Volume 5 · Issue 1 · 2020

SLJ

THE SALAR LAW JOURNAL

THE UNIVERSITY OF NAIROBI

SCHOOL OF LAW

The SALAR LAW JOURNAL

Published by:

The SALAR Editorial Board,

For;

Student's Association for Legal Aid and Research,

(SALAR)

School of Law, Parklands Campus,

University of Nairobi.

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Nairobi, Kenya.

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SALAR LAW JOURNAL EDITORIAL BOARD

This journal should be cited as (2020) 5(1) SSLJ.

FOREWORD

The Editorial Board is the publication arm of the Students Association for Legal Aid and Research (SALAR). Over the years, the board has been in charge of calling for articles and producing different editions of the SALAR Law Journal. Through the journal, the board has given life to SALAR's primary aims of promoting intensive research, developing a culture of writing and stimulating intellectual debate among students within and beyond the University of Nairobi. By means of themed and general editions, the Journal has hosted rigorous academic debates and canvassed modern issues that circulate within the legal academy.

This edition is the first of 2020. It is a reflection of our commitment to research and a demonstration that intellectual debate should never cease even as we grapple with COVID-19. It is our sincere hope that we can, through

this journal, continue mentoring young intellectuals to be more courageous in their interrogation of legal norms.

The Editorial Board is open for collaboration with like-minded organizations in our quest for stimulating rigorous legal conversations on contemporary issues.

THE EDITORIAL BOARD

SALAR LAW JOURNAL, 2020.

ACKNOWLEDGEMENTS

This publication could not have been possible without the input of certain individuals. The Editorial Board would like to appreciate Mrs. Joy Asiema for her continuous inspiration and guidance to SALAR since its formation.

We also appreciate Prof. Kiarie Mwaura, the Dean, School of Law, for his leadership to the Law School Faculty and for providing an enabling environment for SALAR and other clubs to thrive. Blessings galore!

To the SALAR Council, under the leadership of **Bettina Okinyi**, may you keep up the good work. May the spirit of legal research and the desire to improve the legal community stick with you throughout.

We are deeply grateful to the authors whose works have found life in this journal. May your hunger for legal

writing blossom and may you attain excellence in your subsequent writing endeavors.

To our readers, we couldn't be more grateful. We highly cherish your taking time to go through this journal. Your comments will be highly appreciated.

Thank you!

EDITOR'S NOTE

The legal landscape around the world is fast changing. There is a whole array of issues ranging from health, politics, economics, technology to societal matters whose increasing influence on the law is nothing short of tremendous. You only need to take a look at the effects of the current Coronavirus pandemic in the legal field to affirm this assertion.

It is in this regard that Volume 5 (1) 2020 of the SALAR Law Journal traverses the general legal infrastructure in Kenya and beyond with a view of sparking useful debate. This is in line with our aim of promoting and facilitating unfettered legal thinking among budding intellectuals.

In this volume, I give a brief indictment on the Government of Kenya's treatment of the media and call for reclamation of the freedoms of the fourth estate.

Brian Odiwuor affirms, using an insightful analysis of recent inhuman demolitions around Nairobi, that there is a huge variance between law in action and law in books. He also discusses, in a separate article, how the advent of online learning is a threat to the basic right of education.

Esther Chihaavi discusses the cutting-edge technology of Artificial Intelligence (AI) and points out why it spells doom for human rights if no concrete regulations are put in place. She specifically urges for the installation of protection mechanisms to safeguard the Right to Privacy of unsuspecting individuals in this age of AI.

Aaron Onyango critiques the latest judicial pronouncements in Kenya on custody matters while calling for a new approach in granting of custody of children after their parents separate. He opines that men have for long

suffered unjustified discrimination and that it's high time courts factored in equality in successive cases.

Bonface Nyamweya explains why logic remains to be a vital membrane of the law. He reiterates the age-old wisdom that: *Without logic, the law is worthless.*

This edition winds up with **Lamec Nyamora's** critical analysis of the comfort zone that exists within the Kenyan legal framework.

I want convey my gratitude to our writers for their fantastic analysis of issues and for heeding to our call for articles. I also urge our readers to interact with this edition with an open mind and send any feedback that they may have to info.uonsalar@gmail.com .

Brandon Otieno
Editor-in-Chief,
SALAR Law Journal.

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RECLAIMING THE FREEDOMS OF THE FOURTH ESTATE

By

Brandon Otieno

"…Somewhere I read of the freedom of press…" These words are straight from Rev Dr. Martin Luther King

Jr.'s speech, I've Been to The Mountaintop. Sadly, that would be the last speech ever made by Dr. King. A day later in April 4th 1968, he was assassinated at a motel in Memphis, Tennessee. Despite his untimely death, Dr. King's words still echo in our minds years later. As a civil rights leader, he understood that no country on earth can achieve a democratic status without respecting freedom of the press.

Sunday 3rd May 2020 marked the World Press Freedom Day. A look back into history reveals that this day was proclaimed by the United Nations General Assembly in the December of 1993. The cardinal aim of its creation was to remind governments to adhere to their commitments on media freedom. Moreover, it was meant to be a day through which media stakeholders can reflect on media ethics, defend media independence and to celebrate the sacred principles of press freedom.

Recent statistics released by Article 19, an NGO that defends freedom of expression, however reveal gory details of the hostile environment in which the media operates. Against the backdrop of COVID-19, there has been a surge in attacks on journalists and media freedom. Government officials and security agents have occasionally been implicated in these attacks. It is not long ago that a Nation Media Group journalist, Peter Wainaina, was roughed up

while covering how events unfolded at the ferry in Mombasa at the onset of the curfew declaration.

On 29th March, it is reported that police officers attacked a journalist from a local TV station for supposedly filming the police and government officials who used violence while enforcing social distancing measures in Meru County.

That same day, three journalists from Citizen TV were arrested for supposedly violating curfew hours despite the fact that media personnel have been classified to be providing essential services. The personnel arrested included John Wanyama, Charles Kerecha and Mukoya Aywah who is an independent journalist.

These are just a few examples of the numerous cases of brutality against journalists that have been witnessed these past few weeks. This begs the question as to who will protect and defend the press at a time when transparency and accountability is of essence. With the increasing threats and attacks, the wrong message is being sent out here that the

fourth estate can gagged through violent means. A dangerous signal is also coming out that this country can easily slip back to the Nyayo era that was marred with wanton attacks on journalists. If great care is not taken by all relevant stakeholders then all the gains made by the 2010 Constitution might end up being reversed.

We are in the middle of a severe public health crisis. With the 'stay at home' advisories from the government, only the media can provide the necessary link to the outside world while everyone is indoors. Furthermore, fake news and wild conspiracy theories are so much on the rise in this age of Coronavirus. As the UN Secretary-General Antonio Guterres recently remarked, "the press is the antidote to the pandemic of misinformation that is rivaling Coronavirus in its spread."

It is high time we as a country took part in reclaiming the freedoms of the fourth estate. It is commendable what journalists have done so far especially since the first case of

the virus was reported. It is not rocket science to understand how complex the media landscape is in Kenya. It is equally not hard to miss the horrors that journalists go through in order to serve us with timely and verified information. For this reason, all members of press deserve applause.

There is still so much to do however. To realize this reclamation, everyone and especially government officials must appreciate the precepts of Article 34 of the Constitution of Kenya. The article imposes a negative obligation on the state to not interfere or unlawfully exercise control over journalists as they execute their duties. That the drafters of the constitution included this comprehensive provision on media freedom is enough testament of the need for all of us to take part in reclaiming these freedoms.

With the current pandemic tightening its grip on the country, there needs to be a collective emphasis on truth and integrity even as we grapple with the crisis. The media is an integral part of this campaign against Coronavirus. Not only

do they play a significant role in fighting misinformation but they also give necessary fact-based analysis of current issues of our time. It is indeed time for the citizens, organized civil societies, journalists and agencies of the government to collectively take part in reclaiming the hard earned freedoms of the press. If we all fail to speak up in safeguarding these rights, the utter disregard for them might stick with us beyond the pandemic.

THE INHUMAN FACE OF DEMOLITIONS IN KENYA, A VINDICATION OF THE SOCIOLOGICAL SCHOOL OF THOUGHT.

By Brian Odiwuor[1]

Sights and sounds of bulldozers shattering settlements are seldom strange to many a citizen. Season after season, there is a purge on greedy land grabbers or illegal settlors. It's starting to look like a recurring scene in a bad movie. Akin to the destruction is the deprivation of basic human rights. A lay man may imagine that **EVICT** is an acronym for **Eject Violently In Confusion and Turmoil**. In fact, demolitions in Kenya share a face with brutality. While the

[1] The writer is a 3rd year law student at the University of Nairobi. He is also the Overall Head Elder of the University's SDA church.

machines tear down the buildings, the occupants go down in tears.

Sociological jurists are of the persuasion that there exists a dichotomy in law, namely; the law in books and the law in action. Over the years, the path taken by government agencies during evictions reveal a consistent trajectory of defiance of law in books. The stipulations of the statutes and the acts of the public servants bear no strain of resemblance. It seems as though the drafters of legislation landed from planet Mars and departed right after completing their assignment, whereas the executors live on Earth.

Here are a few instances. Two years ago in Kisumu city, Dunga estate in particular, the evictors conducted their exercise in the deep of the night. In Runda estate, Nairobi, the evictors seamlessly carried on the demolition exercise regardless of the fact that a valid court order had been

served upon them by the evictee. Such blatant disobedience to the law arouses the question; *what does the law say about demolition?* Is it clear, specific, practicable, definitive and predictable? Let us examine the rules in this aspect of our system.

To begin with, Section 155 of the Land Act, 2012 states in no unclear terms that before any process of eviction is began, the National Land Commission should serve a notice on the unlawful occupants. Such notice should last for three months; sixty days to show cause, leaving a window of thirty days for the parties to seek the intervention of the court in the event of a disagreeable outcome. The notice can be served orally or in writing. Oral notification could take the form of a broadcast on national television, radio or other telecommunication platforms with wide national coverage. On the other hand, a written notification could be done through a publication in the Kenya Gazette or an advert in a newspaper of nation-wide circulation

Secondly, landowners who are evicted from public land for purposes of development should be compensated pursuant to Article 40(3) (b) (ii) of the Constitution of Kenya, 2010. Even occupants in good faith who do not have good title should be compensated thanks to sub-article four of the aforementioned provision.

The eviction process should heed to human rights among them, the right to human dignity, right to own property and the right to be heard. Vulnerable persons, such as the women, children and the senior members of the society need to be cared for. Section 152(1) of the Land Act, 2012 expressly state that demolition should be conducted between six o'clock in the morning and six o'clock in the evening. The evictees should be accorded priority to salvage their property.

On the day of carrying out the evictions, the law requires for an officer authorized by the National Land Commission

or a government official to be present. He should play a supervisory role in ensuring that the dictates of the law are fully complied with.

A cursory glance at the reality however reveals a perfect mismatch. Consider the instances below.

The most recent cases of Ruai and Kariobangi demolitions showed the worst cases of non-compliance with the law on demolition. The unforgiving bulldozers wrecked the posh apartments in the cool of the night. The horror was compounded by commands hurled by the armed policemen. Worse still, the victims had no notice, they salvaged barely a handful of property from the debris. The fordo happened at night, in the midst of this novel Coronavirus pandemic, with a curfew staring, a crashed economy and a transport system arrested by the lock-down. All about this eviction process failed the test of compliance, to say the least.

In September 2019, the government evicted people from the Mau forest in an effort to conserve the water catchment areas found within the Mau ranges. The officers involved did all within their powers to violate the law. From a report published by Human Rights Watch, a non-governmental organization based in Kenya, a total of nine aged people and two children died during the eviction process. Property worth millions were set ablaze. The cops lashed out at the victims who made attempts to salvage anything from the inferno. They torched the homes and destroyed crops poised for harvest in a few days. Some were shooting in the air, others used power saws to cut trees.

Concomitantly, a process which is envisioned by the law to be smooth, systematic, calm and civilized end up being messy, noisy, haphazard and dogged by grave human rights abuses. While the sibylline leaves of the prophetic word of the law aim at reduction of damage to property and respect

for human rights, the actual process is tainted by the exact opposite. On one hand the books shout, "Save lives, preserve property, protect the downtrodden and the vulnerable", on the other hand the actual practice responds with disrespect for Article 26 of the Constitution of Kenya 2010 on the right to life. It also spits on the face of Article 28 of the Constitution on the right to human dignity.

Ultimately, the unprocedural evictions lead to a further violation of the right to housing under Article 43 (b) of the Constitution of Kenya, 2010. If there is an aspect of law where sociological jurists draw their definition, demolition fits in fairly and squarely. In the books it adorns a humanitarian look but in real life it wears a weary, cruel and inhumane face.

HUMAN RIGHTS IN THE AGE OF ARTIFICIAL INTELLIGENCE

By Esther Chihaavi[2]

Artificial intelligence (AI) is the ability of a machine or computer system to copy human intelligence processes, learn from experiences, adapt to new information, and perform human-like activities[3]. It focuses on three cognitive skills; learning (machine learning), reasoning, and self-correction.

Artificial intelligence has been advantageous in many ways. It has enabled prosthetics to be created with human-like reflexes and sensations. It has also enabled companies

[2] The writer regards herself as 'a young learner constantly seeking to improve in all aspects'.

[3] Margaret Rouse, 'Artificial Intelligence' <https://searchenterpriseai.techtarget.com/definition/AI-Artificial-Intelligence>.

like Tesla to produce self-driving cars. Another example is its ability to read through data and transfer it very quickly and conveniently. In this regard, it has led to the development of a human-robot; Sophia.

Mimicking human behavior makes AI very attractive to various kinds of people. Manufacturers are one such kind. They can reduce production costs in the form of salaries and adopt 'free labor' in the form of machines which can carry out multiple tasks, reason and keep learning as they carry out their functions.

The use of AI paints a very rosy picture. With every innovation, however, there comes some side effects that we humans have to contend with. In this case, we narrow down to a vital area which, if not dealt with, will have unimaginable consequences.

Let's pause for a moment and evaluate the concept of human rights within the context of AI.

All human beings are born free and equal in dignity and rights[4]. This predisposes them to certain rights and duties right from birth. After the Second World War and the horrors that accompanied it, countries came together and decided that to adopt a universal standard (The Universal Declaration of Human Rights, UDHR). They thereby determined that human beings are entitled, from birth to certain rights and freedoms and that no one, (except in certain situations) could deprive them of such. Over the years, these rights have been enforceable through various platforms. Such are the places where grievances are aired by those whose rights have been infringed and guilty offenders punished accordingly.

With the increasing use of Artificial intelligence, certain human rights are threatened. The right to privacy, to be specific. Under the constitution of Kenya 2010, 'every person has the right to privacy which includes the right not

[4] 'Universal Declaration of Human Rights' article 1.

to have-… (c) Information relating to their family or private affairs unnecessarily required or revealed, or (d) the privacy of their communications infringed.' [5] The UDHR also provides for the protection of privacy under Article 12. Artificial intelligence, as mentioned above, can read through lots of data and transfer it quickly and efficiently. The problem that arises here is the access to private data.

Sometime back, Facebook allegedly sold user data that had been accessed through AI to Cambridge Analytica. This not only led to the violation of the privacy rights of those involved but also impaired democratic processes in countries where the firm was contracted. President Donald Trump, for example, sought the services of Cambridge Analytica during

[5] Article 31.

his presidential campaign in 2016. More than 100 election campaigns in over 30 countries, spanning five continents, were affected.

The architects of Brexit too involved Cambridge Analytica in the run-up to Britain's decisive yet divisive vote.[6] What comes out clear from this is that Artificial Intelligence, with its constant leaning, has the unique ability of accessing data without users' permission. This isn't an isolated case of access to and dealing with data that a person did not consent to. Numerous times, data has been accessed and sold without the knowledge of the owner of the data. Such acts grossly offend the right to privacy.

Another factor that stands out is the fact that AI uses machine learning. Machine learning is very advantageous as it provides systems with the ability to automatically learn and improve from experience without explicitly being

[6] https://www.courthousenews.com/facebook-cant-duck-legal-fallout-from-cambridge-analytica-scandal/

programmed. This learning too can result in violation of human rights. This is however no ordinary violation given that on the surface there is no offender since it is a machine. Such situations leave people whose rights are infringed with no recourse. If no substantial solution is found to this hurdle, human rights violation might escalate to the levels they were at during the world wars where horrific acts were committed against mankind.

There needs to be coordination between lawmakers and developers of AI to ensure that there is a balance. They should work to ensure that we are gaining from AI while keeping its demerits at the possible minimum. This will ensure that human rights are upheld as they were meant to be and we stand to gain from the various advantages derived from AI. Artificial Intelligence is the inevitable future and hence the need to some quick action.

In conclusion, the evidence presented is bound to get one to feel as though we are at the end of the rope. AI develops

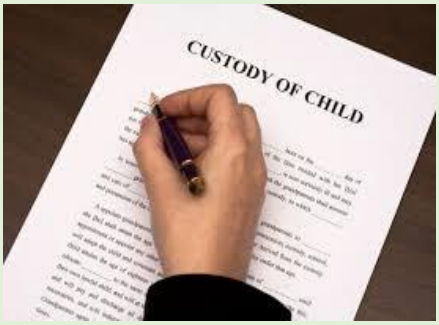
much faster than our laws. I believe that to match up and uphold human rights we need to have stringent measures put right at the start of this to prevent the situation from going beyond our control.

WHY COURTS NEED TO ADOPT A NEW APPROACH IN CUSTODY MATTERS.

By Aaron Onyango.[7]

Of abandoned children and their fathers

An emotional James Njenga narrated how he had single-



handedly raised and cared for his children after his abusive ex-wife, walked out on them. "It was only when I had gained some financial footing that she returned and tried using the children to hurt me, she tried several ways of taking them away, including accusing me of defiling them," he said.[8]

[7] Mr. Onyango is a 3rd year law student at the University Of Nairobi School Of Law.

[8] https://www.youtube.com/watch?v=gEXsZ4KnfN4&t=1196s

The case of James Njenga is one that has been experienced by several other men. In such a case, when a marriage breaks down, the wife abandons the family to remarry leaving the man to fend for the children alone, only to return later demanding custody. Njenga's case is unique because unlike him, many of his counterparts have lost custody because of the courts' rigid application of the prima facie rule that "the physical custody of children should vest in their mother.[9]

The position of the courts

The courts have applied the rule to letter despite the outrageous results in some instances. In ***J.K.N v H.W.N,*** Justice Ngugi averred that morality or lack thereof was irrelevant in determining one's suitability as a parent and hence unimportant in determining custody.[10] This position fails to consider the emotional and moral well-being of

9 Re S (an infant) [1958] 1 All ER 783, at 786 and 787,

10 Civil Appeal 40 of 2014

children which is as important as their physical well-being, especially since the children in many cases are fully aware of the details surrounding the parent's acts of immorality or infidelity. It goes against the best interest of the child as espoused by the Constitution[11] and the Children Act which envisions an environment where both their psychological and moral well-being of a child are protected. Such judgments relegate aforesaid to the back seat in favour of maternal consanguinity.[12] If proper moral guidance is not considered a fundamental part of child upbringing then one might ask what is?

The only exception to the provision preventing the removal of a child from the custody of a father is if the father has resided with the child for at least three years.[13] However, the provision is not absolute because on certain cases even when the three year condition has been meet, courts can still

[11] Constitution of Kenya 2010, Article 53(2)
[12] Children Act, Sections 4,13
[13] Children Act, Section 85(1)

deprive a father of custody, as was in the case of ***B v M*** where the father was denied custody of his children because they were very young.[14] The court disregarded the detrimental and destabilizing effects that would result due to the changing the custodians on not only daily lives of the children but also on their education and emotional well-being.

The unfair rule of exceptions

Although the prima facie rule allows room for its rebuttal by indicating that a mother can be disposed of custody in light of special circumstances, the burden still lies upon the father to prove why the mother is unfit.[15] If they fail to do so to the satisfaction of the court, a mother, who may be an unsuitable custodian, will gain custody ipso facto. The courts demand that a father poke holes into the character and actions of the mother to prove her unworthy, rather than infer from

[14] B vs. M [2008] I KLR 531
[15] Civil Appeal No. 32 of 2017

the prevailing circumstances in determining who should be given custody.

Kenyan courts have only aggravated the situation by limiting what is considered special circumstances to a handful of occurrences. In ***Sospeter Ojaamong v Lynnete Amondi Atieno,*** disgraceful conduct, immoral behavior and drunken habits were the only special circumstances listed.[16] Clearer references were outlined by Justice Gatembu in ***J.A v S.A.O*** when he listed the mother being unsettled, remarried, living in deplorable conditions, and exhibiting disgraceful or immoral conduct as the exceptional circumstances.[17]

Recommendations

It is well established that the Kenyan Courts have evolved and developed their own rich jurisprudence which has reduced reliance on common law. However, stereotyping

[16] Civil Appeal No. 175 of 2006
[17] *J.A v S.A.O* Civil Appeal No 43 of 2015eKLR

remains rampant as was demonstrated by a recent ruling which indicated that a father is incapable of providing care and control to children and that his main role is that of breadwinning.[18] This ruling was reversed by Justice Ngugi' appellate court. The learned judge pronounced that the trial magistrate had erred in law and fact by referencing to archaic belief systems such as the inability of a woman to be a breadwinner and inability of men to be caregivers which have been long since debunked and need not be relied upon for decisions.

In addition, the Children's Act states that the express wishes of the child on the parent they want stay with should also be factored in. Children can be subject to coaching and manipulation or make choices that are not suitable for their long term well-being, but this can be easily established by

[18] *K.N v H.W.N* Civil Appeal 40 of 2014 eKLR

the experience of a judge and the special circumstances of a case.

It is thus my position that laws which place undue burden on a father to demonstrate why he is the better parent, should be reconstituted. Any of the parents wishing to deprive another of custody should bear the burden of proof. Laws that state that custody of all children be awarded to mothers should also be scrapped lest scenarios with crying children who refuse to be handed over to a parent, as in Mwingi Law Courts earlier this year, proliferate.[19] The practice of courts of awarding custody of young children to mothers on the sole basis that they provide better care because of their maternal instincts should also cease. If maternal instincts were the sole indicator of better care, there would be no reported cases of infants slain by their mothers. Courts should maintain

[19] Kitavi Mutua, *Drama as child rejects absent mother who won child custody* (Reported by the Daily Nation)

objectivity and make decisions on each case on its own merits without presumptions.

RIGHT TO EDUCATION: Why Online Learning Perpetuates Inequality In The Acquisition Of Knowledge.

By *Brian Odiwuor.*

Dons have hailed education as the lifeblood of a free people. In the words of Justice Cardozo, we are free only if we know, and so in proportion to our knowledge. This

statement underscores how education undergirds our liberties and freedoms. Above the role of learning in liberating the inner life of an individual is the higher purpose of safeguarding democracy. I refer to the words spoken by Thomas Jefferson, a revered American president, that an enlightened citizenry is an indispensable prerequisite for a democratic government.

Long has been the fight for free education. All this time, the motivation for recognition of the right to education was to develop every child's ability, personality and talents to the full. It must promote respect for human rights and fundamental freedoms. It should foster mutual understanding, tolerance, friendship and maintenance of peace among all groups. Aforementioned, are the words of Article 29 of the UNCRC, as quoted from Article 26(2) of the Universal Declaration of Human Rights, 1948. The ethos of these legal provisions was well articulated in theme song for the 1990 World Conference on Education for All, thus:

Education is the right of all

For you and for me

It's action time and time is now

Let's all heed the call

Join us, come with us,

We are on our way

To Education for All.

These delegates cheerfully and charismatically chanted the long cherished dogma that; ***Education is the crucible for democracy and liberty***. Crown Prince Hassan of Jordan categorically called out on policy-makers to use education as an avenue to instill moral and spiritual values. These were his words, *"Education should be made to implant human values that are manifest in the interaction of individuals in their struggle to improve the quality of life."*

It is thus overt and apparent that the purpose of education is not completion of syllabus. Beyond progress in the level of studies is a greater need to instill values in the learners.

While considering these precept, the rolling of online learning and online examinations in Kenya turns logic over its head. It draws back all the strides that the world education has made in the quest for universal, free and non-

sectarian education. At a time when the government of Kenya is supporting free primary school education and a hundred percent transition to secondary school, the selective online classes for tertiary institutions is an off-beat in the music of the government. It would be a reversal of all the gains made by learners to go through primary and secondary schools then be half-baked at tertiary level.

Article 26(1) of the UDHR,1948 states in part, that technical and professional education should be made **generally available and higher education should be equally accessible to all ...** Article 28(1) of the UNCRC states that nations should:

(i) Encourage the development of different forms of secondary education, including general and vocational education, **make them available and accessible to every child**, and take appropriate measures such as the

introduction of **free education and offering financial assistance in case of need**;

(ii) Make higher education accessible to all on the basis of capacity by every appropriate means;

(iii) Make educational and vocational information and guidance available and accessible to all children;

(iv) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

The Constitution of Kenya, 2010 provides for the right to education at Article 43(1) (f). This right accrues to every person regardless of social status or economic class. As mentioned above, one of the objectives of learning is to dispense with the feelings of inequalities. As Horace Mann, the pioneer of American public schools said, *education is the great equalizer of the conditions of men*. Prof. Kameri Mbote concurred that online learning equals inequalities, in a tweet. It heightens the struggle between the haves and the

have not's. It also fosters truancy for the haves. In short, online learning is discriminative and unethical.

A cursory glance at the figures posted on the university official website reveals a bias in reporting. The administration applauded the number of sessions conducted, while turning a blind eye on the number of learners reached. From an assessment of the students' body, close to seventy percent of the regular students do not attend classes. They are locked out by lack of data bundles, poor network connection upcountry where most of them are trapped because of COVID-19, lack of electricity in the homes, lack of proper gadgets and unstable supply of power due to heavy rains. Of the few students who make it to class, many of them are cut off midway. The rest brave the class amidst interruptions and disconnections.

As a word of caution to the proponents of online classes, I refer to the dictum by Chief Justice Warren in the case of

Brown v Board of education, in which the learned judge stated that;

"Today, education is perhaps the most important function of state and local governments. ***Compulsory school attendance*** *laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.* ***In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."***

Prof. S. H. Bitensky could not put it any better when she heralded the pedagogical message that education is a national priority of the first magnitude and as such, all stakeholders including the children, parents, teachers, administrators and policy-makers must treat their respective responsibilities regarding education with commensurate dedication and activity.

As a steward of learning, the university acts like a shepherd to a flock. To them, the noble duty of building this nation's future is entrusted. They should remember that education is like salvation. If only one student missed the learning opportunity, then the institution should leave the proverbial ninety nine and seek the one. Just like God gives the showers of the rain and the rays of the sun to every person, the university should give the right to education to each one of the students as though he was the only learner in sight.

LOGIC, THE ALPHABET OF LAW

By Bonface Isaboke Nyamweya[20]

Logic is the most vital membrane of law. It is, nonetheless, the most ridiculed because of errors committed in judgments. Whenever an issue of hasty generalization in a judgment

arises, there is a tendency among some elites in law to attribute it to logic. The truth of the matter however remains that the hand of logic can positively influence judicial pronouncements if used rightly.

In an attempt to explain this misunderstanding of the relationship between logic and law, we must grasp first what

[20] The writer is a 1st year at the University Of Nairobi School Of Law.

each of them implies. The *Black's Law Dictionary* defines law as:

> "A system of principles and rules of human conduct, being the aggregate of those commandments and principles which are either prescribed or recognized by the governing power in an organized jural society as its will in relation to the conduct of the members of such society"[21]

On the other hand Logic is defined as "'a science dealing with the principles of valid reasoning and argument."[22] Thus, the law cannot at all express itself without logic. If the law is the heart, then logic forms the veins and blood. This means that logic and law are mutually inclusive. The fact that law is possible because of logic means we cannot render logic useless. Indeed, it is only accurate to appreciate the fact that errors in judgments are attribute to errors in logic.

[21] Https: //thelawdictionary.org [25/05/2020].

Wilson Huhn, in his article: *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*; attempts to elaborate on this issue. It is essential to observe that he considers these three as equal. However, the most significant intellectual error that Huhn commits is that of limiting logic exclusively to formalism. He identifies formalism with deductive reasoning[23].

Huhn adds that "The ultimate purpose of legal analysis is to create a system of laws that is clear, consistent and just, a code of conduct that is universally understood and accepted."[24] It is essential note that to create such a system of laws; logic must be invoked. To make such laws clear, we must invite logic to sweep off any ambiguity of equivocation. Still, for consistency in the laws to be possible, the hand of logic is inevitable. Thus, logic is the life of the law.

[23] Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 Vill. L. Rev. 305 (2003), p. 307.
[24] Ibid. p. 306.

Whenever a curious eye is thrown to some of those who have been known to employ logic in their legal decisions, the misconstruction of logic is always evident. For instance, "[Justice] Scalia interprets the plain meaning of [a] text, sometimes with the aid of a dictionary, and he rejects legislative history as a tool of interpretation."[25] This is entirely untrue to the extent of its minimizing the spirit of logic to formalism.

The law deals with several facts to establish justice. "[Formalism is the application] of law to a case because the facts of the case are the same as the terms of the rule."[26] Suppose, there is an error in the determination of whether or not the facts of the concerned case cohere with the rule, is that a problem of logic? Certainly, no. It is actually by the help of logic that these very errors can be detected. Hence, both formal logic and informal logic ought to be embraced

[25] Ibid. p. 311.
[26] Op cit., p. 312.

in law to relish logic in its fullest flavor. We do use both of them always; although, we seldom realize this.

Logic is the gist of not only formalism but also legal reasoning by analogy and legal realism. To affirm this, it is ideal we invoke the FIRAC method of analyzing cases: those under formalism, analogy, and even realism. We realize that, if an issue concerning the facts arises, it will mean that either there was at least a formal or informal fallacy involved. For instance, the person who was last seen with the deceased is presumed to have known the circumstances under which the deceased died.[27] This is a fallacy of hasty generalization and the law can fault thus.

Logic is not the problem; instead it is logic that detects the problem inherent in the claimed facts. Besides, logic is vital in establishing the issue (s) of the case. An error in identifying the issue(s) means that the error is inherent in the

[27] Ndunguri v R [2001] 1 EA 179 (Omolo, Shah and Bosire JJA).

one using the tools of logic. Still, concerning the rule, logic provides the alphabet of establishing the laws. However, people do commit fallacies in selecting which provisions of the law should be relied upon in making a particular judgment.

In analyzing how the facts correspond to a specific provision of the law, it is logic that helps this task to be fulfilled. Errors committed here are also condemned by logic as notorious errors in reasoning hence not as a result of using logic, but as a result of using logic insufficiently.

In conclusion; when judicial officers make judgments they should embrace logic instead of departing from it. The *ratio* is inebriated with logic, and as a natural consequence, even the conclusion flows from the *ratio*.

All in all, it is evident that if the principles of logic are invoked sufficiently, the legal issues leading to errors in judgment will no longer be heard. It is crucial to emphasize

that logic is sprinkled heavily in all forms of legal reasoning: formalism, analogy, and realism. Besides, the rules themselves have logic as their alphabet, by which they are chiseled and applied in the courts.

A COMFORT ZONE IN THE LEGAL FRAMEWORK?

By Lamech Nyamora[28]

A comfort zone is, according to Mariam Webster's English dictionary, the level at which one functions with ease and familiarity. When one is in a comfort zone, they usually avoid doing what is expected of them. Such people will usually give an excuse to justify their state of behavior.

The Constitution establishes a system of governance that allows the electorate to get into a comfort zone immediately after a democratic election. The legal excuse is provided for under Article 1(2) of the constitution of Kenya. They get into

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a "we have representatives" comfort zone. They, like a typical sovereign authority, expect their subjects (the elected leaders) to deliver their side of the bargain.

Interestingly, the said representatives also come up with legally-creative mechanisms to adapt. It is expected of them to champion the moral views of the large percentage of the electorate who are God-fearing [29] . They also have a reputation to maintain[30]. Under duress, they come up with laws to satisfy the electorate. Sadly, the laws are half-baked as temporary rent of comfort. With minimum review for decades, the law becomes retrogressive. Meanwhile, the representatives have priorities to deliver in their manifesto[31]. They get into a "we have important issues to focus on" comfort zone. The outcome as far as the principles of the rule of law are concerned is tragic.[32]

[29] Preamble & Second schedule (b) of the constitution.
[30] Article 73(1) of the constitution
[31] https://big4.president.go.ke/ (Accessed on 24th May 2020)
[32] https://worldjusticeproject.org/about-us/overview/what-rule-law (Accessed on 24th May 2020)

A comfort zone has long-term implications. The argument herein will revolve around the controversial Lesbian, Gay, Bisexual, and Transgender (LGBT) rights. The provisions are very stringent on paper but half-baked in their applicability.

Firstly, these laws are generally unenforceable- The Human rights Watch is aware of only two prosecutions against four people under Section 162 of the Penal Code in the last decade[33]. It is essential to note that of these two, no lesbian has been prosecuted. This might be due to the standard of proof in criminal litigation. Nevertheless, the number of infections due to anal sex is on the rise[34], so is lesbianism especially in high schools[35]. The reflection is that

[33] https://www.hrw.org/news/2019/05/24/kenya-court-upholds-archaic-anti-homosexuality-laws-0 (Accessed on 24th May 2020)
[34] https://www.avert.org/professionals/hiv-social-issues/key-affected-populations/men-sex-men (Accessed on 24th May 2020)
[35] https://medcraveonline.com/OGIJ/sexual-activity-and-the-risk-of-acute-uncomplicated-urinary-tract-infection-in-premenopausal-women-implicationsfor-reproductive-health-programming.html (Accessed on 24th May 2020)

the "perpetrators" rationed to the number of "prosecutions" under Section 162 of the Penal Code is alarming. The anti-sodomy laws were officially enacted in 1897 by the colonial government. No substantive review of the progress of these provisions is evident. Notice that the public majority is now taking the law in their hands.[36]

These laws underpin a broad array of human rights abuses and contribute to a culture of discrimination and violence. The majority of cultures and religions agree with the anti-LGBT laws. The repugnancy clause of the Judicature Act and Article 2(4) limits the applicability of these laws. Article 24 provides the Key principles in the limitation of a right or fundamental freedom. The "perpetrators" have to undergo forced anal examination which is a contravention of their right to their inherent dignity and privacy[37]. These rights

[36] https://www.hrw.org/report/2015/09/28/issue-violence/attacks-lgbt-people-kenyas-coast (Accessed on 24th May 2020)
[37] Article 28 & 31 respectively.

were referred to as "not absolute" in a recent case.[38] The right to access health care has also been infringed due to discrimination.[39]

The measures put in place to actualize these provisions are inefficient. They are not in harmony with the ultimate goal. With the purpose being to eradicate homosexuality, how does jailing a perpetrator in a same-sex facility serve to accomplish this purpose? This, like a comedian named Trevor Noah said in jest, will serve as a reward more than it will as a punishment. Ironically, the same government has legalized same-sex boarding schools; a move that catalyzes homosexuality. In Penology, reformation outweighs deterrence in the contemporary world. Prof. Githu Muigai, in

[38] Petition 150 and 234 (consolidated)
[39] https://www.galck.org/the-plight-of-gays-while-seeking-health-care-services-in-kenya/ (Accessed on 24th May 2020)

a past debate, said that "we cannot police morals"[40]. The constitution affirms these views under Article 24(e).

Meanwhile, the conversation remains thorny. The facts are stubborn. The moral views of the public are of priority to defend. No judge would want to be maligned for setting a precedent against the constitutionality of these laws. The Kenyan government has taken an ambivalent stance on these rights. Religious leaders have opposed the registration of these groups labeling them of "western import".In a 2018 media interview, His Excellency President Uhuru Kenyatta described homosexuality as "not acceptable". He has previously indicated that he wouldn't tolerate 'witch hunts' and other forms of violence against the LGBT.No such legislation has been passed to this effect, either way[41].

Res Ipsa loquitur. The facts and figures are disturbing.

Consequential deletion of these provisions is

[40] The Great Debate: Prof. Githu Muigai vs Dr.Willy Mutunga at the University of Nairobi, School of Law, Parklands

[41] Article 21, constitution

imminent[42].The lawmakers are trapped in the same legal framework they designed. The demanding public has the law in its hand with a malicious intention. The nation is in a quagmire. The provisions have failed and need reviewing. Simply having threats of sanctions in the law isn't enough to boast a problem is solved. Time has proven that these laws are unclear, unstable, unevenly applied, inefficient, and generally unenforced. Whether the *ratio decidendi* will be that of deletion or that of improvement, it is time to have a conversation. The remedy to getting out of any comfort zone requires leaving behind all excuses and getting to work in the quest for a long-term solution. Past comfort is haunting us but the future is in our hands.

[42] African countries that have revoked anti-homosexuality laws through penal code reform in recent years include Seychelles, Mozambique, Sao Tome, and Principe, and Lesotho.

THE END!