work effective. Human rights work is expected to translate into better lives of dignity for the people in question. In the course of time, however, this work has institutional implications.

In order to effectively carry out the important work of promoting and protecting human rights, we soon realize that we need to bring more committed people together and mobilize them to a cause. The basic reason for this may be that human beings are, by nature, social animals. But there are others. It may be that you desire to bring more knowledgeable or more committed people on board. And so on. Whatever name is given to the group that emerges out of these needs, the inescapable fact is that there is now a group of people that is supposed to pursue a common goal. If the group is to achieve its common goal or goals, it will need some knowledge on how to manage its affairs effectively and to keep everyone focused on the group's aims. The knowledge required to manage the affairs of the group effectively and to assist it to perform effectively is what this chapter is about.

In this chapter, we shall use the term “institution-building” to refer to the conscious construction and maintenance of the basic underlying framework – the structures, the information and the psychology – of a human rights organization. We are referring to issues that any organization, more so a human rights group, ought to think critically about when it is getting started. These are things such as its composition, leadership, management, mandate, division of labour, rules, and internal procedures. We are also referring to issues such as resources, the environment in which it is to operate, its capacity and how it will be sure that it is achieving its objectives.

By “human rights institution”, we mean any group – whether it is composed of individuals or organizations – whose goal is to carry out an activity or any range of activities with the aim of promoting or protecting the entire spectrum of human rights. These could be civil, political, economic, social, or cultural rights. This definition includes organizations that may choose to restrict themselves to a single area of human rights such as women's rights, children's rights, environmental rights, development rights or farmer's rights. It also includes the broadest number of organizational descriptions including NGOs, CBOs, paralegal networks, peer learning groups, youth groups, support groups, societies, associations, trusts, and companies limited by guarantee.

The need for this chapter arose out of the realization that human rights institutions are constantly at risk of performing below expectations or failing completely if they do not pay regard to the institution-building aspects of their work. This can happen where they are embroiled in unnecessary power struggles, or lack clear procedures for regulating their internal processes. Besides this, it is necessary for human rights institutions to

practice the values that they espouse – or lose credibility, with the likely consequence of not making an impact or failing completely from achieving their goals.

Developing a Core Group

When you pause to think about how your human rights institution was formed, you may quickly realize that it began from the idea of a single individual or a small group of individuals. This individual or these individuals recognized a human rights need or issue in the community and sought to find a way of addressing it. They then consulted others and began the process of putting together the institution. This resulted in the initial small, *core* group of founders. This group determined the purpose of the intended institution, which people it was going to serve and the kind of activities it would be involved in to fulfill its purpose. Different institutions do this in different ways, some formally (through planning committees) and others informally. But in each case, it is necessary to address these organizational questions: who, what, why, where and when.

The process, and who is involved in it, will depend on the environment, context or setting in which the new institution seeks to operate. In countries where there are repressive governments, the core group will most likely consist of a few highly trusted friends. They may even hold their initial meetings in secret. In countries where freedoms are more respected, the approach may be more open and may include public appeals to people who want to belong to the institution. Whatever the case, there are a number of issues that are necessary if the first meeting or the first set of meetings is to be successful.

Convenience

Set a time for the meeting that is convenient for those you wish to attend. You will, for instance, want to avoid working hours if you want working people to attend; set the time far enough in advance to allow people to plan to attend but not too far so that they forget to attend; or try to arrange the meeting around some other bigger event so that you can easily meet the people you would like to involve in your first meeting. Depending on the circumstances, you may want to also consider what is a convenient location for your meeting. It should be safe, quiet, easy to find, and inexpensive. It should be held in a neutral venue or at least one where the people you wish to meet will not be uncomfortable about getting in. In some settings, a government building may not be a good place to meet. In others, a woman's integrity may be compromised if she attends a meeting in a private home with men.

Planning

Plan the meeting carefully: nothing dents commitment like poorly planned meetings, and you want to get off to a good start. Planning questions to go through include: who will facilitate or chair the meeting; who in the original core group will present the initial thoughts on the group; how to structure the larger group discussion following the presentation; who will take notes; the amount of time it will take to go through all the issues; if one meeting or a series of meetings will be required and so on. Keep some notes to refresh your memory.

Conduct of meeting

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The core group should, ideally, present the idea followed by discussions. Nevertheless, there is need to have each participant introduce themselves. There should also be identification of one or two initial activities for the group. Resources should also be committed, no matter how small, from those committed to the group.

Managing Time

Start and end the meeting on time, and respect explicit time limits for each agenda item. This way, people will be motivated to come to future meetings, instead of seeing participation in the group's activities as unduly time-consuming.

Follow-up

If [participants have expressed a willingness to undertake specific tasks, core members should follow up their implementation. Interest often diminishes as time passes, and it is important that maintains respect for commitments.

Group formation theory

It is important to remember the basics of group development theory at this early stage. According to this theory, there are five stages of group development. The initial meeting is part of an initial phase, referred to as *forming*. It is characterized by a great deal of uncertainty about the group's purpose, structure, and leadership. This stage is complete when members have begun to think of themselves as part of a group. The next stage, *storming*, may be marked by conflict within the group. Members accept the existence of the group but there is resistance to the constraints that the group places on individuality. It will be complete when a clear hierarchy of leadership emerges. The third stage is one in which relationships develop and the group demonstrates cohesiveness. This *norming* stage is complete when the group's structure solidifies and the group has agreed on what defines correct group behaviour. The fourth stage is *performing*. The structure at this stage is accepted and fully functional. Group behaviour has moved from understanding each other to performing the task at hand. This is often the last stage in the development of most groups. For groups that have a temporary task, such as committees and task forces (even some coalitions) there is an *adjourning* stage. In this stage, the group prepares for its disbandment and wrapping up activities. At each stage, there are challenges to surmount and some members of the group may even leave. Nevertheless, the key challenge is in getting the group to the performing stage.

Determining Mandate

Mandate answers the questions: What does the organization intend to do? What will be its primary goals and objectives? To determine a clear mandate, an organization has to ask itself: Why is a group necessary? Who will it serve and what will its members be? What will it do, and where and when will it do it? A group's mandate, in turn, will determine and define its activities.

On the *what* question, there are a number of things that the group will have to discuss and agree on: the goal, the objectives and the methods (or approach). The goal of the group should be broad but not too wishful. For instance, it may be to raise awareness on human rights issues, or to empower peasant farmers. The objectives, however, must be more specific. Besides, they must be measurable, attainable, realistic and time-bound.

They address what particular outcomes the group hopes to achieve and usually start with expressions such as “to increase” or “to decrease”, which lay the groundwork for measuring the degree of success later on. After this, the group has to agree on the *means* by which it will achieve its objectives. Advocacy, documentation or human rights education are all methods of, or a means to, achieving objectives such as reducing the incidence of domestic violence or improving prison conditions or increasing the awareness of the legal rights of a minority community.

Writing the Organization’s Rules

In order to ensure that the organization functions on the basis of clearly and commonly understood principles, it will be necessary to put down a number of rules regarding the manner in which the organization will run. Indeed, some of these may be a legal requirement for the registration of the organization. Drafting of rules, however, should not just be an exercise in fulfilling legal requirements. There is need to discuss and agree on the structure, organization and operation with the needs of the organization in mind. These are the rules that will define roles and relationships amongst members, the organization’s leaders, and managers. They will also set forth the rights, powers and duties of specific governing bodies of the group. If carefully thought through from the outset, good rules can help an organization avoid power struggles and disputes over procedures.

These rules will vary in length and comprehensiveness, depending on the complexity and scope of activities contemplated by the group. Depending also on the laws in use and the aim of the group, they may take various forms. They may take the form of by-laws (as in the case of a cooperative society), a memorandum and articles of association (in the case of a company), or a constitution and rules (in the case of a society, non-governmental organization or community based organization). In each case, it will be good for the organization if the process of developing the rules is as inclusive as possible.

Generally, the by-laws should address the following issues:

- ♣ How board members are chosen and by whom (elected by the membership? appointed by a special committee or the executive director?);
- ♣ On what basis are they chosen (eligibility criteria);
- ♣ Whether board members may also be members of the staff;
- ♣ Whether board members may receive compensation for special services provided;
- ♣ How long their terms of office are and how many times they may be re-elected;
- ♣ Whether board terms of service will be staggered to ensure a mix of new blood and experience;
- ♣ How often the board will meet and the number of board members required for a quorum;
- ♣ How specific officers of the board, such as its chairperson, secretary, treasurer, etc. will be chosen and how long they will hold their positions;

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- ♣ How specific committees within the board will be established and what authority they will exercise (this is especially important with regard to an executive committee which may meet more regularly or in times of crisis to make emergency decisions);
- ♣ Procedures for removing members of the board either for infractions, inaction or newly arisen conflicts of interest;
- ♣ Procedures for replacing a board member who may become ill, leave the country for a period of time, etc.;
- ♣ What monetary responsibilities will be exercised by the board?

In addition to the board and membership, some organizations have advisory, ethics and other committees of the board. The by-laws may also specify how an executive director, coordinator or other chief executive is chosen and sometimes outline on what basis and by what procedure or procedures they can be removed. The chief executive's managerial, financial and policy-making responsibilities should be clearly defined. Some rules will also include the responsibilities and authority of other key members of staff. The rules should also state how the organization will define its financial year and the manner in which finances will be handled. Other matters that can be included in the rules include a policy of non-discrimination on the basis of gender, race, religion, national origin and sexual preference. Finally, the rules should outline a procedure for their amendment and for the organization's dissolution.

Creating the Organizational Structure

In order for any organization to implement its mandate successfully, it must have a functioning internal structure. These include issues such as staff, the board of directors, members, recruitment procedures, financial procedures, dispute handling procedures and so on.

Staff

In the initial days of the organization's life, there may not be enough resources to hire salaried staff. In such instances, volunteers come in handy. In addition to providing critical administrative support, volunteers can help train recruits, disseminate information about a group's work and help spread awareness about human rights generally. Because they are useful to an organization at its most critical period, that is when it has little or not financial resources, they must be nurtured properly. Most groups will probably start with only one paid member of staff who coordinates volunteers and does most of the work himself or herself. However, this is a temporary rather than permanent situation. And when the organization moves from a largely volunteer effort to a staffed organization, it will be even more important to celebrate and to recognize the work of volunteers more so that they do not feel that their unpaid status has driven them to the bottom of the hierarchy.

Once an organization has staff and volunteers in place, it will be necessary to determine the structure of the office – namely who amongst the staff does what. Departments may then be established around functions, such as advocacy, publications or research, with a programme officer or coordinator responsible for each department. There may also be such support staff as are considered necessary.

Board of Directors

A board is needed to ensure that the broad organizational purposes of the group are being served; to review and approve programme plans and budgets; to bring prestige, credibility, skills and access to the group; and to raise finances. Like rules, boards will vary from organization to organization. There are those which simply rubber-stamp the decisions of the executive director, and others which consist of committed activists who devote substantial time and energy to the group's cause. Great care should be taken when constituting a board to ensure that only individuals who will take the work of the board seriously are recruited. The number of board members ranges from quite small (3-5) to quite large (30 or more). This will largely depend on the role of the board, how large the organization is, and the range of activities it is involved in. Generally, there is need to find a happy balance between covering the skills and talents needed on the one hand, and keeping the board small enough to be manageable and useful on the other. To avoid conflicts with the staff, the role of the board should be clearly defined at the outset.

Systems and Procedures

The use of the word organization presupposes an entity that is functioning smoothly and where things are visibly *organized*. Community members may not easily trust the efforts of a human rights organization with a reputation for being perpetually disorganized and in turmoil. As the organization evolves there will be need for methodical procedures on critical areas of its work. Some of the important areas in which an organization needs to have methodical procedures are financial management, human resources management, and management of volunteers.

Methodical procedures are important because they have a direct impact on an organization's ability to be efficient, trustworthy and credible. These are the prerequisites for their effective functioning. Absence of procedures can lead to disorganization, financial impropriety and conflicts over how things should be done. At the minimum, an organization is expected to develop and implement a financial management manual and a human resources manual.

Strategic Planning

Strategic planning is the conscious process of making fundamental decisions and taking actions that shape and guide what an organization is, what it does, and why it does it, with a focus on the future (Adapted from Bryson's *Strategic Planning in Public and Nonprofit Organizations*). It is a management tool to help an organization do a better job, by focusing its energy, to ensure that members of the organization are working towards the same goals, to assess and adjust the organization's direction in response to a changing environment. It is *strategic* because it involves preparing the best way forward for responding to the circumstances of an organization's environment, whether or not they are known in advance: human rights organizations often must respond to dynamic and even hostile environments. It is about *planning* because it involves intentionally setting goals (that is, choosing the desired future) and developing an approach to achieving those goals.

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Although strategic planning can be complex, challenging, and even messy, it must be done to ensure the organization's survival and performance. Because it is impossible to do everything that needs to be done all at once, strategic planning implies that some organizational actions are more important than others and much of the planning involves making tough decisions about what is most important to achieving organizational success, or prioritizing.

Strategic planning is only useful if it supports *strategic thinking* and leads to *strategic management*. Strategic thinking means continually asking, "Are we doing the right thing?" More precisely, it means making that assessment using three key requirements: a definite purpose; an understanding of the environment or context (particularly the forces that affect or impede the fulfillment of that purpose; and creativity in developing effective responses to those forces). Strategic management is about continually adapting to a changing environment and keeping an organization relevant. This means that an organization is more likely to succeed if it continually changes than if it adopts the traditional approach of "if it ain't broke, don't fix it".

To form an effective plan, one must first understand and define the elements which comprise the creation of that plan. These components are:

- ♣ An organizational vision
- ♣ A set of group values
- ♣ A mission statement or statement of purpose
- ♣ A set of objectives and goals
- ♣ A clearly defined organizational strategy
- ♣ A set of key result areas

The vision is often a far-sighted and generally very broad statement that serves as overall motivation rather than concrete agendas for action. Besides giving the group members the strength and courage to work for the future, it helps everyone to know what it is that they are working for. For example, the vision of the National Council of NGOs is *We seek an organized NGO sector, working for sustainable development and a just society.*

Values, on the other hand, note what is important for your organization. These can range from trust to work-life balance, to consultation. It is the values that define the character, method of operation and the working environment of the organization.

The mission is a statement of purpose. It is a simple one or two-sentence statement that should address an organization's main purpose for existence, the target group involved and the principal means of serving the target group. For example, the mission statement of National Council of NGOs reads: *We provide overall leadership to the NGO sector by enhancing capacity of NGOs; strengthening self-regulation; and providing a forum for influencing public policy. We are committed to the founding values of the sector. We will serve our members equally and strive for excellence in everything we do.*

The goals and objectives are what the organization intends to accomplish. They need to be specific enough to allow an organization to work towards them. To set goals, it is important to ask:

- ♣ What are our problems?
- ♣ Who do these problems affect?
- ♣ How can we overcome them?
- ♣ What do we need to overcome them?

Organizational strategy is about the format for executing programmes in order to achieve targets. It may involve mainstreaming gender or integrating advocacy or implementing a rights-based approach. Finally, the key result areas are the areas in which accomplishments will represent attainment of the objectives.

Project Management

It is important that organization's develop and implement a logical way of conducting activities. Before a project is formulated, there is need to study it, using various methodologies, in order to understand what the problem is, the underlying and immediate causes for it and possible solutions. In the course of implementation, it is important to collect monitoring information to assure the organization that work is progressing in the desired manner and that financial resources are being applied correctly for the desired goals. At the end of the project, it will be necessary to conduct an evaluation, which could be done either by the organization's staff or an independent consultant, to determine if the project achieved its goals and to obtain any lessons for future work. This should what the organization does in future, whether it is with the same project or a totally different one.

Basic Management Principles

A number of inter-related issues determine the quality of the working environment within the organization. These are internal democracy, leadership and teamwork.

Internal Democracy

Organizational styles of governance fall somewhere between the "hands off" and "autocratic" approaches, with "democratic" somewhere in between. In the "hands off" approach, leadership is essentially avoided. The chief executive of the organization feels uncomfortable making demands and is more interested in the staff liking him or her. While this may at first look democratic, it may lead to chaos, strife and paralysis, prematurely grinding an organization to a halt.

The autocratic model usually involves one person who wields absolute authority. Unilateral decision-making is the order of the day and the leader aims to control everything in the organization. Everyone is completely dependent on his or her judgment and go ahead. Many human rights organizations unwittingly fall into this mode. It is marked by few checks and balances, dependence on the leader, high likelihood of poor judgment (since there is no consultation), and lack of staff creativity.

Democratic governance, on the other hand, supports consultation and broad participation in policy and decision-making, even if the chief executive and/or the board

have the final say. In the democratic model, staff are accountable to each other and the chief executive, and the chief executive is accountable to the staff, the membership and the board. It is important to treat an organization's governance as part of its track record and aim for internal democracy. As one activist puts it:

How we get results is of utmost importance. It is actually practical to be a democratic organization because the organization will last in the long-run. It is an effort, but also an investment for the future.

Leadership

In most cases, the leader of a group tends to be one of its founders, who has assumed the position of chief executive. This is most often the person with the vision, commitment and ability to inspire and mobilize the people necessary to get the group off the ground. But the organization should not depend on the skills and talents of one person alone. A good leader will be committed to building an institution that can outlast him or her. To do this, he or she must be willing to develop other leaders within the organization. Effective leaders formulate and articulate a clear picture, or vision, of where the organization is headed and of what is important. They build trust and commitment and mobilize support for the group vision. They seek to lead by inspiration, vision and the empowerment of others.

In many organizations today, boards are the source of stagnation and decline in performance because they have forgotten their leadership roles and tend to manage the minute details of what goes on in the organization. It is important in the early life of an organization to clearly set out the roles of the board and the staff. Over time, these should be re-assessed and re-defined every time there appears to be a conflict or a potential of a conflict over roles.

The Difference Between Leaders and Managers	
Leaders	Managers
♣ Visionaries (think about the long-term goals of the organization)	♣ Missionaries (think about the short-term goals of the organization)
♣ Strategic (constantly ask: are we <i>doing the right things</i> ? Are we still relevant?)	♣ Operational (constantly ask: are we <i>doing things right</i> ?)
♣ Set the strategic direction of the organization	♣ Set the operational direction of the organization
♣ Establish structures	♣ Implementers
♣ Concerned about effectiveness	♣ Concerned about efficiency

Generating and Managing Resources

Many human rights organizations experience difficulties in raising sufficient funds to support their work. A small community based organization may occasionally obtain resources from larger NGOs to assist with the implementation of work at the local level. These funds are nevertheless always restricted to the activities to be undertaken and

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cannot be relied on for growth and sustainability. Many groups therefore focus on building their credibility and developing local sources of financing. Once credibility has been established, the organization may begin to rely on a larger variety of sources for funding. For the organization's health, it is important to diversify these sources (have more than one source) so that when one source goes down, it does not take the organization with it.

Possible fundraising strategies may include:

- ♣ Subscriptions and the sale of reports, newsletters and other publications
- ♣ Charging fees for training sessions
- ♣ Holding exhibitions where donated items are sold
- ♣ Organizing raffles or lotteries
- ♣ Organizing cultural events
- ♣ Renting a facility to host seminars and workshops
- ♣ Providing recycling services for a fee
- ♣ Organizing a walk or dancing competition
- ♣ Income generation activities (keeping livestock, renting out equipment, selling handicrafts, etc)
- ♣ Investing revenues in a trust fund
- ♣ Assisting in project implementation for a fee (including behalf of governments)
- ♣ Writing proposals to donors, government and larger NGOs

Some of these approaches will require training while others may not. For example, proposal writing is a technical skill that may require training. Others may be applicable in certain contexts whereas others may not. In some settings, receiving government financial support may compromise independence and credibility. Irrespective of how resources are raised, they should be managed properly. The organization should adopt cost-effective ways of attaining results and reducing pilferage. For example, in public meetings, or *barazas*, with the communities may be more appropriate than workshops in expensive hotels. Proper books of account should also be kept and an annual audit conducted.

Networking and Coalition Building

The terms "network" and "coalition" have become very common today amongst human rights organizations. Sometimes they are even used to refer to the same things. For the sake of clarity, "networks" are often defined as groups of individuals, groups, or institutions which exchange information and/or services. The emphasis in a network is on *exchange*. Networking can be done formally in the context of a network intended to exist for some time to which members belong, or informally in the context of a short term need, for example to prepare a press statement on illegal arrests.

A coalition, on the other hand, is an alliance of organizations for joint action. Like networks, coalitions can exchange information and services, but the focus is on action. Groups forming a coalition often know each other through past cooperation and networking. A coalition may be temporary or permanent. Coalitions may be established

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after long planning and thought, or quickly as a response to some threat from the authorities in a repressive state. They are formed for the following purposes:

- ♣ To enable the members to speak with a stronger voice and increase pressure over an issue
- ♣ To enable groups whose mandates do not include advocacy to indirectly support advocacy efforts useful to their work through coalition activities
- ♣ To increase the pool of information and contacts necessary to achieve their objectives
- ♣ To avoid duplication of efforts
- ♣ To coordinate quick responses to a crisis
- ♣ To create collective security against a common threat
- ♣ To obtain funding through a central channel
- ♣ To establish a system of referrals and recommendations where certain organizations are more renowned for certain services, for example legal aid.

Coalitions need be managed properly if they are to achieve their objectives. There may be problems of communication, credibility, undemocratic decision-making, loss of autonomy, competition between the coalition and the constituent members, and money tensions to surmount before they can achieve their objectives. Some of the principles of organizational management are particularly relevant for coalitions as well. For instance, the steering committee may find that it is better for it to play an increasingly leadership role while leaving the management aspects to the coordinator and other staff or volunteers of the coalition.

Consolidating and Sustaining the Organization

Many organizations retain the same size as they had at formation, while some even shrink. There are a number which, due to broad agendas of indefinite duration, will even regard expansion as desirable. Be that as it may, there is a need to set limits to the rate of growth and ultimate size. The rule of thumb here is to strive for maximum effectiveness, not for maximum size. Only after there is a satisfactory degree of institutionalization and cohesive operating structures should an organization think of expanding – either within the context of more staff and a larger office or a wider network with more branches.

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Glossary

To follow

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