KLRC

KENYA LAW REFORM COMMISSION

THE LAW REFORM NEWSLETTER

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At a Glance

KLRC
KENYA LAW REFORM COMMISSION
A vibrant agency for responsive law reform

MESSAGE FROM THE EDITOR-IN-CHIEF

" It is worth noting that the Law Reform Newsletter has been instituted so as to enhance public awareness and access to information on law reform in Kenya as well as across the borders."

The Kenya Law Reform Commission (KLRC) is glad to publish the 4th issue of the Law Reform Newsletter (LRN). The issue comes at a time when Kenya is about to undergo its 3rd general election after the promulgation of the 2010 Constitution.

The Law Reform Newsletter thus highlights the key issues, experiences and lessons on legislative, policy and administrative aspects that may arise prior to, during and after the elections. It also captures KLRC`s contributions to its mandate of law reform and shares critical experiences and lessons. Part of this issue has also been dedicated to the recent work done by KLRC in close collaboration with our stakeholders and partners.

It is worth noting that the Law Reform Newsletter has been instituted so as to enhance public awareness and access to information on law reform in Kenya as well as across the borders. The Law Reform Newsletter targets the policy makers at the two levels of government (National and County Governments),legislators, Civil Society, Development Partners,

Academia and the general public who are the ultimate beneficiaries of our work. The articles are selected from a plethora of contributions with the aim of addressing the unique readership and needs of our stakeholders. The Law Reform editorial team did subject the articles to peer- review before final publication. The team equally made deliberate efforts to guarantee that the language and design is user friendly for a great reading and compatibility with user's needs.

We are confident that our authors, experts and the contributors to the newsletter have been alive to the issues reflected in the body politic and have penned inspiring experiences and possible policy solutions where applicable for the betterment of society. The editorial team will continue to work on your feedback in the upcoming Law Reform Newsletter issues.

Joash Dache, MBS

Secretary/ Chief Executive Officer, KLRC
Editor-in-Chief, the Law Reform Newsletter

BLIND PEOPLE AND VOTING METHODS

"The right to full citizenship of blind/ partially sighted persons is one of the major concerns in the world."

The right to vote is one of the basic and fundamental political and human rights enshrined in the Universal Declaration of Human Rights (UNDHR), International Covenant on Civil and Political Rights (ICCPR) and other specific thematic UN conventions. Article 29 "Participation in political and public life" of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) clearly mandates states parties to ensure the right to vote of all persons with disabilities including blind and partially sighted persons.

To buttress this right and to foster free choice in elections, the secret ballot has been adopted in most democracies. It has been propounded as one that protects the individual from the risk of intimidation and or physical violence. While this system seems universal, it poses certain challenges to Persons Living with Disabilities and especially to the blind or partially sighted. This of course happens in both developing and in developed countries. As Kenya is headed to its next general elections in August 2022, the specific issues faced by these classes of citizens are worth noting by the electoral management bodies.

Primarily, the right to full citizenship of blind/partially sighted persons is one of the major concerns in the world. Full citizenship rights include, *inter alia*, the right to vote, right to get elected and right to participate in decision making processes in all statutory bodies. These rights associated with citizenship are a bit more complex with regard to blind/partially sighted persons owing to: (I) in-accessibility, (ii) non- inclusive and (iii) non-universal designs of voting tools. These three pronged bottlenecks result in a myriad of challenges highlighted below:

- Blind and partially sighted persons are often not viewed as individuals with full citizenship rights including having the right to vote and to be elected, by their families, communities and the political parties.
- Often they are just ignored in the elections and voting process in their communities or countries.
- They are viewed as objects of charity and pity where family

members or agents of political parties who assist them in exercising right to vote, just drag them like an animal and cast their vote without their knowledge or informed consent and their choice of assistant.

- They may be ridiculed and humiliated by the polling station staff.
- Blind and partially sighted women are often discouraged by family members to cast their vote since they need assistance which is often provided by male staff of polling stations.
- In many developing countries, the ballot papers are not made accessible in braille and large print.
- For those countries that use electronic voting machines (EVMs) they are often not equipped with Braille markings or auditory instructions.
- Often the ballot box is kept in a dark room without adequate light which causes disproportionate hardship to partially sighted persons in casting their vote which may result in a spoiled or incorrectly marked ballot being submitted.
- Election campaign processes and campaigning materials are not usually available in accessible formats which reduce the ability of blind and partially sighted persons to make informed choices.
- Election campaign platforms rarely address the issues facing persons with disabilities including those who are blind or partially sighted. Source: "Right to vote and to be get elected" (An article to Human rights publication series) International Disability Alliance (IDA), June 2013.

The above highlighted challenges have certainly undermined enjoyment of the right to vote and have been attributed to inattention especially in resource allocation to the acquisition, training and implementation of requisite infrastructure to this end.

Voting Methods

To address the challenges, a variety of voting methods are used by governments to accommodate blind and partially sighted persons at the polls. The method chosen depends on many factors, including the integrity of the process, the commitment of electoral authorities, consultations with blind and partially sighted people, available technology, and cost.

The choice is more difficult where the ballot paper contains a long list of candidates or parties, where second choices have to be indicated, or when a single ballot paper includes voting choices for multiple positions that are being elected simultaneously.

In such instances, the possibility of error is increased and rendering the ballot papers accessible becomes much more complex. Even when an effective method is in use, blind people frequently experience problems with officials who are untrained, uninformed, or behave inappropriately.

Whatever method is used, it can be made more effective by voter education. The needs of partially sighted voters also have to be taken into account when designing the ballot paper. Font size, typeface, colour contrast, clarity of symbols and logos as well as available illumination are critical factors. Source: "Blind and voting methods" (WBU external resource paper) August 2002.

Suggestions

Based on the challenges and barriers and voting methods highlighted above, the following suggestions may enable blind and partially sighted persons to exercise their right to vote independently and in secrecy:

- That accessible and inclusive voting methods be put in place for all elections and that these are available at all polling stations.
- Voting by direct recording electronic devices (DREs) – these are computerised machines that use touch-sensitive screens. Although DRE touch-sensitive screens are of little use by themselves to the visually impaired, several voting technology companies now produce plug-in components for the machines that "talk" through voice recordings and have keys with raised arrows and icons that blind voters can read with their fingertips. These adapted electronic voting machines can work very well.
- Advocate that blind and partially sighted voters may be assisted to vote by someone of their choosing to assist them in marking the ballot papers in the event that the voting methods available are inaccessible to them.
- Advocate for the sensitisation and training of poling officials in order that they understand the needs and issues of blind and partially sighted voters.
- Advocate for inclusive election campaigns with fully accessible materials in order to understand the voting procedures and to make informed choices in the voting process.
- For any of these methods to work effectively, voter education and training as well as training of polling station staff are very important.

Written By: Mathew Kimanzi,
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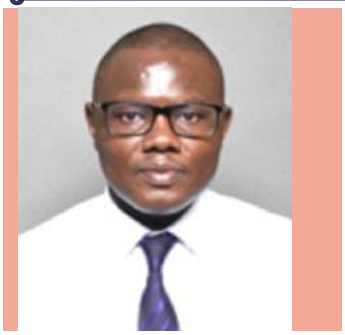

PROHIBITION ON THE USE OF CERTAIN TERMS BY NCIC HAS NO LEGAL FORCE

Under section 13, to provide for a list of what constitutes or is deemed as hate speech. The section does not also create any offence under it but provides for a fine of Kenya shillings one million or imprisonment term of three years or both. The effect of this is that, despite the provision of a penalty and the listing of what is deemed as hate speech under section 13 of the NCIA, no charges can be sustained under this section.

The power to make law or anything having the force of law is ordinarily vested in Parliament. However, because of the exigencies of time and the need to provide for matters of detail to give "life" to certain procedural issues in an Act of Parliament, Parliament ordinarily delegates this power to a Cabinet Secretary or state organ or state officer, to develop a subsidiary/subordinate legislation.

The legislation developed by the Cabinet Secretary, state officer or state organ is known as delegated, subordinate or secondary legislation because it is made

"One of the fundamental principles in the law making process, is the involvement of the people in the process."

The National Cohesion and Integration Commission (NCIC) recently released a statement against the use of certain terms such as madoadao, mende, sipangwingwi, linda kura, kama mbaya mbaya, fumigation, among others, deemed to be constituting hate speech during this electioneering period. Although the intention is noble, the prohibition may not have any legal consequences.

Freedom of expression or the freedom to speak, is a fundamental right under Article 33 of the Constitution. This right however, is not absolute and its enjoyment can only be limited by law in a just and reasonable manner. The limitation may be justified in instances where the speech is aimed at propagating war, incitement to violence or hate speech.

The National Cohesion and Integration Act, No. 12 of 2008 (the NCIA) is the primary legislation that regulates hate speech and ethnic discrimination. The NCIA however, does not define what is meant by the phrase "hate speech" but attempts...

under an existing legislation and must be subject to the provisions of the existing legislation. The interpretation of such legislation by a court of law must also be within the framework of the existing legislation, otherwise it runs the risk of being declared ultra vires-beyond the vested powers. The existing legislation in this context includes the Constitution, as the law from where all law originates, the parent/primary Act, the law under which the delegated legislation has been made and the Statutory Instruments Act, which is the law that guides the processes of making the delegated legislation. The delegated legislation is also known as a statutory instrument.

The Statutory Instruments Act, No. 23 of 2013 defines statutory instrument to include any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.

One of the fundamental principles in the law making process, is the involvement of the people in the process. It's worth noting, that the involvement of the people in the law making processes was one of the issues for consideration by the Supreme Court in the recent "BBI" judgement. Failure to involve the people may have the effect of having the law being declared null, by a court of law.

The recent release of terms that are deemed to constitute hate speech, by NCIC, although seeks to criminalize certain terms within the Kenyan society, fails the test of what constitutes a legal instrument having the force of law hence unenforceable.

It is understandable, however, that NCIC was borrowing from certain jurisdictions, such as the Republic of South Africa where derogatory terms such as Kaffir which is an ethnic slur that was used to refer to black Africans in South Africa in the apartheid era, are prohibited. It is worth noting, however, that unlike the prohibitions that was made by NCIC, the prohibition of these terms in some of these societies, has attained universal acceptance.

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THE ECONOMIC VIEW

The year 2022, just when everyone's turning a corner on covid-19, and the economic repercussions that came with it, with news filtering in from different segments, alluding to post-covid-19 recovery, has forced us to deal with another curve-ball of sorts, the Russian invasion of Ukraine. Now, what am I talking about here?

This is about our Kenyan economy, and maybe to bring my prognosis a little bit closer home, this is about the cost of things you and I are buying on a regular basis. So let us talk inflation, the Consumer Price Index (CPI) rose month on month, from 118.6 in January, to 119.1 in February 2022. This translated in increased costs of food, non-alcoholic beverages, household fittings and furniture, transport, water, electricity, and so forth. We have been paying more, in general for the same basic stuff. Things get a little bit trickier, this being an election year.

"We have been paying more, in general for the same basic stuff. Things get a little bit trickier, this being an election year."

The government, the biggest investor in the land, will continue spending as it normally does. However, the private sector specifically, foreign investors, normally take a cautious approach to their investments during this year, translating to the withdrawal of venture capital, from NSE (stock and derivatives) to the money market (insurance), to real estate, a trend that has been observed over the electioneering seasons. These disruptions are taking hits on the Kenyan economy and data from the CBK shows a pattern of inconsistently high inflation during the election year as shown in the *table below.*

Year	Month	Annual Average Inflation
Year	Month	Annual Average Inflatio
2021	September	5.35
2020	September	5.79
2019	September	5.24
2018	September	4.53
2017	September	8.40
2016	September	6.50
2015	September	6.29
2014	September	7.19
2013	September	4.75
2012	September	13.29

The reason the Russian invasion is a curveball for our economy is because of its after-effects. That war is actually a front, for actual war is economic in nature, between the West and Russia, with the west attempting to economically suffocate the Russian economy.

The Russian war has seen a rise in the price of oil doubling from 70 USD per barrel in early January to over 130 USD per barrel in late March. There has also been a disruption in the supply chain for the Russian and Ukrainian markets since container ships are reportedly afraid of landing in and sailing off from both of those countries.

Furthermore, the uncertainty in the geopolitics of Europe has rallied the value of the dollar higher, since the dollar is considered a safe haven for international investors, resulting in the weakening of the Kenya shilling to new lows never experienced before. Good news for our Kenyan exporters, but not so much for you who consider yourself a fan and consumer of imported goods.

So if this was a weather forecast, of the coming few months, we will have to dig deeper into our pockets, although inflation fell slightly in the month of February, we had better brace ourselves for higher prices for the rest of this year.

Written By:
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BLOCK-CHAIN AS A BASE FOR FUTURE DIGITAL VOTING SYSTEMS

As a technology, block-chain is quickly becoming unrivaled. In the decade since its inception, it was mostly tied to the success of the technology that created it, Bitcoin. In recent years, however, it has quickly become a star on its own. With the rise of the world's favorite crypto-currency, awareness of the mysterious and unique technology behind it also grew. Developers who recognized the value of block-chain are now racing to create new use cases for it and put their ideas into production.

Many are finding that block-chain's primary value lies in its ability to improve old systems. Enterprising observers saw the technology's potential from the start, as Bitcoin offered a 'more' secure and transparent payment processing and banking solution than existing ones. In recent years, the same people have used block-chain to revolutionize industries far and wide, including cloud storage, smart contracts, crowd-funding, and even healthcare. However, one of the biggest problems that block-chain's decentralized muscle can solve is voter fraud.

Online voting is a trend that is gaining momentum in modern society. It has great potential to decrease organizational costs and increase voter turnout. It eliminates the need to print ballot papers or open polling stations. Voters can vote from wherever they can access an internet connection. It is good to note that Kenya recorded the highest internet penetration rate in Africa in the year 2020. This is according to a ranking by Internet World Stats (IWS), showing that 87.2 percent of the country's population was connected to the internet. Despite these benefits, online voting solutions are viewed with a great deal of caution because they introduce new threats. A single vulnerability (Centralized database – as we Kenyans famously call it 'Server') can lead to large-scale manipulations of votes. Electronic voting systems must be legitimate, accurate, safe, and convenient when used for elections. Nonetheless, adoption may be limited by potential problems associated with

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electronic voting systems.

IT'S NOT ONLY FINANCIAL TRANSACTIONS THAT WORK WITH BLOCK-CHAIN, BUT ANY TYPE OF DATA TRANSMISSION'

Block-chain technology came into the ground to overcome these issues and offer decentralized nodes for electronic voting and is used to produce electronic voting systems mainly because of their end-to-end verification advantages.

In its most basic form, block-chain is a digital ledger. The technology draws its power from the peers—or nodes—on its network to verify, process, and record all transactions across the system. This ledger is never stored, but rather exists on the "chain" supported by millions of nodes simultaneously. Thanks to encryption and decentralization, Block-chain's database of transactions is incorruptible, and each record is easily verifiable. The network cannot be taken down or influenced by a single party because it doesn't exist in one place.

This kind of system infrastructure is extremely useful for voting because **a vote is a small piece of high-value data**. Out of necessity, modern voting systems are largely stuck in the last century, and those that want to vote must leave their homes and submit paper ballots. Voter apathy can be reduced exponentially as the right to vote is exercised at your own comfort be it on your internet connected PC or mobile phone.

Why not bring this process online? Some have tried, but it has proven difficult to put faith in the results due to large gaps in security.

Block-chain can solve the many problems discovered in these early attempts at online voting. A block-chain based voting application does not concern itself with the security of its Internet connection, because any hacker with access to the terminal will not be able to affect other nodes. Voters can effectively submit their vote without revealing their identity or political preferences to the public.

Officials can count votes with absolute certainty, knowing that each ID can be attributed to one vote, no fakes can be created, and that tampering is impossible.

"Any sufficiently advanced technology is indistinguishable from magic."

– Arthur C. Clarke

This technology is a beautiful replacement for traditional electronic voting solutions with distributed, non-repudiation, and security protection characteristics.

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THE USE OF LENIENCY PROGRAMS AS A TOOL FOR ANTI-CARTEL ENFORCEMENT IN KENYA

Cartels are considered to be the most common violators of competition laws worldwide. This occurs when competing firms agree, directly or indirectly, to cooperate and coordinate with the aim of controlling/fixing prices, output, allocating markets or excluding entry into a market. In Kenya, the situation has been somewhat described to be "weeds". This has echoed the need to seal all loopholes that allow for cartels to germinate, grow and damage the economy.

One of the largely effective approaches used to deal with this phenomenon is a "leniency program." A leniency program is a system, publicly announced, of, "partial or total exoneration from the penalties that would otherwise be applicable to a cartel member which reports its cartel membership to a competition enforcement agency". The overall objective of a leniency program therefore is to improve the level of compliance with competition laws through increased detection of cartels. This approach obviously comes with a number of advantages and disadvantages.

"The overall objective of a leniency program therefore is to improve the level of compliance with competition laws through increased detection of cartels."

The use of leniency programs has proved to be an extremely effective tool for fighting cartels. As an anti-trust enforcement program, leniency programs secure lenient treatment for early confessors and conspirators who supply information that it is helpful to the antitrust authorities. Having its roots in American legislation, it has spread all over the world and many Jurisdictions have adopted it including Kenya.

In hindsight, in 1978, the United States Department of Justice (DOJ) introduced a method to detect cartels known as the Corporate Leniency Policy. The rationale behind the system, also referred to as amnesty or immunity program, was rather straightforward. The DOJ would vow not to punish a company involved in an illegal cartel in exchange for a confession and cooperation which would enable the indictment of other cartel members. Although the policy was largely unused in its original formulation, it planted the seed of what would arguably become the most influential leniency program

in the world. The current policy, fruit of a revision that took place in the 1990s, has helped enforcers obtain evidenceagainst a myriad of cartels, and has inspired multiple other countries to follow suit.

Kenya is among the developing countries which has adopted the use of leniency programs in cartel enforcement. Section 89A of the Competition Act of Kenya expressly provides for the use of leniency Programs in Kenya as a tool for Cartel enforcement. However, a critical look at the Competition Act of Kenya reveals certain difficulties in the implementation of Section 89A.

To begin with, the sanctions provided by the Competition Act are insufficient. Part III of the Act prohibits restrictive trade practices with Section 21 specifically prohibiting by object or effect agreements, concerted practices and decisions by trade Associations which prevent, distort or lessen competition in trade in any goods in Kenya or a part of Kenya. The sanctions for contravening the provisions of Section 21 of the Act are captured under Sections 21 (9) (criminal sanctions) and 36 of the Act (administrative sanctions).

The criminal sanctions under section 21(9) are specified a fine not exceeding 10 million Kenyan shillings, a jail term of 5 years or both. The amount is very minimal for effective deterrence of cartelization to take place. In addition, the scope of leniency as provided for by the Act is very wide and may be subject to misinterpretation. Section 89A of the Act provides that the Authority may operate a leniency program where an undertaking that voluntarily discloses the exercise of an agreement or practice that is prohibited under the Act and cooperates with the Authority in the investigations of the conduct. The interpretation of this section is that an undertaking which contravenes any section of the Act can apply for leniency. Prohibitions under the Act cover consummation of a merger without approval, restrictive business practices, abuse of dominance, misleading and misrepresentations among others considering the expansive coverage of the Act which incorporates provisions for consumer protection.

The lack of specificity in this part makes it awkward to implement a leniency program without narrowing the scope of coverage to cartels in line with best practice. Legal practitioners will always find fault why the Authority is limiting itself to cartels when the Act is broad on the contraventions covered as they can argue that guidelines cannot supersede a substantive law. It has been noted by the Authority that many legal practitioners have actually approached the Authority on leniency on matters such as mergers consummated without approval, though leniency should only apply to cartels

The Act also empowers the authority to enter into settlement agreements with undertakings on the terms agreed upon by the parties under section 38. There is a risk of undertakings confusing settlements with application for leniency as others will propose that by opting to settle with the Authority, the Authority should downgrade the applicable financial penalties considerably.

As noted earlier that in absence of a robust history of vigorous investigations and sanctioning of cartels, implementing leniency program might face challenges as the cartelist will weigh the chances of being detected against self-confessing. The cartelist may also elect to end the secret cooperation quietly and hope that it won't be detected in the short-run. It can be argued that the Authority is relatively young and has not built enough history of bursting cartels to successfully implement a leniency program.

Penalties and Sanctions

Amid the afore-described challenges, leniency programs can be effective when there is some degree of predictability of penalties to be imposed to enable potential applicants to roughly estimate the benefits and costs of seeking leniency. In the alternative, these sanctions and penalties when properly applied can lead to success. Undertakings and individuals are not deterred from participating in cartel activities if they consider that potential penalties for engaging in cartels are outweighed by the potential rewards. The purpose of optimal sanctions is to deter the competitors from cartel participation. In terms of "carrot and stick" approach, the possible sanction works as the "stick", and the opportunity to avoid the sanction by cooperating with the authority means the "carrot" for the leniency applicant. Sanctions must be substantial if effective, while competition authorities must keep absolutely "zero tolerance" towards cartels.

In Kenya, the Act provides that a person who is guilty of a restrictive trade practice is, if not forgiven, liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings, or both. The Authority may also impose a financial penalty of up to ten percent (10%) of the immediately preceding year's gross annual turnover in Kenya of the undertaking.

In relation to the imprisonment punishment, the leniency guidelines in Kenya provide that the Authority shall engage with the Director of Public Prosecutions accordingly. This is designed to ensure that an applicant does not suffer double jeopardy. It is expected that, as part of the leniency application or discussions process, an applicant should aim to obtain appropriate assurances from the Authority that it shall procure the Director of Public Prosecutions not to take any further adverse action or prosecution against the applicant if it complies with the leniency terms.

Incentives for Betrayal

Cartels are voluntary agreements with certain benefits for their members and feature certain level of trust and common interests shared by the members. Therefore, the offer from the competition authority must be attractive and

appealing enough to persuade the members to betray their fellow conspirators. Enforcement of the leniency program is therefore a cost-effective investigation tool although it supplements and is not a replacement for ex officio investigations.

In conclusion, Kenya should ensure that its leniency program framework is clear, comprehensive, regularly updated, well publicized, coherently applied, and sufficiently attractive for the applicants in terms of the rewards that may be granted. As already demonstrated, the leniency program is inadequate in meeting its intended purpose of enforcement against cartels if sanctions and penalties are not effectively applied. There is also need for amendments to the existing law and a heightened detection and investigative framework which should include cooperation between the Authority and other sector players.

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STAKEHOLDER ENGAGEMENT

Technical committee members pose for a photo during the development of Marsabit County Community Health Policy and Bill, 2022

Kenya Law Reform Commission (KLRC) has a mandate to provide advice, technical assistance and information to the national and county governments with regards to law reform.

This support is in various ways among them: development and review of policies and draft bills, legal research, capacity building, and information sharing on matters law reform. As a result, KLRC receives and attends to requests from MDAs at both levels of government. KLRC has also championed the need for policy frameworks to precede legislation.

In this regard, in March 2022, KLRC was represented in Marsabit County by Ms. Catherine Wahome who participated in the review and development of the Marsabit County Community Health Policy and Bill, 2022. The Community Health Policy and Bill, 2022 seek to improve the health and healthcare services, enhance disaster mitigation and improve the socio economic status of the people of Marsabit County. Further, the policy and bill will form an integral segment in the ongoing policy and legal reforms in the health sector aimed at lowering public spending on healthcare.

While giving input during the sessions, KLRC and other stakeholders present acknowledged the significance of such legal reforms in community health and in medical practice generally.

In particular, is the need to expand access to preventive healthcare services and improve well-being in various geographical places which may be prone to health related vulnerabilities. The reforms thus would also seek to achieve the convergence of health care services, economics and social responsibilities.

This is essential if public health sector is enabled to:

(i) develop programs to help neighborhood members in protecting and improving their health,

(ii) deter the transmission of infectious diseases, and

(iii) plan for natural disasters among other community health emerging issues.

Consequently, KLRC gave its commitment to work with Marsabit county and other stakeholders to support the process until its completion.

Compiled By:

The Editorial Team,

Law Reform Newsletter

2022 GENERAL ELECTION, LITMUS TEST FOR THE TWO THIRDS GENDER PRINCIPLE.

The upcoming 2022 general elections is deemed as decisive in many fronts including the realization of the 2/3rd gender rule. This is so as the Constitution makes it mandatory in Article 81 that not more than two thirds of members of elective or appointive public bodies shall be of the same gender. The realization of this principle has been elusive since the promulgation of the Constitution in the year 2010. This "unconstitutional constitutional status" of Parliament has in the recent past been prosecuted in the courts and even occasioning the apex court to require the President to dissolve Parliament. This election is thus the litmus test amid the vested interests militating against the status quo.

With the hindsight of the challenges facing women in the electoral system; the Constitution expressly provides for 47 and 16 exclusively women representative positions in the National Assembly and the Senate respectively. In-spite-of the constitutional gender parity provisions, the first general elections under the 2010 Constitution (held in 2013) reflected the opposite: 16 out of 290 (5.5%) women were elected to National Assembly; 82 out of 1,450 (5.6%) women elected to county assemblies, 6 out of 47 (12%) were elected as deputy governors, 0 governors and 0 senators. There were improvements in the second election (held in 2017) where at-least four women were elected as governors among other elective seats. However, arguably miserable figures did not statistically achieve the required threshold even with the apparently mandatory gender sensitive nominations to the legislative bodies.

Several other futile attempts have been made to promote this principle: administrative, judicial, legislative, consensus and the like. To unlock the impasse, several bills aimed at providing a legal framework to operationalize this principle have been tabled in Parliament. As already noted, the courts, have equally intervened and pronounced themselves on this precarious issue to no avail.

"Two most outstanding contributions are the historical anachronism where women have played 2nd fiddle and male-dominant chauvinism."

Comparatively, legislation has been a key driver in enhancing women representation. Countries such as Rwanda and Bolivia have remarkably over 50% women representation. In Bolivia, a 2010 law requires an equal number of candidates in elections. Arguably, we previously failed to join the ranks of Rwanda, Liberia, South-Africa, Ecuador, Madagascar among others in at-least producing such successfully elected candidates. This imbalanced participation comes in the wake of public enlightenment on the potential constitutional impasse if the principle is not observed. Recent court rulings have implored upon political parties to find mechanisms of upholding the principle. As it is, the 2022 election might pedestal us onto the right trajectory.

There is a dire necessity for a national renaissance and reflection. Why can we not have the requisite number of women candidates yet the latest census indicates an almost 50:50 male, female ratio? Essentially, if a similar ratio came forth in seeking the elective positions; this debate would be superfluous. Two most outstanding contributions are the historical anachronism where women have played 2nd fiddle and male-dominant chauvinism. These have transcended pre-colonial, colonial and now over 50 years of independent Kenya. Consequently, the electoral processes are skewed towards disadvantaging women. They are largely characterized by unfairness, non-inclusiveness, stigmatization, corruption and inequality. In the name of democracy, parties have perpetually also shied from implementing this provision at the onset.

The remedy is in respecting this principle in its fullest form and in all spheres. Similarly, the election stakeholders (candidates, parties, IEBC, police, media, and the public) should forestall and prevent actual or perceived misrepresentation, violence, intimidation and other electoral malpractices against female contestants during the primaries, campaigns and in the elections.

Beyond these, women need to be proactive in achieving this principle. The dominant answer is in aggressive contest in elections (in parties or as independent candidates) and not the post-election appointive nominations. They can inspire political parties to undertake affirmative actions such as direct tickets in their strongholds as a bargain for their vote. So far, there is a dismal performance in this direction. Otherwise, a big bang is indeed necessary where change is inevitable. Could all legible women veto these imbalances and vote for their own?

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ROAD SAFETY AWARENESS

"Kenya Law Reform Commission takes road safety very seriously by training all its drivers, members of staff and stakeholders on road safety every year."

Road safety is a concern to Government and the citizens because road crashes continue to claim more lives each year. In 2020 road crashes claimed 4477 lives of Kenyans (NTSA data) putting a big burden on the government and its people. The leading category of these deaths were motorcyclists followed by pedestrians. Of these fatalities 73% were men who had dependents therefore destabilizing families. Hospital bills arising from road accidents have plunged able families into poverty.

The pressure of taking care of the families left behind is enormous to communities and both levels of governments. This requires a concerted effort from all road users to practice road safety at all times. Kenya Law Reform Commission takes road safety very seriously by training all its drivers, members of staff and stakeholders on road safety every year. Accountability is also given prominence by branding our vehicles with our organization logo. In the same spirit, it gives members of the public an opportunity to raise

complaints whenever they feel endangered by our drivers' behavior.

They can channel their complaints or compliments through our online platforms, phone call or physical visit to our offices where a complaints mechanism is in place in line with Commission on Administrative Justice Act, No 23 of 2011. The KLRC has also established and

facilitated Road Safety committee to spearhead this important exercise. Over the years we have seen the benefits of road safety where the Commission's vehicles are rarely involved in road safety violations. In the Commission we believe that:

1. It is better to arrive late but alive;
2. Prepare early for journeys;
3. Always maintain our vehicles for better efficiency and safety;
4. Drive for safety;
5. Blood should be donated in hospitals not on our roads; among others.

Written By:
James Ruteere,
Head of ICT & Chairperson Road SafetyCommittee, KLRC.

RULE OF LAW AND ELECTIONS IN KENYA

"An electoral justice system is a key instrument of the rule of law and the ultimate guarantee of compliance with the democratic principle of holding free, fair and genuine elections."

The Declaration adopted on 24th September 2012 by the United Nations General Assembly at the high-level meeting on the Rule of Law at the National and International Level reaffirmed that "human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations." Indeed, government responsiveness to the interests and needs of the greatest number of citizens is strictly associated with the capacity of democratic institutions and processes to bolster the dimensions of rights, equality and accountability. If considered not solely as an instrument of the governance but as a rule to which the entire society, including the government, is bound, the rule of law is fundamental in advancing democracy.

Strengthening the rule of law has to be approached not only by focusing on the application of norms and procedures. One must also emphasize its fundamental role in protecting rights and advancing inclusiveness, in this way framing the protection of rights within the broader discourse on human development.

A common feature of both democracy and the rule of law is that a purely institutional approach does not say anything about actual outcomes of processes and procedures, even if the latter are formally correct. When addressing the rule of law and democracy nexus, a fundamental distinction has to be drawn between "rule by law", whereby law is an instrument of government and government is considered above the law, and "rule of law", which implies that everyone in society is bound by the law, including the government. Essentially, constitutional limits on power, a key feature of democracy, require adherence to the rule of law.

A "thick" definition delineates positively the rule of law as incorporating such elements as a strong constitution, an effective electoral system, a commitment to gender equality, laws for the protection of minorities and other vulnerable groups and a strong civil society.

The rule of law, defended by an independent judiciary, plays a

crucial function by ensuring that civil and political rights and civil liberties are safe and that the equality and dignity of all citizens are not at risk. It also helps protect the effective performance of the various agencies of electoral, societal and horizontal accountability from potential obstructions and intimidation by powerful state actors.

Electoral justice provides another example of the linkages between democracy and the rule of law. Electoral justice ensures that every action, procedure and decision related to the electoral process is in line with the law and that the enjoyment of electoral rights is protected and restored, giving people who believe that their electoral rights have been violated the ability to file a complaint, get a hearing and receive an adjudication. An electoral justice system is a key instrument of the rule of law and the ultimate guarantee of compliance with the democratic principle of holding free, fair and genuine elections.

Kenyan Elections 2022

Constitutionally, Kenyans will be going to conduct their general elections on the 9th of August 2022 (barely three months from now). **At the moment politics in Kenya is at fever pitch.** While competitive elections are a hallmark of democracy, Kenya's elections have always been a flashpoint for conflict and violence. It is the expectation of many that in this year's general election, will be peaceful. This is attributed to the fact that Kenyans have learnt from the past experiences.

Voter education and community sensitization have also been widely done. Processes have also been improved and adaptation of technology that will enhance transparency in the entire electoral process.

At the moment, the "two horses" have already aligned. AZIMIO LA UMOJA versus KENYA KWANZA. Kenyans are closely following to see who will emerge the winner during the upcoming poll. So far, opinion polls showcase a neck to neck race and the rest is to be determined by voter turnout. Of interest, however, will be the presentation and packaging of the party manifestos to the electorate. Meanwhile, Kenyan civil society should be supported to work with communities across ethnic and political divides to help foster a less divisive political culture.

As enshrined in our National Anthem, May Peace, Love and Unity be upheld in the August 2022 elections. Above all, the rule of law must reign supreme.

Written By:
Bertha Otieno,
Communications Department, KLRC.

UNDERSTANDING LAW REFORM IN KENYA

"The focal perspective is to ensure that all laws meet the societal needs and conform to the letter and spirit of the Constitution of Kenya 2010."

What is law reform?

This is the process of changing, adapting, harmonizing and or developing the law to make it more relevant with current times, societal values, and or in order to conform it to the existing constitution.

Who is the primary law reform agency in Kenya?

That is the Kenya Law Reform Commission (KLRC). The State agency (KLRC) was established in 2013 as the successor to the Law Reform Commission, previously established under the repealed Law Reform Commission Act, Cap 3 of the Laws of Kenya.

Who does KLRC serve?

KLRC serves a number of law reform stakeholders and beneficiaries who include: both levels of government (National and County governments) through their Ministries, Departments and Agencies (MDAs), the private sector, civil society organizations, media, academia and citizens of Kenya among others. In addition, KLRC has the necessary autonomy and latitude to work with relevant stakeholders (national and international) for the effective discharge of its functions under the Constitution and in any other written law.

What is the Kenya Law Reform Commission Act, 2013?

The Kenya Law Reform Commission Act, 2013 (No. 19 of 2013) establishes KLRC. The Act outlines the powers and functions of the Commission in Sections 5 and 6 respectively. This makes the Act, the core legal instrument where KLRC derives its mandate alongside the Constitution of Kenya 2010 and other laws of Kenya.

How is KLRC involved in law formulation at county level?

Law making at county level is a function of county assemblies under Article 185 of the Constitution. KLRC is obligated by the County Governments Act, 2012 (Section 5(3)) to provide technical assistance to counties in the development and or reform of legislation. This is achieved (upon request or on own motion) using a number of approaches including: review of draft bills, policy reviews, development and dissemination of

guides/model laws for adaption, public consultations and capacity building with relevant county organs.

How does KLRC serve the National government?

KLRC supports the national government MDAs in the development and reform of their laws and policies. Similar to the procedure of initiating a reform proposal at the county level, this may be occasioned upon request or on own motion. KLRC therefore offers this technical assistance largely by: review of draft bills and policies, conducting of legal research on proposed law reviews, training of officers of national government MDAs, issuance of input during public consultations and offering general information where applicable. In addition, KLRC has continued to review statute book (pre-2010) and emerging (post 2010) legislation to bring it into conformity with the Constitution.

Why is law reform necessary?

Laws, like everything else, do become outdated with time. A continuous review is therefore necessary to ensure they remain consistent, harmonized, just, simple, accessible, modern and cost effective in application and responsive to the social, cultural and economic needs of the society.

It usually involves research on emerging or proposed areas of the law reform. This may be achieved through: comparative analyses, review of existing legislation and making recommendations for their amendment, repeal or formulation of new legislation. The focal perspective is to ensure that all laws meet the societal needs and conform to the letter and spirit of the Constitution of Kenya 2010.

Who are the key players in law reform in Kenya?

The key players in law reforms in Kenya are the: (i) Judiciary (interpretation of the law), (ii) Executive at both levels of government (implementation and making reform proposals) and (iii) Legislative arms at both levels of government (Senate and National Assembly at national level and County Assemblies at the county level). The private sector also play a role in making reform proposals and in advocacy.

Why should citizens care about law reform?

Since laws affect citizens directly (rights and obligations), the public should be keen to participate to ensure the change (actual or proposed) or modification done

over time serves to better reflect the social values the society feels, is important.

How does the public participate in law reform?

Public participation is a constitutional requirement for law reform in Kenya. It is also one of the national values and principle of governance under Article 10 of the Constitution. The public can participate or be involved in the process through engagement in public participation fora and platforms organized by KLRC or any other agency undertaking the law reform as well people led initiatives. These initiatives should be preceded with sufficient information and adequate time and succeeded by genuine consultation and meaningful feedback.

Does the KLRC have offices in all counties?

Currently, KLRC doesn't have offices in the 46 counties except in Nairobi City County (office headquarters). However, KLRC's technical officers participate in various MDAs Task Forces and Inter-ministerial Committees to provide technical support during policy formulation and actual translation of the policy into legislative proposals. Interested groups can partner with KLRC for advanced consultative forums.

Joash Dache, MBS
Secretary/ Chief Executive Officer, KLRC &
Editor-in-Chief, the Law Reform Newsletter.

PICTORIALS


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KENYA LAW REFORM COMMISSION
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Courtesy and Equality
www.klrc.go.ke

Disclaimer:

The views and opinions expressed in this issue do not necessarily represent the position of KLRC. The editorial team welcomes contributions, suggestions and feedback from readers and stakeholders.

The Quote:

'If we desire respect for the law,
We must first make the law respectable'. Louis D. Brandeis

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