

# THE 11<sup>TH</sup> EDITION OF THE KABARAK UNIVERSITY SCHOOL OF LAW BULLETIN



*We are of the opinion that instead of letting books grow moldy behind an iron gating , far from the vulgar gaze, it is better to let them wear out by being read-jules verne*

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## **CHAIRPERSONS NOTE**

It's morning in Kabarak our esteemed reader of the widely acclaimed and favorite Kabarak University monthly law bulletin.

Kabarak university law school has over the years served as the beacon of research, writing and publishing. This is a position we are willing to continue to pursue so as to ensure high quality education. It is a landmark occasion attained by the publication of the 11<sup>th</sup> issue of the Kabarak University monthly law bulletin. It does not only mark the rebirth of Kabarak University Law School Association (KULSA), but also acts as a manifest demonstration of the new impetus behind the KULSA drone.

As KULSA we have fulfilled our constitutional mandate of ensuring this publication comes out. We hail our editorial department for their commitment to this. Indeed, publications are critical in ensuring the broad dissemination of scholarly inquiry and are essential for higher education to fulfill its long-standing commitment to the advancement and conveyance of knowledge.

Special thanks to our Dean Elisha Ongoya who has devoted himself to a cause above all to ensure Kabarak University is and remains the best law school in Kenya .As students, we join together in affirming that common commitment by helping and supporting this cause through such publications.

## **CHIEF EDITOR'S NOTE**

There can only be very few fulfilling moments other than leading the noble journals and publications department. Leading the young editorial team made up of individuals with tremendous willpower and zeal, brings immense satisfaction and is refreshing to say the least. The impetus inherent in the members of the editorial team has led to the successful editing and subsequent compilation of this publication and for this, I salute them all.

The publication of the 11<sup>th</sup> edition of the Kabarak Monthly Bulletin has been greatly delayed. This was occasioned by the process of restructuring the Kabarak University Law School Association (KULSA). However, the aforementioned process was not expected to take an eternity and thankfully it has come to a desirable conclusion. Assurances of continuous and relentless publication are in order especially to our avid readers and consistent contributors.

To our fervent readers, this edition provides you legal and intellectual nourishment. Benson Kaaya's article creates a platform for discourse on the issue of representation of women and which I expect lots of replies. Sunday Memba could not have been more sober when he outlined the unfortunate situation that our youths find themselves in due to unreasonable consumption of alcohol. Chanzu Victor addresses a contemporary issue with regard to conjugal rights and pays emphasis on its enforceability. These and other salient articles form the core of this publication.

## **ACKNOWLEDGMENT NOTE**

It with great humility that the journals and publications team wishes to join the entire KULSA body in thanking God for this minute yet immensely knowledgeable 11<sup>th</sup> edition of our monthly law bulletin. It is great that young brains, probably still crawling in this legal calling, are able to produce rich and high end articles that have served in making publications of bulletins happen in the past, now and in the future. I would wish to pass gratitude in particular to; Njuguna Mugwe, Daniel.B.Kaaya, Sunday Memba, Chanzu Victor, Makori Zephaniah, Ndiritu Stella, Robbin M. Karani, Kamau.F.Wanjiku, Newton. G. Mbogo and Franklin Chelugat for their contribution of articles. I would also wish to thank the Kabarak University management for this platform and allowing for the actualizing of this as well as the Kabarak School of Law management for its unwavering efforts of making these bulletins a reality. It is with profound gratitude that we thank the patron Madam Wakuraya for her continued support and Mr. Duncan Munabi for his insightful contribution with regard to this publication. Last but not least the journals and publications team would like to encourage the entire KULSA to publish or they will have to contend with the undesirable conclusion of perishing. Thank you

Newton.G.Mbogo

Editorial Secretary

KULSA

# **PROGRESSIVE REALIZATION: A LUCID CONCEPT BUT AN ENIGMA TO MANY STATES**

**MUGWE KELVIN NJUGUNA**

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Back in May, the chair of the Justice and Legal Affairs Committee in The National Assembly, Hon. Samuel Chepkonga, published a constitutional amendment bill which stated that the realization of the two thirds principle contained in Article 81(b) of The Constitution of Kenya 2010, should be attained progressively. The proposed amendment was published less than five months to the deadline set by The Supreme Court of Kenya for the realization of this requirement in its Advisory opinion No. 2 of 2012. The Supreme Court stated that; *“Bearing in mind the terms of Article 100 [on promotion of representation of marginalized groups] and of the Fifth Schedule [prescribing time-frames for the enactment of required legislation], we are of the majority opinion that legislative measures for giving effect to the one-third-to-two-thirds gender principle, under Article 81(b) of the Constitution and in relation to the National Assembly and Senate, should be taken by 27 August, 2015.”* In reaching this decision, The Supreme Court had among many things, concurred with the submissions of one of the *amicus curie* in the case, who had submitted that there should be progressive realization in the attainment of Article 81(b) of The Constitution of Kenya 2010. In light of the foregoing decision, one is engulfed with amusement after looking at the proposal by the chair of the Justice and Legal Affairs committee in the national assembly. Mr. Chepkonga proposes progressive realization of the gender rule more than two years since The Supreme Court set 27<sup>th</sup> August 2015 as the deadline for the legislature to enact legislation to fulfill the provisions of Article 81(b) of the constitution. The issue of gender representation as provided for under Article 81(b) of the constitution is an emotive topic and one that divides opinion. Despite its mind-provoking nature, I do not wish to discuss it in this discourse. Rather, I will seek to decipher what entails progressive realization.

When giving its advisory opinion, the Supreme Court explicitly stated that the concept of progressive realization is not a legal term. It is derived from the word ‘progress’ which is defined in the 10<sup>th</sup> Edition of the Concise Oxford Dictionary as *“the forward or onward movement*

*towards a destination*". Progressive realization therefore implies a systematic and organized approach in the attainment of clearly designed goals. Legal pundits have often regarded the Kenyan constitution as one of the most progressive constitutions in the world. True to the aforementioned statement, the constitution in different articles has expressly provided for the concept of progressive realization. Article 21(2) of the constitution provides that the state is supposed to take appropriate measures so as to progressively realize the rights guaranteed under Article 43(economic and social rights). The notion of progressive realization is also embodied under Article 54(2) which provides that there should be progressive implementation of the principle that at least five percent of the members of the public service in elected and appointive bodies should be persons with disabilities. One can therefore be tempted to conclude that the notion that the Constitution of Kenya 2010 is a progressive one is not implausible. The notion of progressive realization is not autochthonous in nature by its existence in Kenya. This aspect of progressive realization is strongly entrenched in regional and international instruments, especially on matters relating to human rights. Regionally, the African Charter on the Rights and Welfare of the Child (ACRWC) encompasses the progressive realization of the rights of handicapped children under Article 13. The charter also envisaged in Article 11 that free secondary education should be attained progressively. Internationally, the International Covenant on Economic, Social and Political Rights (ICESCR) provides for progressive realization of rights recognized by the covenant. This conception is ingrained too in the Convention on the Rights of People with Disabilities (CRPD) where state parties are expected to attain progressively economic, social and cultural rights of persons living with disabilities. It is clearly evident that this concept of progressive realization has found a home in the legal circles nationally, regionally and internationally.

The legal recognition of this concept is not in doubt. However, it should not escape our attention that many states are in doldrums in its implementation. The unending desire to maintain status quo and the archaic nature of most of these states, takes precedence compared to other essential needs of the citizenry. This concept has been addressed in the Kenyan courts in different cases. Salient features relating to this notion of progressive realization have been elucidated by the courts. Learned Lady Justice Mumbi Ngugi was very lucid in her analysis of this concept of progressive realization. She propounded in the case of *Mitubell Welfare Society v The Attorney*

*General and 2 others*, that “The argument that socio-economic rights cannot be claimed at this point two years after the promulgation of the Constitution ignores the fact that no provisions of the Constitution is intended to wait until the state feels it is ready to meet its constitutional obligations. Article 21 and 43 require that there should be “progressive realization” of socio-economic rights, implying that the state must be seen to be taking steps, and I must add be seen to take steps towards realization of these rights...” She went on to add that the state has the “obligation to assist the court by showing if, and how, it is addressing or intends to address the rights of citizens in the attainment of the socio-economic rights, and what policies, if any, it has put in place to ensure that the rights are realized progressively and how the Petitioners in this case fit into its policies and plans.” In this particular case, displaying that concrete steps have been taken is imperative in ensuring progressive realization of social-economic rights. This position was affirmed in *Mathew Okwada v The Minister of Health and Medical Services and 3 others* where it was explicitly stated that even where rights are to be progressively achieved, the State has an obligation to show that at least it has taken some concrete measures or is taking conscious steps to actualize and protect the rights in question. There is consensus in the above stated cases that the concept of progressive realization of social-economic rights should not be a defence that states should cling on when they abdicate their duties.

However, most states, especially in Africa, have epitomized the art of mischievous and cunning practices. It is trite knowledge that these states often claim the unavailability of funds when justifying their inability to perform their mandate. This melancholy state of affairs does however have a remedy. This abhorrent practice arose in the case of *Michael Mutinda v The Permanent Secretary, Ministry of Education and 2 others*. It was decided that the obligation of progressive achievement exists independently of the increase in resources. This means that the State must effectively use the resources available and not wait for increased resources (the “when the funds are available” argument) before implementing the right to education. Education is one of the rights that are to be attained progressively under article 43 of the Constitution of Kenya, 2010. It is therefore the mandate of the state to ensure allocation of funds in enhancing the right to education and should not clutch to the unwarranted excuses that have always sufficed before. Article 20(5) of the constitution further gives principles to be adhered to in the event the state

claims unavailability of resources. One of the principles includes the state “giving priority to the widest possible enjoyment of the right or fundamental freedom” when allocating resources.

This concept of progressive realization has found its place in the legal world. However, it has unfortunately provided states, especially in the 3<sup>rd</sup> world, an opportunity to abandon their duties and ultimately raise the defence that they are performing their roles progressively. All this happens as their respective countries continue to plummet further to abject poverty. It is however clear from judicial precedent set as well as the provisions of the law that it should not take an eternity to fulfill what is to be done progressively.



*The Dean School of Law Z.E Ongoya addressing grandaunts of the Forced Immigration Law training at Kabarak University School of Law*

## **VIVE LA DIFFERENCE**

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*The source of all life and knowledge is in man and woman, and the source of all living is in the interchange and the meeting and mingling of these two: man-life and woman-life, man-knowledge and woman-knowledge, man-being and woman-being. [D. H. Lawrence (1885-1930), an English writer.]*

Over the years there has been a surging rise of several types of feminists. The common denominator in all these types of feminist movements is equal opportunities in the society similar to their male counterparts. Due to this rise in search for equal opportunities, many countries have crafted laws and regulations to provide recourse to this wailing. Despite many laws being fashioned both in national and international echelons, the difference between men and women has proved to be absolute and insurmountable. This is an inequality that has to be respected rather than trying in futility to solve it.

I am of the considered opinion that status quo should remain. If a woman wants to rise to power or occupy an influential position, she should do it *pro posse suo*. Creation of many laws to remedy the situation will not help. More often than not, I have contended that the State has done enough by ratifying many Conventions which protect women in the society. The many laws, convention and protocols are enough to protect their aspirations, motives and hunger. Sometimes I wonder whether women are more important than men or is the state on an expedition to misandry? These questions are informed by the fact that we have many laws protecting women as compared to zero protecting men. Armed with sophisticated wordsmithing tools and cunning minds, skillful feminist pleaders can make one appreciate the bewitched idea that women are the most endangered species compared to white rhinoceros. The state should not listen to these bewitched wails. If the state is going to give an ear to these wails then we shall have a more imbalanced society; an imbalance that is a creation of law and not nature. This is grave and fatal!

The most preeminent law ammo in this province of law is the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979. This convention defines the right of women to be free from discrimination and sets the core principles to protect this right. It establishes an agenda for national action to end discrimination, and provides the basis for achieving equality between men and women through ensuring women's equal access and equal opportunities in political and public life as well as education, health and employment. CEDAW is the only human rights treaty that affirms the reproductive rights of women. It has been ratified by 187 out of 194 countries. Only seven countries have not yet ratified it: The United States, Iran, Somalia, South Sudan, Sudan, and two small Pacific Island nations (Palau and Tonga) making it one of the most ratified international treaties. State parties to the Convention must submit periodic reports on women's status in their respective countries. CEDAW's Optional Protocol establishes procedures for individual complaints on alleged violations of the Convention by State parties, as well as an inquiry procedure that allows the Committee to conduct inquiries into serious and systematic abuses of women's human rights in countries. Other laws or regulations *inter alia*, are: Protocol to the African Charter on Humans and Peoples' Rights on the Rights of Women in Africa with the latest being the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention).

The latter is a European instrument. Many of us view the Istanbul Convention as an egregiously misandric document. This is because the Convention has made many feminist definitions and approaches to key provisions. In the preliminary, the Convention recognizes the ongoing human rights violations during armed conflicts that affect the civilian population, especially women in the form of widespread or systematic rape and sexual violence. The ongoing human rights violations during armed conflicts that affect the civilian population are overwhelmingly aimed at men and boys — in the form of death. In the last armed conflict that took place in Europe, the Bosnian war, 85 to 90% of the civilian Bosnian casualties were men and boys. In July 1995, more than 8,000 men and boys were rounded up and shot in the head in what is known as the Srebrenica Massacre.

I do not dispute that there instances the society has treated women cruelly. This is because I am neither misogynist nor a sexist. Practices like wife inheritance, female genital mutilation forced

marriage, narrowed access to education and *ejusdem generis* abhorrent practices. These are practices that should be purged, ousted and effaced from the society. However, I submit that the state has done enough as regards to women affairs by constructing and ratifying statues. Women should be left to pace alone now. Since we have laws that protect them from cultural detested practices like female genital mutilation, no more laws or legal mechanism should be cogitated upon, drafted, or operationalized in their favor, unless it is intended to address cultural perils. If laws and regulations will be crafted continuously to help women, am not an oracle but I foresee a development where men will one day want their laws! This displays that if the streak is to continue soon we will have a polarized society. My proposition is and will always be that both men and women should be treated *inter alia*, according to their strengths, abilities, merits and their moral compass and not by reason of gender. So far mechanisms like affirmative action have done enough and should come to a cessation. Universities have more female students than male ones. Many male students who completed their secondary education but did not attain 62 or 63 points and have no monetary muscle to punch poverty to join private universities have stayed in the village while their female counterparts with five less points throng universities. This shows that the law has done enough to appease women thirst. It is time all endeavor to address women issues should be switched off. Since there are more female students than male ones in universities, I am tempted to hold an opinion that women will occupy more commanding position in forthcoming years. That should worry any reasonable human being. This is by reason that men will perceive it as an affront. The foregoing is informed by the fact that the occupation is a figment of rebuffing a male child to join campus on the premise that he did not attain 62 or 63 points, and admitting another with five points less because she is female.

In matters concerning women representation, I embrace jealously the opinion that it should be based on merits not on gender. It is sometimes tempting to question why is it a must that we have not more than two third of a particular gender. More often than not I find myself questioning this constitutionally entrenched position. Why is it a must that a particular gender should be represented? Has democracy changed its position in representing the people to representing a particular gender? What is the problem having parliamentarians from the same gender? Democracy is about representing the people. Though I am not a democracy faithful on this, I stand in its defense. I give in to the notion that representing gender instead of the people will

soon abate the very quintessence of democracy and further rifting the society. Of all political positions I have witnessed, women representative position has proved to be a total affront to democracy. Is this true manifestation of a new jurisprudence of gender democracy? I hope you have once attempted to ask yourself, what about Men representatives? Since Article 97(1)(b) of the Kenyan Constitution provides that “*National Assembly consists of forty-seven women, each elected by the registered voters of the counties, each county constituting a single member constituency...*” This proves that women representatives perform same duties as other parliamentarians. The question which then crops in is if there special tasks that these women representative perform in relation to their position?

It has always been my ground that women representative position should be effaced. This is because it is a creation of misandric approach. One will stand and say this position prepares women for further political ambitions and it makes them grow in politics in preparation to challenge men in politics. Then if that is the position, we should ask ourselves who nurtured the likes of Martha Karua, Esther Murugi, Hillary Clinton, Dilma Rouseff, Cristina Fernández de Kirchner, and Ellen Johnson Sirleaf among others? Definitely, they are not figments of affirmative action or women representative positions. These women sailed their way to power past stormy seas. I shall repeat this until it irritates you that its time women pace alone. The law has done a meticulous job exterminating abhorrent cultural practices. Let them walk alone. Token politics epoch is over. Appointing women to various positions slackens them. They should enter the amphitheater of democracy and fight their way in.

The point I am driving abode is that, we should appreciate the difference that both men and women have in terms of merit, skill, strength, will power and audacity among others. Trying to bring equilibrium will subjugate those with better qualities. Therefore, appreciating the difference is the best concoction for this inequality and no one will feel extraneous. However, equating the equation will further dissimilate the society and that is not convivial at all. Vive la difference!

# THE ZOMBIFICATION OF OUR YOUTH: A SOBER APPROACH.

SUNDAY MEMBA

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Kenya statutory laws fascinate me. Our ‘honorable’ legislators legislated The Rabies Act, The Human Tissue Act and The Witchcraft Act. Once in the history of our state we had the Changaa Prohibition Act. It was replaced with the Alcoholic Drinks Control Act. The National Authority for Campaign against Alcohol and Drug Abuse (NACADA) was established in 2012 through the National Authority for the Campaign against Alcohol and Drug Abuse Act. It was to help in stopping the excessive consumption of alcohol mainly among the youth. All this aimed at curbing the menace of alcohol abuse among the youth. This has become the Achilles heel in our society as many youth delve further into drinking leading to some sectors of our economy bumping along in doldrums. One Barrack Muluka suggested that we should look at these problems stark in the eye.

Many alcohol consumers are undoubtedly zombie-walking packages of frustration and inferiority who have either suffered economic disadvantage or enjoyed financial sanctification. NACADA reports that Nairobi, Rift Valley, Eastern and Central Province have the tyranny of drunkards in our society respectively. The efforts of NACADA have but in vain tried to bore fruits. The NACADA laws restricted alcohol sale to six hours during weekdays and nine hours on weekends and public holidays. However, a study by NACADA found out that sixty percent of alcohol was consumed in Central province before midday. In the year 2014, sixty one people died after taking ‘Moonshine’ in Kiambu while eleven died in Embu. Twenty four persons last year succumbed to eternal blindness. Who forgets the infamous ‘Countryman’? Despite many laws being formed, people still find ways to manufacture, sell and drink this strong concoctions. When men learn to shoot without missing, the birds learn to fly without perching.

The problems caused by alcohol consumption in our country are varied. It always goes my heart when I find the guy I used to compete with in primary, dropped out in college and now is a strange version of his former self, after his mental software vanished to the La-la land to see the “Wizard of Oz”. It goes my heart further when I find the girl who used to make young men’s hearts want to leap into the mouth has become a withered ‘cabbage’. All this is due to a

concoction worth twenty shillings which addles the brain completely in a span of time. The aroma of alcohol seduces all and sundry causing men to quit their parental responsibilities. It's also for a fact that alcoholism is a cause for impotence among men, especially in the central parts of Kenya. Husbands therefore fail to fulfill their sexual obligations either for procreation or recreation. Though the men emanating from this region argue that their sober wives have made a personal and informed choice as to when to have children, I heavily doubt this and reserve my political reasons. Furthermore, this class of individual is politically used by politicians. When goons are needed to perform cheap anti-social works like looting or cheering, drunkards are a ready armor. They further are given tokens of fresh and lethal shots by the politicians that ensure the deviant works are a success.

After much thought into this matter, I arrived at a decision that the problem of alcohol needs long term solutions that can salvage this drowning boat of the citizenry. I look at this problem stark in the eye and offer a proper mixed prescription for this contagious malady. I don't approve of the knee jerk reactions which entail a mix of commando tactics and political persuasion by the head of state, His Excellency President Uhuru Muigai Kenyatta. His directive to destroy illicit brews led to massive looting, deaths of individuals and destruction of legitimate business enterprises. A politician's *modus operandi* and motives are hard to unravel. These tactics do not provide a lasting solutions and its flaws overwhelm its advantages. This can be adequately proved. One Ferdinand Waititu ordered a vigilante mob of youths during the first day of the operation to destroy some wines and spirits spots in Kabete Constituency. The youths, after exhausting their energies in the brawl, zombie-walk to their habitats drunk. Moreover, six persons in central province kicked the bucket due to acute withdrawal symptoms after an instant stop in alcohol imbibition. Governor William Kabogo ran for his life after an inferno of alcohol exploded and caused an Al-Shabaab like environ. What amazes me is that only few days after the crackdown, three chiefs and four assistant chiefs were found with the "second generation" brews in their homesteads. Random roadside political imbizo and imbroglios in the name of curbing zombification that leads to vandalism are unfortunate and should not be encouraged. Effective solutions will come from more structured and fact based initiatives. This method is ineffective like an analog signal.

The first thing the government needs to engage in is the causes of alcoholism in our nation. You cannot bamboo-beat a child without knowing why he spilt the milk. Alcoholism is attributed to stress and many other factors that tend to be inclined with problems. I don't assume that alcohol is not also consumed by many revelers for fun. But this taken into consideration, "second generation" brews mainly serve a purpose to the economically disadvantaged in the society we brag about. The sober answer to this is to eliminate the causes of alcoholism. I believe if the nation alcoholic agencies strive to stem this, then the problem is half solved.

Alcohol consumption as advertised on our television sets depict it as part of an elite constructed lifestyle. Only the well-to-do can afford them, meaning the rich can get drunk on the legal stuff but the poor can remain sober. It would be a good thing but the poor also want to get drunk.

Alcohol intake is associated with affluence and good life. That's the reason why cheap alcohol users in dingy bars brag about everything including their unpaid electricity and water bills. Next is to reduce the price of legitimate recognized concoctions and brews. I am aware that the government has exempted unmalted beer from tax duty this financial year. But how does this aid one reveler who can consume seven liters of this for him to gain a zombie pose. The government should enable the low income earner be able to satisfy their alcoholic appetite. Alcoholism is not a preserve for the grandees, big cheese, business oligarchs and wealthy bon vivants in our nation.

Where do the illicit substance that forms part of this brews emanate from? Just as termites come from anthills, formalin also has a source it comes from. The "second generation" brews fail to undergo the distillation process. It's even better to imbibe traditional brews like busaa, changaa and muratina than these illicit brews. Alcohol should be devoid of such toxic substances that endanger the sight and manhood of our citizenry. Well quaffed and matured vines and honey wine should be sold, not the poison in nondescript plastic bottles. The government agencies, for instance NACADA, should ensure that this substances do not find entry into society and harsh penalties imposed on persons who endeavor in such deviant behavior.

Let's sober up Kenyans and deal with this Herculean task. Let's be teetotalers by choice.

# A DISCOURSE ON WHETHER THERE ARE CONJUGAL RIGHTS

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The definition of what is ‘a right’ ministers many questions as to whether truly there are conjugal rights or if it just a caption whose application is somewhere within the tetrad wings of the sky. If today, a marriage partner petitions that he or she has been denied the right to sexual intercourse, can they really substantiate the claim before the court and can the courts enforce it? Another question that arises is whether the spouses can personally put screws to it and enforce it. Some spouses have gone to the extent of thrashing and shellacking their partners in the name of enforcing conjugal rights.

In this article, I will explore the following issues that are at the heart of this matter;

- Do spouses have the right to sexual intercourse?
- Who bears the obligation?
- Can it be enforced by either spouse?
- Can it be legally enforced?
- What are the liberties and privileges?
- Is there marital rape?

## **Do spouses have the right to sexual intercourse?**

It is of preponderancy to note that the right to sexual intercourse accrues from the right to consortium. **Consortium** is the right to company, society and affection of a spouse in any matrimonial relationship. There are a number of rights that accrue from consortium which have been classified as;

- Right of the wife to use her husband’s name; in the Kenyan case to acquire her husband citizenship only if she wants to change it.
- Both spouses have a duty to cohabit together in their matrimonial home. However, the decision as to where that matrimonial home will be cannot be specifically made by a specific spouse.

- The spouses have the right to sexual intercourse with one another and this commences with consummation of marriage and continues even after the marriage has been consummated.

For us to elucidate on this matter we must first understand what is a right. A right has gained a number of meanings, depending on the situation with a wide variety of expressions. In the language of the law, they are moral, ethical entitlements which need to be conferred and exercised as framed in the law.

In its analytical perspective, “a right” has two parts; form and function. One is the internal structure of right (their form) and the other is what rights do for those who hold them (function). From a historical point of view, ‘a right’ in its objective sense is described as right or just actions that individuals have to discharge to maintain harmonious relationships between themselves.

Accordingly, right is a combination of claim and duty. In law a right confers certain liberties or privileges and imposes duties upon individuals to exercise while claiming their rights. A number of jurists define the concept of exercise of rights with duty as positive and negative rights.

Accordingly, the person who is possession of positive rights is entitled to provision of some goods or services. A holder of negative right is entitled to non-interference. In the eyes of law, a right confers on a person certain amount of liberties and privileges. At the same time, it imposes obligations to discharge. Furthermore, possessing a right should also enable a person to exercise it. Hence it is clear that a right has definitions in philosophy, politics, law and logic.

### **Who bears the obligation?**

Both parties are duty bound to have sex with the each other, especially in Kenya. The constitution under article 45 (3) provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of marriage. Accordingly, it should not be viewed that it is the husband or wife who has the duty. It is a mutual duty they have towards each other. Demands for sex should not be beyond the call of duty e.g. a party demanding for anal sex.

### **Can it be enforced by either spouse?**

Parties in the marriage can enforce this right. The fact that marital rape has not been criminalized enhances this .However, use of force can amount to cruelty. This does not however mean that a

spouse should submit to unreasonable demands of sexual intercourse. In *AB V CD 28 K.L, R, 210*, the court held that the wife had the right to refuse to submit to unreasonable demands for sexual intercourse. It amounts to cruelty and can be a ground for divorce.

The spouses have the right to sexual intercourse with one another and this commences with consummation of marriage and continues even after the marriage has been consummated.

Consummation is the act of sexual intercourse after the celebration of the marriage. However, the right to sexual intercourse continues even after consummation.

### **Can it be legally enforced?**

If the other party is not willing to enforce it, no court can grant an order for enforcement of conjugal rights. Where consortium is lost, a husband can neither insist on conjugal rights nor seek an order for enforcement of those rights if the other party is not willing. One has an option to go to court to seek divorce instead. This right cannot be enforced with court orders such as specific performance. In the Indian law, it was possible to enforce conjugal rights through the enforcement of the Restitution Decree. It stated that, "The order of restitution of conjugal rights is observed by its breach rather than its abeyance." When a person fails to comply with a decree of restitution, the Court has a power to enforce the decree under Order 21 Rule 32 of Civil Procedure Code, 1908. A party who willfully does not comply with the decree will have his or her property attached by the court. Under Rule 32 (3), the Court has the power to sell the attached property if the decree holder has not complied with the decree within six months.

The restitution of conjugal rights is often regarded as a matrimonial remedy. The remedy of restitution of these rights is a positive remedy that requires both parties to the marriage to live together and cohabit. The texts of Hindu law also recognized the principle "let mutual fidelity continue until death". While the old Hindu law stressed on the wife's implicit obedience to her husband, it did not lay down any procedure for compelling her return to her husband against her will. It must be noted that such a concept existed in England since the 19th century and was introduced in India in the case of *Moonshee Buzloor v. Shumsoonissa Begum*, where such actions were regarded as considerations for specific performance. This section in the Hindu Marriage Act is a reproduction of sections 32 and 33 of the Indian Divorce Act.

These provisions thus understood from what has been written above on the concept of restitution of conjugal rights has left enough ambiguity as to whether it is in violation of any of the

fundamental rights guaranteed under part III of the Indian Constitution. It can be noticed that this provision is violates articles 19 and 21 of the Constitution and does not violate other articles.

However, the Indian concept has a loophole since the fact the even if one goes back cohabit it does not mean they will automatically agree to sex. In Kenya such methods cannot be used for enforcement.

### **What are the liberties and privileges?**

Married parties are at liberty to have sex with each other without conditions as long as there is consent and they do not infringe on each other's rights since they are married. Spouses are duty bound to have sex with their partners and factors such as desertion if proved and right to consortium which includes sexual intercourse has been violated they can seek a divorce.

### **Is there marital rape?**

Marital rape occurs where a spouse uses violence or the threat of violence to force the other to have sex. In Kenya, it has been held that a man cannot be guilty of raping his wife unless they are separated or divorced. This is judicial separation. If a man insists on sexual intercourse when they are judicially separated, he will be guilty of rape as was the case in *R v. Clarke* also *R v. Miller*.

However, there are calls for marital rape to be explicitly prohibited in national law on grounds that;

- Both men and women experience sexual violence and coercion
- The right to be free from coercion and violence in relation to sex is a human right
- Marital rape happens frequently, causing health problems, pain and distress to abused women. Children in households where marital rape occurs also often suffer from the psychological effects of witnessing violence and because of this it can undermine the ability of their mothers to care for them.

### **CONCLUSION**

It should be acclaimed that sex in marriage is for purposes of procreation and also for pleasure. Shoulder to that it should appreciate that one is duty bound to have sex with their husband or wife. However, unreasonable demands for sex would amount to cruelty.

There is therefore a right to sexual intercourse for spouses. However, if the other party is not willing, no court can force an order for restitution of conjugal rights in Kenya.



*Memorable times ....Moments after His Excellency, The Chancellor Kabarak University, Daniel T. Arap Moi unveiled the newly purchased library law books*

## **KENYAN PRISONS; WHERE MEN ARE BEING MADE WOMEN...**

### **SERIOUSLY SPEAKING!**

**NEWTON.G.MBOGO**

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A few days ago as I burnt the midnight oil listening to a rather interesting but eerie conversation between the presenter and a correspondent of the BBC, who is a researcher at an iconic research-renowned institution of higher learning in California, I could only try do digest what was being said vis-a-vis equating it to us humans. Though on quite a different topic with regard to the burgeoning problem of destruction of the ozone layer and its effects, the new research was on how temperature has been found to alter the sexual reproduction of a certain lizard in Australia such that its male chromosomes turn to having female characteristics upon reaching a certain temperature which means that the lizard hatched is partly male and partly female. In short, high temperature was likened to favoring the female genes more than the male ones. Coincidentally I had just read an article ***Gangster stabbings and rape; Brutal prison lifefacing Oscar Pistorius***, on the five years the athlete was to face in the notorious Pretoria central prison after being found guilty of capable homicide. Well the word “rape” almost confirmed my most feared doubts about the temperature...well...it did.

Recently, a school sponsored trip to a maximum prison, was a rather shocking but one very ideal situation that took me by surprise on my findings. Things that I only heard of or which I saw in those medieval era films and series mostly with regard to Romanians were confirmed to my dear ears. Though issues such as masturbation was one that our guide and guard was quick to re-avert as highly punishable in the facility, he was reluctant to say that the other most probable was that these same prisoners would result to the more unlikable act of having sexual acts with same sex members.

Yes, as we speak a study conducted by myself estimate that two out of every five long term inmates with a period exceeding six months have succumbed to being either perpetrators, fallen victims or have almost lost themselves into the act .Thanks to the improved conditions of modern

prisons as compared to the previous but seriously speaking this is one matter so critical that has gone untended and if any, not just enough taste of the broth.

I made a point to speaking to a newbie at the facility, well, those cooling their heels in probation for peccadillos, mostly young men in their twenty's and who are probably still there exceedingly, for the simple reason that they were unable to pay simple fines or they just enjoy the whole idea of *luxury*, you know, work-free-food-free environment. Asked, he agreed that he had almost fallen victim of being mishandled during his first few days at the facility. The study also concludes that just like the young women are the mostly targeted gems out here, men also target the freshmen.

Seriously speaking, this is not funny. Most prisons in Kenya are not willing to allow open days where the inmates meet family members to have an intimacy period with their spouses, can you imagine, who quo-warrantos any man the power to curtail his fellow human being from having sexual intercourse with his or her legally married spouse. Then how do we keep the nation growing? Even as the state or prison authorities hang loosely on the claim that that would elevate insecurity through smuggling of contrabands, would we the hide behind the erroneous constitutional provision on "the importance of certain limitations" under article 24(b)?

Article 51(1) of the constitution is precise on the issue of affordance of detained and imprisoned persons with rights as stipulated in the *BILL OF RIGHTS* (chapter four) "...except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned" In addition, it avers to be subject to international instruments on the same issue of upholding those rights.

The same constitution at article 27(1) assures that "*Every person is equal before the law and has the right to equal protection and equal benefit of the law*" Specifically on this point, the constitution impliedly invokes at article 45(2) that every adult has the right to marry a person of the opposite sex based on the free consent of the parties. Does the same constitution put upon itself the power to repeal the provision not to apply to prisoners without reference to article 27 as above and its commission to the culture of the people?

This issue then raises the question of what is to happen to those without spouses. The correctional service body should enact procedures where inmates of the opposite sex, with due regard to those who behave well can meet during recreational visits and educative seminars\*\*\*

Parliament should enact laws that intimately support the issue and ultimately disband restrictive measures by prison authorities in their pursuance for “panya” roots to laxity. It should seek and actualize the provision on inmates having such rights as privacy (article 31) by setting aside at least rooms for such conjugal acts. We should all remember that a right to life is at the heart of the country’s future and should not be equated to issues of insecurity in our prisons which is to be controlled and is controllable by those who make it to live...well and are alive.

Then what do we get when these rights are curtailed? *Homo-rapists(mark me)*. Yes I am not bound to express my very thoughts that a high percentage of those involved in trailing back their storyline were prisoners and had an experience of the same in prison or on the contrary had an encounter with a prison leaver who induced them into the practice. In any case there is a low possibility that those who leave prison are going to abandon their learnt profanity in prison.

Change is good as our own son NgugiwaThiongo in his work *THE RIVER BETWEEN* tries to drill in to us...and if we don’t change, change will destroy us...but just to hit the nail on the head, it demands that we take what is right and abscond what is profane. I mean not to direct this to anyone but to all of us...that we must disagree to agree that we have a culture to uphold and morals to keep. In as much as we agree to the enactment of some “crazy laws” as Kenneth R. Szulczyk calls them in his book, *THE RISE OF AN INSANE STATE*, we must always remember article 19 which is actually the parent rock and pointer guide to all the following rights and freedoms which at article (2) says that *the purpose of recognizing and protecting human rights and fundamental freedoms is quote me; to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.*

Ideally these are the same people who are perpetrating acts of bestiality accruing from the fact that in prison they have learnt that the people of the same sex are the only and best sex mates, or the opposite sex mates will not agree to their intentions, or the society is against such demands and animals that lack human instincts are the only solution to their unquenchable thirst

In fact in a previous paper by Chris Masitta on *Kenyan Prisons* based on a few but emergent issues including the need to de-congest prisons through privatization of prisons drove me to finding that some countries like the U.S had actually began conducting some research based on actually freezing peoples bodies up to a certain regulated temperatures, feeding them with fluid foods with tubes and stacking them on top of each other in boxes like in a morgue. That would actually be one of the best solutions to same sex intimacies in prison facilities and could and can be pursued pursuant to article 33(1) (c) that provides for the freedom of expression which includes academic freedom and *freedom of scientific research* which is realizable in that the law only creates rights and freedoms which its able to protect and vice versa, but need we reach such levels as well with our human dignity?

They say-bad sells and that seems to be what the media and other public information bodies have resulted to in their *lustful* craving for money and fame pushing their consumers to a state anomie preceded by utter madness . It is not remembered that these inmates are treated almost to a dozen of luxuries including watching the television and surfing the web, a scenario of so much fun that was nowhere close to even the imaginations of the sympathizers and well-wishers of inmates such as Bentham.

It's highly unlikable that you will find a group of misinformed opinion makers or idlers speaking of the whys but the how's after they have in their normal listening and watching of amazing events of this world found out something that existed only as a mystery to their very beings. In their quest to break the anxiety of the group they would most likely if not a must result to trying it out and there they are. In pursuance and practice within the highly protected media rights under art (34)the today's mainly privatized media houses (*NB. in contrast with the then government controlled ones(s)*) instead of it spreading messages that would be in pursuance to shaping the moral standards of its citizens its busy destroying what was fought for and unwaveringly built by our founding fathers. Come to think of it, what is the sense behind warning on viewer discretion on in-intio of a film and giving age restrictions yet the contents of the very film shows disturbing paranormally of people of the same sex having sexual intercourse. Am I then supposed to get convinced that that is what grownups are allowed to be doing? What will be of them then, when this world is only left with one man and his husband to listen to medias woes and wows?

Inmates should thus be fed with the right information pursuant to the reason of their very being in such special worlds.

A recent statement by the chief justice Dr. Willy Mutunga could be taken to have meant a lot apart from just de-congesting the prisons and taxpayers the agony .In the statement *“keeping offenders out of prisons prevents their recruitment into serious crimes, reduces prison population and saves the public money”*(The Nairobi Law Monthly Volume 4 issue no 10 Nov 2013) the young offenders on small sentences are better reserved from being taught or actually being abused by the hardcore criminals in prison when given punishments such as community service. Another thing is that it is highly unlikable for a youth to go back to crime when they are set free from their first crime unlike those who face imprisonment.

In conclusion I fully concur with the idea of privatization of prisons as one way of improving prison conditions and services. Prison authorities should also push for and actualize training in prisons against immoral acts such as these amid upholding the prisoners’ rights of enjoying conjugal rights with their spouses otherwise the correctional sector would be stumbling to nowhere. Being an institution on its own, rarely heard of yet at the heart of the country’s budget, its time they started thinking inside the box because the solution is around the problem if the problem is not its own solution. Seriouslyspeaking...

## **CORRUPTION: KENYA'S LIFESTYLE**

**MAKORI ZEPHANIAH**

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When you utter about corruption in our lovely country Kenya, it is not news. It is not something that can trigger your heart to race. In fact for you to survive, you have to indulge in it. To many inhabitants in this country, their close friend is corruption. In Kenya, corruption involves everyone whether a child, youth, middle aged and shockingly, octogenarians are of no exception. Our leaders, whom we voted for, are the ring leaders in this field. They are leading by example as the governed emulate them. A child aged ten years and above can elucidate more on corruption just as the person of full age can do. The distinction between these two kinds of persons, centers on their difference in terms of age and how many times one has been involved in it. Of course the elder emerges the winner.

People talk about corruption both at the international level and at the municipal level. When you hear them engage in a long conversation about corruption, what comes into mind? Are you bombarded with many questions? Personally, when I hear of corruption, Kenya comes to my mind because this is the area where it has really performed well. It deserves a reward for this wonderful performance. Your answer to my question, I confess, I don't know. Participants and non-participants talk of this deadly disease called corruption. They masquerade to be wrestling it or even looking for the remedy. The fact is that they are covering it. They are adding a thick blanket to it. They are always unwilling to unmask the key players in this game since to their knowledge, they are going to benefit from it. Benefits are either favors or even jobs for the job seekers. Job seekers have forgotten that they can employ themselves and even become job creators.

Whoever had a chance to go to school or had a privilege to hear from someone, can tell that charity begins at home. I say that corruption as well commences at home. Today, many parents are disseminating to their children what corruption is in a practical way. This means perpetuity. Children cannot perform home chores unless they are promised something which in most cases is money. It can be anything but still, it is money since it has to be bought. Without compliance to their request, they distance themselves from home chores. In addition to this, there are those who

cannot go to school until they are given money which of course is not necessary, but is for luxury. Their parents have condoned it since they have not objected. It is like bribing them to acquire knowledge. They grow up knowing that for them to get or do something they must be paid or pay.

Parents have a responsibility to their children which they cannot shirk. The constitution of Kenya 2010 which is the supreme law of the republic and binds all persons, under article 53, stipulates that children has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child whether they are married to each other or not ,but not bribe them. No provision of such is encouraged by the constitution.

Our policemen as we all know have a role in protecting the law and enforcing it as well. Have they really done it? My answer is “no”. What I am sure of, is that they are the one who are breaking the laws and pretending to be protecting them. In this context, they are taking bribes especially the traffic police. This is something attestable by any traveller to be specific, passengers. The protection and enforcement role they possess, to them it is a written role and not a practical one. I congratulate you for the practical role which you have really done passionately but in a negative way. I doff my cap for you policemen. You deserve accolades in this field of bribe taking and the givers as well should be commended for this. In recruiting policemen, one who is capable of doing a good work is left out on the ground that he has no money to buy his chance. Is this reasonable? No wonder we have high rate of incompetence in this field. Those who have a say in a society, seizing job opportunities is not a problem. In fact, they laugh at you when you say, there are no employment opportunities.

Will we ever alleviate corruption in our lovely country Kenya? To me, there is no glimmer of hope. To you, I bet I don't know. May be there is. Officers with protruding bellies in top positions are embroiled in this deviant act. Employers as well indulge in it. These officers purportedly allege to be clean yet they are unclean. They deserve to be cleansed. Their protruding belly portrays the amount of bribes they have taken. I guess something between many and a lot.

Kenyan citizens give it openly without any fear. Leading examples are our good drivers who do it openly in return as a thanksgiving. They are allowed to continue with their journey even though their vehicles are not in required conditions. Everybody in Kenya is capable of giving a

bribe to win the favor from the receiver. Somebody in his impecunious status still engages in it. Participants in this game believe that it is better to give rather than receiving. They are always philanthropic as one way of either buying favors or anything beneficial to them. Many, who are cornered by the policemen, buy their freedom out by bribing the law protectors who are breaking the law. They are supposed to subject them to justice system but they have failed to do so.

The accused persons buy freedom through bonds and cash bail, as they wait for the judge to judge them. Participants in corruption also buy favors through bribery. Few accused persons are at liberty after their cases are heard. Majority are sent behind bars to enjoy their holiday. In corruption situation it is not easy to be trapped. If the body conferred with this duty had to zero down, many could have been caught up.

Wrestling with this disease called corruption is not easy. If you are a participant in eradicating it, chances of you emerging the winner are very minimal. The winners definitely are those embroiled in corruption. This game doesn't need a referee to control the match. Many people are corrupt, few are not and we are all aware that majority wins. The opponent has conceded many goals and obviously has been defeated. The referee in this context is The Ethics and Anti-corruption Commission which is in place to fight corruption. This commission is livid as it has failed to eradicate it. For this commission to win, it must be backed by the citizens and also by the government. Citizens and the leaders, who were voted for, are the key players in this field. In fact they are under oath and they are unwilling to be called traitors by their co-players. In short, they want a tranquil life. They cannot support The Ethics and Anti corruption Commission in fishing out the actors. To them, corruption is like a basic need which you cannot do without. How do you expect them to extricate themselves from this yoke which is beneficial to them?

As far as corruption is concerned, one must take a bribe in order to employ someone. I think the employers are led by the principle of mutuality whereby, both of us must benefit. Corruption did not start yesterday. It has been there before even we divorced the colonial status. To date, we are still colonizing this territory of corruption. We can only eradicate corruption partially but not totally since a good number of the population in Kenya are swimming in it. Basically, many are comfortable with it. They are glued to it and they are not willing to be separated from it.

Economically and also in developments, we are still lagging behind as a country at large. When it comes to corruption, we deserve a reward since this is our area of specialization and we have really done wonders. Thank you for that sensational performance.

I draw my conclusion saying that the reason why eliminating corruption in Kenya remains a main challenge is that majority of people got onto the positions they find themselves through corruption and nothing is going to forestall them from engaging in this fraudulent activity. Surely, corruption in Kenya is perpetual. I rest my case by furnishing you with a new right before I vanish. You have a right to corruption. I can't cajole you to fight it, instead stand out and declare your right as a prudent citizen. You are at liberty to declare your interest. I know this statement will attract public opprobrium. As citizens of this country, let us fight corruption for us to make positive progress. Anything which is hot finally will get cold.



*Law students, Benson Kaaya and Sunday Mema, receiving a dedicated copy of the books from His Excellency The Chancellor Daniel T. Arap Moi (hidden).*

# THE CANCER OF BANDITS AND ILLEGALISED SECTS IN KENYA

NDIRITU STELLA

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A cancer begins with the tiniest dot on the surface of a living substance the same way tiny groups of armed men started in the Central region referring themselves to the *Mungiki* sect or the *Sungu Sungu* we hear of. It is a wonder that even today the current government is laying down strategies to heal this outgrown growth on our country's surface. This cancer is now politically instituted and even funded. The failure of the government to deal with the scam leads to the deprivation of citizens' right to security.

How many more sleepless nights will the citizens have trying to be their own watch dogs and how much more money will they pump into forming estate security groups to undertake the failed or forgotten government responsibility? Isn't it enough that the media projects massacred bodies of people allegedly killed by members of those sects and the threatening messages passed to various people?

What is the government doing to cure this cancer in the security docket? What measures can they show to the people that have not only been put in place but also bore fruits or are they toothless dogs that bark but do not bite? What a shame it was for the world to hear of the hundreds of army officers killed by bandits' arms stolen and all the propaganda and politics behind this. Though warnings were sounded and there was enforcement in the deployment of army officials to the same area it was a sign that apparently all would be well.

Which Kenyan is yet not tired of hearing the daily news of people dying or of stolen cattle? Was it not the other day at Kidepo area where innocent citizens and army officers were killed by a group of bandits at the country's borders while in a 'said' mission to protect the country. Is it because of our porous borders or is it the laxity of the intelligence group of Kenya? Was it ceremonial for the government to instruct for the massive movement of military ware from one of its bases in Lanet to the Turkana basin or was it a strategy to try and curb this scam? This is tragic as it happened before the country could heal its wound of the innocent military officers

killed by the same bandits. It soon will look like a norm to this nation and seem so hard to even deal with.

Cattle rustling is a name that should be history by now this being the 21<sup>st</sup> century but to our dismay it is reality in the Turkana basin and in Pokot: a cancer that successive governments have failed to regulate or even cure. To these communities it was a cultural practice but now bandits hide in this name to enrich themselves and harm communities. It is a shame that this happens between ethnic communities and the greater shame is that great politicians who should be working with the government to stop this have apparently been named to be behind this scam.

Ethnic groups in this region are always in conflict and steps to restore peace in these areas have proved to be futile. One of the main reasons as to why this may prove hard is the fact that any disarmament set out by the government has failed. The people in these regions bear arms illegally and use the same to attack or even for self defense. The porosity of our borders makes this situation even worse as the acquisition of these arms from the neighboring Somalia is easy. The fact that the borders are not exclusively manned means that civilians from the same country walk up and about in the country and can carry out criminal activities in these areas. It then becomes a great hustle for the security personnel to curb crime as the criminals just cross the borders and are nowhere to be found.

Illegalized sects in the country have contributed to the already spreading wound of the nation. Sects that are deep rooted in the country have become a menace to the society. In some areas of this country the *Mungiki* sect has become the micro government of the places. Eastlands in Nairobi and various parts of central region are the worst hit areas. People living here are forced to pay 'taxes' for their businesses, houses, economic activities and even for the provision of their 'security'. These same people who are forced to pay these taxes are the people who are attacked by the same members of the sects. The residents of these areas have no one to cry to due to the propaganda behind this same issue.

Recently there has been the emergence of the Gaza sect recruiting youngsters in the same Eastland's area. This has now become the greatest menace. School going children have been recruited to this sect and carry out criminal activities such as mugging and robbery. These youngsters tend to use crude weapons to carry out their mission. They use knives to stab their victims and even carry guns around. Recruits of the Gaza group are school going kids who

mostly live in poor conditions such as the slum areas. They tend to join these groups as they are promised of brighter futures. Benefits from successful criminal activities are used to woo them to take part in bigger crimes and woo others to join.

In areas under the control of these sects, the government representatives such as the chiefs in these areas have no say as they also fear for their own lives. The government through the security docket is doing very little or nothing to curb the growth and spread of these sects. It is a shame that Kenyans continually pay taxes which is used to pay state officials yet nothing is given back not even the assurance of their own safety

# **HOW FAST WE FORGET, BUT THEN AGAIN IS IT NOT BEING HUMAN...**

**ROBBIN MURIMI KARANI**

**4<sup>TH</sup> YEAR LL.B STUDENT, KABARAK UNIVERSITY**

It is funny how a guy or lady suddenly becomes too ugly, tall or short, plum or skinny, heartless and what a view to his girl or boyfriend as soon as they break up. Regardless, it is this same psyche that our society has ceded to regrettably. A wise saying goes that the biggest problem in life is not being at the top but rather maintaining that position which put in context here translates to being very easy to grab the attention of people but climbing a mountain hill when it gets to remaining in their thoughts.

Scientists argue that people forget 40% of what they have learned in 20 minutes, 77% of what they learned in six days and 90% after one month. An undisputed fact lies that forgetting varies widely depending on things such as the person's interests, the subject material, prior knowledge and time duration among others. Psychics on the other hand circumscribe on the idea that man forgets what he wants to forget and vice versa. However, I am neither a scientist nor a psychic so what can I say? Mine is to deal with the facts of it all, try to be legal, politicize what I can and wait for my reader's critique. Wait! Who says numbers don't lie? Here is an illustration: our so respected teachers recently won a case against the Teachers Service Commission and the government part of which the court advocated for a pay rise for the over 280,000 public servants. Now don't misquote me to mean that teachers don't deserve a pay rise. They do. The question is which teachers need that rise? A report used in the judgment shows that at average the consumer price index from 2009-2014 rose by 39% while the teacher's net salary grew by approximately 54% giving a disparity of around 15%. From the look of it the teachers are well catered for over and above their needs but are they? A deeper insight will have you learning that the average is a combination of a 21% rise by p1 teachers which is 18% below the index and an 87% rise to the Chief Principal and similar facts. That P1 surely deserves a raise but Sossion knows if this happens he won't have a crybaby to lean on next time he goes to courts.

Moving on, the rail goes back to this ex-girlfriend that spites you and calls you names once you are no longer an item. She is quick to forget that not long ago she called the most handsome, sweetest and best guy in the world (and vice versa). Nevertheless, who should blame them? The world we are growing up in is the teacher of all these. Every day that passes more headlines and trends hit our world stirring debates sometimes lapsing for days but as soon as the story goes off air we don't even care to know what happens to the real players.

The monster in the room is not forgetting but rather how fast we do. Here's a juggler; what ever happened to 'bring back our girls'? My bet goes with the least odds that most of you don't even have the slightest idea apart from the time they were abducted to the story about their alleged impregnation. Some of you may have some little insights but the heart-felt activism we had back then when the tag hit our news headlines and social media trends is long dead. Not that the remaining 216 girls are facing less suffering now but it turns to be a cliché as we call it. To some, especially the affected, the fight still rallies on even as the world turns to 'better' things such as Bruce Jenner turning to Caitlyn Jenner. I find it amusing that all the enthusiasm suddenly dies just like how quick a dog bites a bone and quickly gets tired of it puking the whole length of its tongue out in expectation of some more.

Sometimes we even pretend to inscribe the memories of a happening in our laws and national frameworks but still the very essence of it all is something we no longer comprehend. Kenya as a nation alleges to hold to its heart the impact and consequences of the 2008 post election violence. In return, the republic theoretically gears towards unity and fighting ethnic divides but to hear an Honorable leader such as Moses Kuria talk of '*hao watu*' and tell his followers to cut people with *panga* is utter sorrowful. Have we forgotten what such spite did to us or to our brothers in Rwanda? And then to add more salt to the wound my much-adored Jakoyo Midiwo goes in front of national television and claims to have received phone calls from Eldoret, Kitale and Kisumu (the same he alleges to have received in 2008) with his friends asking whether to chase away 'these Kikuyus'. Although he claims to have told them 'no' the very thought of a Kenyan saying so is hurting to the core principles of our constitution. More so, why are we holding '*kina*' his Excellency the deputy President at the International Criminal court at The Hague while our leaders are using innuendos now to admit their participation in the violence? We should bear in mind that the whole saga emanated from the allegations of a political party that the government

is creating a militia through the National Youth Service (NYS) so as to ensure that the jubilee coalition remains in power after the next election. True, it's normal to hold such thoughts but with a large following and marking an important icon in this country, how can one make such statements knowing fully well the state our nation is.

I may reprimand the actions of leaders such as Moses Kuria or Johnstone Muthama now but what is real is that there is no smoke without fire, to the headlines it's just the individual but we don't know for sure how many Kenyans hold a similar conviction starting with those who elected the leaders. I may not be as learned yet but that was just a piece of my mind, maybe now I can have a peace of mind.



*Fulfilling moments...Part of the cream of Kabarak University School of Law.*

## THE HANDS OF AFRICA

WINNY NYASETIA MOKAYA

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Anyone who has ever struggled with poverty knows how extremely expensive it is to be poor. This is according to James A. Baldwin.

Some people argue that colonialists never left at all. They left by the front door, only to come back through the backdoor. This is what we now refer to as “neocolonialism”, a new form of colonialism. The neocolonialism of today represents imperialism in its final and perhaps its most dangerous stage. The result of this is that, foreign capital is used for the exploitation rather than the development of the less developed parts of the state. Investment under neo-colonialism increases the gap between the rich and the poor countries of Africa rather than decreasing it. Look at the people that control businesses and trade in Africa. Most are from the same old countries that enslaved and colonized Africa, only that now; they don’t come directly as rulers, rather, as transnational companies or international monetary organizations.

So, this leads us to our big question: Why is Africa so poor? Is it the horde of *chokoras* struggling at the rubbish heaps for morsels of rotten food? Or is it the army of underpaid laborers opting for strikes time and again? Why are children walking barefoot in ragged trousers and tattered shirts? The hands of Africa are black; black due to poverty, poverty the parent of revolution of crime.

Looking at the face of Africa, surrounded by myriads of scruffy people crammed in hovels in smelly unhygienic slums. Out in the countryside, a herdsman is seen chasing around a few herd of scrawny cattle, in the name of livestock-keeping, yet, another image of poverty. These are some of the familiar scenes of Africa. Even the most sympathetic and optimistic assessments of the state of the world’s economy, list Africa as the poorest continent in the planet. This situation begs four vital questions.

- Why is Africa so poor?
- Are we going to let the situation continue like this forever?
- Can we and should we do something about it?

- What can we do and how can we go about it.

You and I must work together to develop our country; to get education for our children, to have doctors, to build roads, to improve and provide all day-to-day essentials.

There are varied reasons why Africa is poor. Some are historical, others political and yet others, psychological. Historically, Africa was subjected to slavery and colonization. Africans were captured by Europeans to go and work for them in their countries. It was evident that they needed quality manpower, which, Africans could provide. It can be argued that, Africa was robbed off its best manpower and human force. Then, when they got tired of shipping Africans to their countries, they came and settled here, making use of the available resources. With this, we can argue that Africa was not created poor, and was not always poor. It became poor because it was plundered off its human power and natural resources.

Most of the African countries got their independence over 40 years ago. The “independent” Africa which the colonialists left behind was a continent riddled with calamities. To begin with, it was and still is fragmented into tiny states and areas of influence, all competing and often fighting against one another. Secondly, all the systems which the colonialists put in place were geared towards the interests of their “home” countries. Africans were never taught to manufacture anything but were expected to import everything. This situation has not changed since independence.

As a way to control this notion, I think that we must free our minds from that dependency syndrome. We should learn to do things for ourselves. We cannot always run to our former enslavers and colonizers, and beg them to give us knowledge, technology and money. If Africans can prove that we can run our own business, outsiders will cooperate with us fairly. Otherwise, beggars cannot be choosers.

Africans must unite. If Africa was united into one, viable, political and economic entity, we would find it easier to earn a living anywhere on the continent. Most of the African leaders are not poor. Their wealth and money for instance is deposited in banks outside Africa..We must get our priorities right. The starving, ailing and dying people didn't elect these leaders to enrich themselves at the expense of the common majority people. Greed and dishonesty of some

African leaders remain Africa's weakness. These are the same leaders that loot and hoard all the available resources for their own self gratification. All this must change. Arise Africa!



*Gloria Kimani and Jedidah Ngina at Crown Plaza Hotel Moot during the awarding ceremony of the ICRC Moot Competition.*

## **DECEMBER HORROR**

**KAMAU FAITH WANJIKU**

**2ND YEAR LL.B STUDENT, KABARAK UNIVERSITY**

For the past one month, I have been wondering about the medical practitioners in my mother land. The issue of “separation of power” rings through my mind now and then. I need any prudent individual to stand and explain whether there is any vertical or horizontal “separation of power” in the medical fraternity. Is there anything like a skilled or a semi-skilled doctor in the vertical division part of it? Or a skilled or semi-skilled nurse in the horizontal part of the division? I used to think and still do, that a doctor or nurse are just all skilled, nothing more or less.

Medical practitioners ought to know the definition of an emergency and this displays itself clearly in most cases (*res ipsa loquitur*). Why then take a long procedure asking questions like the year of birth while someone is dying? Unnecessary procedures are often followed at the expense of a life. My December horror is about two different people; a cousin who apparently did not mean a lot to me (it is ironic) and a friend who meant the world to me.

My friend apparently took rat poison with the intention being clear; to end the problems in his life among them family wrangles. However, not in accordance with his plans, his meddling neighbors rushed him to the hospital in time. But guess what? The local hospital referred him to the county hospital citing lack of facilities to deal with such cases. As earlier indicated, insensitive procedures are followed and this takes time limiting his chances of survival. After he is admitted, a tube to suck the poison from his system is connected to him but unfortunately the nurses remove the tube before all the poison is out. Apparently he is pronounced dead.

My cousin suffers the same fate. He is well all day, but in the evening a terrible headache attacks him. While in the hospital, the same long procedures which could have been done when he is out of danger cost him his life.

This reminds me of the arrogance I have witnessed over the years, having been to a number of dispensaries. You walk into one feeling as if your day is about to come to a halt only to meet the

long queues awaiting medical attention and no single staff is within your vicinity. After some ten minutes of interaction with the sick fraternity, the news can only be portrayed by a finger signaling you to a room entitled STAFFROOM. What can be heard coming from such rooms are laughters and giggling capable of pissing off any healthy soul around. The tea breaks are often taken as Tuesday siestas and centers for gossip. Wait until discriminatory selection is done where people are being served on the basis of 'we know each other'. A person receives medical attention before you who have queued since time immemorial, the irony of it all (am sure a number of people have been a victim to) is where a 'competent' health worker administers a wrong drug. Painkillers are the order of the day, meant to reduce your pain when the real deal is actually not being tackled.

This hospital treatment is not limited to the government dispensaries only. A recent occurrence left me baffled, after a rush afternoon visit to a dermatologist around Kenyatta Avenue in Nakuru. On arrival the receptive secretary sternly stared at me as I walked towards her (this reminded me of my high school mathematics teacher releasing my maths results each term). The next thing I heard was 'what are you doing here and do you have an appointment?'. To suppress my disappointment I smiled and answered 'good afternoon madam, am just booking one right now'. Communication skills is among the skills this staff lacks. One may wonder, don't they know the tongue is a small organ that can build and also destroy? Professional ethos have lost their place.

It is my wish that a new bill should at least be thought of, if not passed instead of absurd bills like reproductive health bill seeking to give condoms and pills to kids. This bill left me almost agreeing that the more a woman climbs up the academic or the corporate ladder, the more likely she is to do something that will baffle you. Some of the ideas these women on higher academic and career pedestals advance often compel me to ask if they have their senses intact. This is putting the cart before the horse. Back to my so-proposed bill, it should include that the procedures of registering patients should be done after they are out of danger and just as in judicial independence, the state has the responsibility to ensure that they have all the resources they require. All hospitals should be allocated all the resources they need and as far as medical services are concerned and harsh penalties ought to be put in place. As is the knowledge of law students, when pain outweighs the benefits, not a soul is willing to risk that. I have lost

something worth fighting for, many have but it is quite sad many do not know the right channels to air their cries. Legal awareness is something the state ought to include in the vision 2030.

2014, a year which has seen the passing of the new security bill regardless of the opposition proves that for the sake of securing the people of Kenya some freedoms are worth stepping over. This is in agreement with most of the social contract theories. Consider this a letter to my government, at the same time rest in peace Kariuki my dear friend and all the dear's. I rest my case.

## **DEAR AFRICA; WE ARE THE ONES WE HAVE BEEN WAITING FOR**

### **FRANKLIN CHELUGET**

If I was standing at the beginning of time and had the chance to see and meet God, I would choose to meet with Him immediately after he had woken up from the rest on that seventh day of creation. The moment He lays eyes on me I would blush and draw the map of Africa on the ground- the kind of thing ladies do when they are shy. I would then make a sad face if He doesn't notice me. When he finally notices me, I would pray that He asks me *that* one question. I would be certain that He would hear and grant my prayers. The question He may ask me after my prayer would be; "Franklin Cheluget Kosgei, in which age would you like to live in?"

At that point, like Martin Luther Jr., I would take a general and panoramic view of the ages of the world up to now. I would visit all the continents and times of old.

I would take to the days of Adam and Eve, and watch them eat the forbidden fruit at the devil's deception. For a moment, I know I would be tempted to implore them not to. I mean, I know now full well the repercussions of all that. That would make me for a great hero... spare humanity of all the troubles that boils from that choice. Geez, I would undoubtedly make my way to the Bible! Nevertheless, I wouldn't stop there.

I would move on to see Methuselah. I would fancy watching him from some bush to see exactly what made him live so long. Well, it could not have been because of obedience to his parents. No. The commandments were not published yet- literally. Anyway, he would be so old. Seeing how he would struggle in doing the normal doings of life... I would not stop there.

I would move on to watch Moses. As a lawyer, I would verify the biblical representation of fact that his mom put him and left him to float on water to save his life. Even when he is rescued by his Egyptian mom, I wouldn't want to spoil the fun by selling him out as an Israelite. I think I would prefer to wait and see him open up the Red Sea. That part to me has always felt like a legendary tale; the kind we tell kids to go to sleep. But even seeing him split open the mighty water body of the sea, I would not stop there. I would take a selfie first though.

I would move on to David. Yes, King David. Today I have been reading how he assured King Saul that he would kill Goliath. He even went on to the extent of telling him how he had killed bears and lions that tried to carry away his flock. Well, I don't know about you, but to me, it is much harder to kill lions and bears than to kill Goliath... just think about it; 'to grab it by its neck and beat it to death.' For that reason alone I would want to see him kill at least seven lions. But you know what, I wouldn't stop there.

At this point, I would rewind time just for the fun of it. I would go back to that time when Lucifer was cast out of heaven. I'd really want to see him thrown down. I would record as jurisprudence his defense before his expulsion. I would also spy and see where God placed that sword at the Garden of Eden. That would make for quite some theological thesis for me here on earth. Nevertheless, I would again fast forward; I wouldn't stop there.

I would move on to around 400 BC, and like Luther, I would move on by Greece and take my mind to Mount Olympus. And I would see Plato, Aristotle, Socrates, Euripides and Aristophanes assembled around the Parthenon. And I would watch them around the Parthenon as they discussed the great and eternal issues of reality. Unlike Luther, I would approach them all in chambers and strike a deal with them to be their Intellectual Property Lawyer. I swear that would make me a millionaire. I would speak of computers and lift my shoulders high as I spoke of it before them; they would be as green as grass about computers. But I wouldn't stop there.

I would pause at the birth of Jesus and watch him get born. I think I would really enjoy the whole thing, especially when he actually turns water into wine! Who wouldn't?! When it gets to the part where he is crucified, I would rather just fast-forward for we all know how that ends. So obviously I wouldn't stop there.

After all these scenes, I suspect The Almighty would start getting impatient. For that reason I would move on to the 20<sup>th</sup> Century. There I would stop to watch which of my grandfathers I take after. More keenly, I would go real slow and watch the African in his land fight for freedom. I would not dwell so much in Egypt since I had already been there during the time of Moses. Besides, they gain independence much early. Instead, I would invite Sir Abdel Nasser to walk with me in my tour around Africa.

Oh... I would start here at home and watch with my own eyes the fight that Dedan Kimathi put to see that Kenya is free. I would hate to watch him buried alive, but I still would have to see to believe. I would whisper unto him the whispers of encouragement of those who came before him for Kenya... I'm talking about Koitalel Arap Samoie; about Mekatilili Wa Menza.

I would watch and commend so Albert John Luthuli, Nelson Mandela, Desmond Tutu, Ellen Johnson Sirleaf, Hellen Suzman, Joseph Ki-Zerbo, Kofi Anan, Marcus Garvey, Ndeh Ntumuzah, Kwame Nkrumah, Patrice Lumumba, Frantz Fonon and Walter Rodney. All these great African People I would marvel at their works. I would be short of words and even actions to speak or do for there is nothing they haven't done. Still, I would sit there with them. I mean, unless I am wrong, think with me on this one; these are people who struggled through pain for the future of their people and not their own. People who forgot about family and saw the *Biggest* picture that indeed they are not free until Africa is Free. These are men and women of bravery who after cries of sorrows, came to the eloquent cry of joy that, "Africa is Free and so let it be." Charming as it may, I would not stop there, My Friend.

Strangely enough, I would turn to The Almighty and say, "If you would just allow me to live a few years into the first half of the 21<sup>st</sup> Century, particularly in Africa, I will be happy."

Now that's a strange request to make. Look, Africa is all messed up now. Disasters on our land; Ebola on our land; wars on our land; civil strife on our lands; hunger on our lands; diseases on our lands; hatred on our land; corruption on our land; murders on our land; injustice on our land; neocolonialism on our land; treachery on our land; theft on our land; calamities on our land; despair on our land; hopelessness on our land; ultimately Death *for* our Mother Land. So, again, that's a strange request to make. Only God knows that wouldn't be mockery... at least not to the giver and taker of life. With Him I would shy off issuing idle words.

See, I have learnt in the life that I have lived that just when the night is dark enough is when one is able to see the stars. I have also learnt that even when the sky is laden with clouds, be they dark or be they light, that we can't see the stars... the stars are still right there behind those dark clouds. The Englishmen had it right when they, in their immense wisdom posited that behind every dark cloud is a silver lining. Additionally, I have also learnt that the African Bird chirps even before the first sunlight is out; and they are never wrong that the sun will come out shortly after that.

Now, I put it to you today that as Africans we have had the roughest walk and time as a people than any other has had to go through. I put it to you that we have been to the dark and through the dark. I put it to you that if it is darkness, we have seen it all. We have defined it.

I submit to you that the dark that might seem to engulf us now is just but a passing cloud. It is the kind that blocks the path of the ray that shines down onto us as a people. I submit that come a few moments, the sky will clear; and all of us Africa's Children will see the glory that comes from within. The whole world will know how much they cannot be without us. To all my African brothers and sisters in several countries who are undergoing heartaches and trials now, I say to you *Courage*- it is just a passing cloud. All of our brothers in the west feeling the heat of Ebola as it is, I say to you *Courage*, for it is that passing cloud. All our brethren around the world, scattered for the good of our Mother Land, I submit to you that the time to come home is almost.

And you ask me how it is that I say these things. You ask where it is I draw the audacity to speak of these things.

Like Amos I ask then, "When God speaks who can but prophesy?"

You see, the birds have chirped. The old African Rooster has crowed. The frogs have also croaked. Even they have seen what it is that is coming. Humanity has seen it also. Those who have not seen it are feeling it. Those unborn can feel it. The truth is simple: We Are The Ones We Have Been Waiting For.

We are here now.

From my standpoint, it's like everything and all things that have happened to us in the past have all been for this one particular moment in time. It's like all along Africa coiled its back to carry all the load, knowing too well that with each step, each stripe, each whip; it was one step closer to its arsenal: Us. No wonder it never gave up! No wonder it took up a mother's and walked the journey. Now our motherland stands beyond reproach, and all can see it in its glory and magnificence.

It has been a long time coming. That Dream has been the African Dream. Now dawn has cracked. It is time to wake up and realize that dream. Failure to our realization it will always remain a dream unless we wake up and realize it- make it real.

And so, yes, that's what I'm saying,

This God-forsaken dark; clearing,

Away the night; fading,

This new day; dawning,

No doubt it may take a minute or four,

But, see it will last forever and more,

Boy... wasn't that worth fighting for,

Coz We Are the Ones We Have Been Waiting For.