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FOREWORD

Welcome to a reading of the fourth volume of the Journal of Law and Ethics. This is a publication of the Centre for Jurisprudence and Constitutional Studies in the Department of Public Law at Kabarak University. The consistency with which this journal continues to be published confirms its authority.

This volume contains a number of deeply researched and peer-reviewed articles on various aspects of public law. The intellectual menu in this volume entails writings in the area of elections disputes resolution; independence, accountability and effectiveness of constitutional commissions and independent offices established under Kenya's constitutional framework; the practice and jurisprudence on the right to bail in the prosecution of anti-corruption and economic crimes; the impact of hate speech and anticorruption rhetoric in Parliamentary elections in Kenya; reflections on Egypt's reservations on the African Charter on the Rights and Welfare of the Child; and the anti-discrimination regime of norms in Kenya's employment law. We owe a debt of gratitude to the authors and peer reviewers who have invested their time and intellectual efforts to deliver intellectual outputs on the above themes.

The defining ingredient of this journal, as is tradition, is the debate it hosts. In this edition we host an exciting debate on an aspect of the ongoing "war on corruption" in Kenya. The debate underscores the tension in the endeavour to adopt a conjunctive reading of the provisions of the Constitution of Kenya 2010 on leadership and integrity, on the one hand, and the complementary, but sometimes competing provisions on fundamental rights and freedoms and the principle of the rule of law. It is a debate on the delicate balance in waging a ruthless war against the socially destructive phenomenon called corruption which respective the enduring principles and values of human rights and the rule of law. Mr Duncan Munabi O'kubasu, Mr J.V. Owiti and Mr Ken Ogutu, all lawyers with an academic inclination have done justice to this discourse. In this edition, there are reflections on certain aspects of bond terms that the Judiciary has imposed in

selected cases involving charges of corruption and abuse of office by holders of the constitutional office of Governor in two counties in Kenya. Scholars, students of law, legal practitioners in private practice and the public sector and judicial officers will definitely find this debate enriching.

As the Editor in Chief, I particularly wish to acknowledge programmatic focus of the Managing Editor, Ms Lucianna Thuo for her tireless efforts in making this publication a reality. When the history of this journal is finally penned, be it remembered that Ms Thuo stands out as the fulcrum around which the reality of the vision for this product revolves.

As an editorial team, we undertake to continuously improve on the quality of the journal as we provide a reliable platform for dissemination of intellectual outputs in the area of public law through this journal.

Elisha Z Ongoya
Editor in Chief

EDITOR'S NOTE

We are pleased to bring you the Fourth Edition of the Journal of Law and Ethics. The JLE is the flagship publication of the Centre for Jurisprudence and Constitutional Studies and has continued to offer a platform for discourse on various public law issues, and particularly to advance the discourse on good governance.

This year's edition picks up on the ongoing national discourse on the Rule of Law and the War on Corruption and five of the ten articles featured in this edition are dedicated to engaging this matter from different perspectives. Renowned democracy expert Thomas Franck posited that '[h]istory has warned, repeatedly, that the natural right of all people to liberty and democracy is too precious, and too vulnerable, to be entrusted entirely to those who govern.'[1]

The extensive provisions of the Constitution dedicated to articulating our national values and principles, the guiding principles of leadership and integrity and the values and principles of public service are evidence of not only a desire for leadership that is responsive and accountable, but also an aspiration to pay homage to the sovereignty vested in Kenyans by Article 1 of the Constitution by giving the citizenry the yardstick against which public leadership ought to be measured. Chapter Six of the Constitution, sometimes pejoratively referred to as 'the dead chapter of the Constitution' has come to the fore in recent days with the resurgence of "Kamata Kamata Fridays" and for the first time in our history, the arraignment of serving public officials in court for various integrity-related charges including: abuse of office, flouting procurement procedures, tax evasion, conflict of interest, unlawful acquisition of property, conspiracy to commit the offence of corruption, etc.

[1] TM Franck 'Legitimacy and Democratic Entitlement' in GH Fox & BR Roth (eds) *Democratic Governance and International Law* (2000) Cambridge University Press: Cambridge 25,45.

As is tradition with the JLE, the edition carries a debate on a topical issue touching on governance. The recent decisions of the courts on bail and bond terms for persons facing corruption charges provide fertile ground for this year's debate articulated by Duncan O'kubasu, Ken Ogutu and JV Owiti. What is apparent from the debate is that there are legitimate concerns about how to safeguard the Bill of Rights, particularly fair trial rights such as the presumption of innocence, and how to ensure that constitutional office holders are not removed from offices through means other than those sanctioned by the Constitution. That appears to be the gist of O'kubasu's contention, informed by his litigation experience in one of these matters.

While the manner in which the arrests have been carried out as well as the seemingly onerous bond terms have elicited much criticism, the discourse is not complete without an analysis of how state and public officers can be held to account while safeguarding the Bill of Rights. That is what JV Owiti's response to the debate seeks to do: provide an alternative view in this debate, from the perspective of a prosecutor, thereby facilitating a more balanced assessment of a war that is more often than not highly politicised. Owiti argues for a balance between the protection of the Bill of Rights and the safeguarding of the integrity of the trial to ensure that bond terms do not render a trial nugatory, thus hampering the administration of criminal justice, and by extension, the intent of Chapter Six of the Constitution.

Ken Ogutu weighs in on the debate by critiquing O'kubasu's approach, which in his view understates the threat of corruption to the Kenyan society. He also posits that O'kubasu approaches the debate by framing the wrong issue — whether governors facing trial should be removed from office — rather than looking at the rationale for suspension of state and public officers when their integrity is called into question. He asserts that rather than continuously critique the Judiciary for being the weakest link in the fight against corruption, judges who make such ground-breaking decisions in defending Chapter Six of the Constitution ought to be celebrated.

O'kubasu concludes that debate by a rejoinder to the responses by Owiti and Ogutu. He remains unpersuaded by their arguments. He reiterates that the purport of Chapter Six of the Constitution should be considered as the Chapter stands now, and that jurists should be cautious not to misuse its provisions.

Muthomi Thiankolu's article builds on the integrity discourse by providing a thought-provoking analysis of the decisions of the Judiciary in relation to electoral

disputes for the last fifty-six years. He opines that whereas the Judiciary has made many decisions which are consistent with the ideals of free and fair elections, the pre-dominant approach to electoral dispute resolution both before and after the adoption of the 2010 Constitution has entailed making superficially sound but disingenuous and deeply flawed decisions. This approach, which he refers to as 'legal sophistry' has prioritised legal and procedural technicalities over the determination of serious questions on the validity and integrity of elections, led to the adoption of impeachable case law from other jurisdictions and seen a manipulation of the law in favour of the incumbency. He contends that legal sophistry is antithetical to the transformative agenda of the 2010 Constitution and the requirement that the Judiciary promote the principles and values of the Constitution and determine disputes without undue regard to technicalities. He cautions that this approach, if untethered will continue to encourage electoral fraud and malpractice, support unjust outcomes such as judicial affirmation of flawed elections and undermine the public's confidence in the courts as impartial and honest arbiters of electoral disputes.

Melissa Mungai picks up the dialogue on the war on corruption but takes a different tangent by exploring the possibility of using private prosecution as an alternative tool in the anti-corruption effort. Her paper evaluates judicial decisions on the circumstances under which a person can institute private prosecutions where the Office of the Director of Public Prosecutions has failed to do so. She makes the argument that private prosecutions could prove a useful tool where prosecutorial discretion hinders the anti-corruption effort by providing a check against the abuse of this discretion. The paper draws on the experience from South Africa's independent private prosecutions unit established under the aegis of AfriForum and advocates the enactment of the Kenyan Private Prosecutions Bill 2007.

The second article by JV Owiti reviews the scope of the right to bail in Kenya, with particular reference to corruption and economic crimes cases which are handled by the Anti-Corruption and Economic Crimes Division of the Magistrates' and High Courts. He reviews the constitutional and statutory provisions on the right to bail and assesses these provisions against the practice of the courts, particularly in relation to the recent arrests of high profile government officials in relation to corruption and economic crimes. The tensions prevalent between the need to give bite to the fight against corruption versus the protection of the rights of accused persons is well articulated in this paper.

Walter Khobe reviews the constitutional and statutory design for Kenya's constitutional design for independent commissions and offices as mechanisms

for promoting accountability. The paper proceeds on the assumption that institutional design determines the effectiveness of these mechanisms in promoting accountability. The paper therefore critically analyses the extent to which these ostensibly independent institutions are capable of delivering on their mandate and promoting independence, accountability and effectiveness as they are currently designed.

Irungu Kang'ata *et al* provide an interesting study on hate speech as a tool of ethnic mobilisation and the relationship between an indictment for hate speech and re-election. They argue that despite the prohibition on hate speech in the Constitution and the National Cohesion and Integration Act, the institution of hate speech charges against a sitting Member of Parliament seemingly boosts their re-election chances, especially depending on the timing of the prosecution and the extent of media attention given to the case. The authors express concern that this trend negates the objectives of the prohibition of hate speech and corruption.

Humphrey Sipalla reviews Egypt's reservations to the African Charter on the Rights and Welfare of the Child with a focus on the reservations to the African Committee of Expert's on the Rights and Welfare of the Child's competence to receive communications and the reservation to the provision granting the Committee competence to undertake investigations in state parties. He delves into the question of the extent to which a state can validly reserve its consent to be bound by a treaty body and reviews the validity of jurisdictional reservations. The paper assesses the contentious question of the validity of jurisdictional reservations, whether such reservations can be severed from other reservations and evaluates how international law has attempted to resolve these challenges.

Johana Gathongo's article assesses inequality and unfair discrimination against the legal development of protection against discrimination in recent years. He argues that despite these legal developments, discrimination still persists in the workplace, in part due to the narrow scope of section 5 (3) (a) of the Employment Act 2007 in its prohibition of unfair discrimination. This is because the said section limits unfair discrimination to the grounds listen therein. The author reviews other gaps and inadequacies in the legislation and proposes a more effective wording for the impugned section 5(3) (a).

This publication would not have been possible without the generous support of the fellows of the Centre for Jurisprudence and Constitutional Studies (CJCS) and our peer reviewers. The peer review process ensures that the Journal maintains the highest standards of academic integrity and excellence. The editors would

particularly like to convey their thanks to the following reviewers: Mr Walter Ochieng, Mr Benard Manani, Ms Emily Kinama, Mr Joseph Omolo, Mr Dudley Ochiel, Mr Charles Kanjama, Mr Steve Ogolla, Ms Musu Bakoto-Sawo, Ms Irene Maithya, Dr Godfrey Musila, Mr Isaac Kiarie, Mr Vincent Mutai, Ms Mercy Obado, Ms Rahab Wakuraya, Ms Mary Kinyanjui, Ms Evelyne Asaala, Mr Jared Gekombe and Mr Justus Otiso.

Special thanks go to the Editor-in-Chief, Mr Elisha Ongoya, for his editorial guidance, and unwavering commitment to ensuring that the JLE remains true to the original vision for the publication. In particular, I am grateful for his support towards ensuring that this edition carries a vibrant debate on the thematic area. My gratitude also goes to the Editorial Board comprising Ms Julie Lugulu, Mr Benard Manani, Mr Joseph Omolo and Ms Rahab Wakuraya for their support in the editorial process and their contribution towards strengthening the publishing tradition at Kabarak Law School. This edition is richer with their contribution. We are also grateful to the Dean of the Law School, Dr Fancy Too, for her overarching administrative support which ensures that the publication culture grows in an unfettered fashion.

The JLE is joined this year by another publication from the KLS editorial menu: the African Journal of Commercial Law. This is the flagship publication of the Centre for Commercial Law and ADR. We are excited by the continued growth in the publishing tradition at KLS and we look forward to bigger and better things ahead.

Lucianna Thuo
Managing Editor