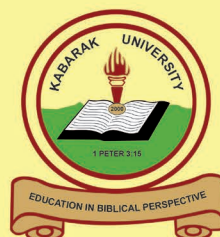


Kabarak Journal of Law and Ethics

Volume 5, 2020

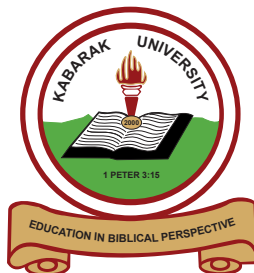
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Kabarak University School of Law



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EDITORIAL NOTE

It gives us great pleasure to once more present to you the latest edition of the Journal of Law and Ethics. Judging by the number of draft articles received by our editorial team and the number that finally made it to this volume, it would appear that despite the various challenges brought about by COVID-19, the academy remains vibrant and good governance remains a shared aspiration.

The JLE continues to distinguish itself as the leading publication on topical governance issues and in this edition, the array of issues covered spans from the exercise of jurisdiction by the Supreme Court of Kenya to regulation of cartels, taming the excesses of discretion in public procurement, public participation in county budgeting processes, improving fisheries regulation, creating accountability in county government impeachment processes and even the BBI process, one of the issues that has stirred up heated debates since 2018. The breadth of issues covered is not limited to Kenya but also extends to other countries in the region. Two articles in this edition enlighten us on the concept of plea bargaining and the extent of youth political participation rights as they apply in Nigeria. By dint of this expanse, our readers will have the benefit of understanding governance issues in the context of the wider African region.

This journal is renowned for hosting vibrant scholarly debates, a tradition which has so far encouraged scholars in the area of good governance to exchange seminal ideas on topical issues such as the horizontal application of the Bill of Rights, the changing nature of administrative law since the introduction of the 2010 Constitution, the jurisprudence of the Supreme Court on the integrity of the electoral process and the place of judicial activism in the enforcement of Chapter Six of the Constitution. This edition remains true to that tradition.

This year's debate, led by Walter Khobe, addresses the pertinent issue of the jurisdictional remit of the Supreme Court of Kenya in the interpretation and application of the Constitution under article 163(4)(a) of the Constitution, the exercise of which has caused no small controversy particularly in election appeals. Contrary to the hue and cry that commentators have levied against that court to

the effect that the court has arrogated to itself powers beyond those intended by the drafters of the Constitution, it is Khobe's assertion that, in fact, the Supreme Court has always acted within the bounds of the jurisdiction constitutionally conferred on it and not outside its scope.

Ian Mathenge strongly disagrees with Khobe, particularly, on the Supreme Court's jurisdiction to interpret and apply the Constitution. He criticises the apex court's exercise of jurisdiction in this regard, since the court has extended its constitutional jurisdiction to a category of disputes arising from what is referred to as 'normative derivative legislation', which in his view is derived from a fallacious conclusion that statutes which give effect to the Constitution change character from ordinary to special legislation. It is his contention that contrary to the assertion by the apex court, there are no constitutional statutes that enjoy a special character in Kenya, since laws acquire character not by their content but by their hierarchy in the formal legal system. He questions the wisdom of interpreting jurisdictional clauses widely as this gives room for courts to redefine their functions. From his review of some of the court's controversial decisions, it is his conclusion that the court's approach to the question of normative derivatives demonstrates a lack of coherence.

Denis Moroga echoes Mathenge's sentiments and while acknowledging that the Supreme Court's jurisdiction to interpret and apply the Constitution is embedded in the Constitution, he posits that invocation of the normative derivative doctrine as a basis for exercising appellate jurisdiction, particularly, in respect of electoral disputes, is inconsistent with a holistic reading of the Constitution and Kenya's electoral laws. He contends that the *sui generis* nature of electoral disputes coupled with the Supreme Court's capacity constraints are factors which tilt the scale away from a blanket application of the doctrine in exercise of appellate jurisdiction in election petitions. He urges the apex court, in the interests of upholding the transformative intent of the Constitution, to not acquiesce to any future invitations to exercise appellate jurisdiction in election petitions under the guise of interpreting and applying the Constitution.

Evans Ogada rounds off the debate by evaluating Khobe's arguments against the jurisdiction granted to the Supreme Court. His paper assesses how this jurisdiction is to operate in a democratic context. He concludes that the Supreme Court's claim to a derivative jurisdiction is conceptually dangerous and unsustainable under the Constitution.

Mukami Wangai *et al* continue the appraisal of the Supreme Court's exercise of jurisdiction by scrutinising its decision to nullify the presidential election result in 2017. Their paper takes a rights-centric approach in faulting the court's reasoning in its decision to nullify the election. They impugn the court for not being conscious of the people's sovereignty which, if it had been taken into account, would have led the court to question whether the election result expressed the will of the electorate. The authors contend that the court's standard on nullification of an election is inadequate and has undermined the court's institutional integrity and make recommendations on how the court may ameliorate the situation.

Paul Ogendi reviews the legal and institutional framework for the management of fisheries in Kenya. He notes the steady growth of fisheries institutions in Kenya under the 2016 Fisheries Management and Development Act. However, he contends that the proliferation of institutions will not result in better delivery of their mandates without the requisite rules being put in place. He calls for a review and updating of the Fisheries policy to bring it in line with the present legislation and the African Union (AU) Africa Blue Economy Strategy, 2019, an amendment to the Fisheries Management and Development Act (FMDA), and a streamlining of the mandates and functions of the institutions with a mandate in the fisheries sector.

Bamisaye Olutola brings an international dimension to this edition by reviewing the political participation levels in Nigeria against the right to political participation of youths under international human rights law. With a focus on the African human rights system and current developments in Nigeria, the author makes the argument that the youth's right to political participation should not be different from that of other adults in any state despite the differential treatment accorded to youths in the exercise of their political rights by most African states, contrary to international standards. He urges states to bring their practices in line with international law by allowing all persons who have attained the age of majority to exercise their full political rights without discrimination on the basis of any prohibited ground.

Mutemi Mbila and Edmond Shikoli review Kenya's competition law regime, with a view to analysing how it regulates cartel conduct both as conduct that is morally reprehensible and illegal. The authors assess the jurisprudential underpinnings of a moral wrong and the norms which form the basis of prohibiting cartel conduct. They conclude by demonstrating that since cartel conduct is morally reprehensible and illegal, the Competition Act is justified in sanctioning cartel conduct both on a moral and on a legal basis.

Muthomi Thiankolu, a keen advocate of interdisciplinary approaches to law, champions the use of economics and administrative law to achieve balance and resolve conflicts between the economic and social objectives pursued in public procurement. He begins by acknowledging that while the pursuit of both economic and social policy objectives is a necessary and often inevitable goal of public procurement regulation, the pursuit of these two sets of objectives creates conflicts and dilemmas, and the exercise of discretion by government officials in determining the extent and the ends for which they can use procurement as a tool of economic or social policy is amenable to abuse. He, therefore, advocates for the use of the twin disciplines to not only address conflicts but to also address incidences of corruption, favouritism and other forms of malfeasance in public procurement decision making due to their rule-based approach to public procurement regulation and decision making, characterised by circumscribed discretion and commitment to the values of competition, transparency and accountability.

Julius Edobor and Faith Osadolor provide our second article appraising the Nigerian legal system. They commend the use of plea bargaining in Nigeria's criminal justice system. Their review compares the historical development of the concept in the US and some Common Law jurisdictions where it has gained prominence against the practice of plea bargaining in Nigeria. After reviewing the issues arising from the practice of plea bargaining in Nigeria, they make recommendations, predicated on the Administration of Criminal Justice Act (ACJA), 2015 which has been domesticated in some States in Nigeria, on how the practice of plea bargaining can be improved in Nigeria.

Leonard Mwakuni tackles yet another governance mechanism that has grown in prominence since the 2017 elections: impeachment procedures. The author calls for a transparent procedure for the removal of county governors to avoid political uncertainty and controversy. Since the law gives the county assembly and the Senate prominent roles in these largely quasi-judicial processes, he cautions that recent experiences have demonstrated that the impeachment processes are prone to political uncertainties and controversies, and abuses by both the respective county assemblies and the Senate. It is against this backdrop that the role of the superior courts in the removal process becomes critical, as these courts protect the rights of persons subjected to the removal process by interpreting the relevant laws, ascertaining whether the grounds for removal have been substantiated and the removal process followed. In his assessment, most of the impeachment proceedings, so far, have breached the laid down procedure and have been based on unsubstantiated charges and the court has therefore been called upon in

certain instances to correct the abuse of powers by the political bodies. Besides unpacking the *sui generis* (political, constitutional, and quasi-judicial) nature of the impeachment process, the author evaluates the extent to which superior courts been effective in their supervisory role of checking against abuse of power in this regard.

Maurice Jumah Okumu follows up the discussion on accountability in county governance by appraising the legal and administrative framework for public participation in county governments in Kenya. The author begins by laying the groundwork on the legal and administrative framework for public participation in counties' budget-making processes. He then analyses the effectiveness of the existing framework for public participation in budget making and concludes by offering comparative perspectives on lessons that Kenya can draw from Brazil and South Africa.

David Ngira concludes this edition by offering some reflections on the ongoing Building Bridges Initiative (BBI) process. He contextualises the BBI process in the ongoing constitutional review processes. He cautions that the process is fundamentally flawed in light of constitutional theory and points out some of the consequences that would claw back on any gains made in the process. He also fleshes out the role of depoliticisation in the achievement of the BBI committee's objectives and ends on a positive note by highlighting some positive aspects of the process.

As always, we remain committed to the highest standards of academic integrity, a feat which can only be achieved with the generous support of experts and thought leaders in the thematic areas covered in each edition. In this regard, we would like to extend our heart-felt gratitude to the following experts who served as peer reviewers for this edition: Dr Jegede Ademola, Dr Bamisaye Olutola, Dr Azubike Onuoro, Mr Adebayo Alowoludu, Ms Petronella Mukaindo, Mr Joshua Mbinda Ngulu, Mr Bernard Manani, Mr Vincent Mutai, Ms Ruth Mosoti, Ms Jaini Shah, Mr Denis Moroga and Mr Maurice Oduor and many other people who spared time to improve the quality of this manuscript.

We also wish to extend our gratitude to the Kabarak University management which has continued to support the publishing tradition at KLS and to allow it to grow in an unfettered fashion.

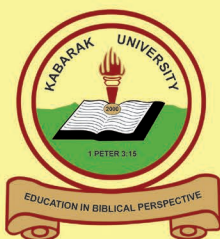
In the journey of coordinating editorial activities that delivered this volume, I did not walk alone. I enjoyed the company of two great people: Mr. Elisha Ongoya and Ms. Lucianna Thuo. These gentle souls have been key pillars in the schools

research and publication enterprise. I salute your stewardship of the ship so far and I have no doubt that in the hands of Mr. Edmond Shikoli, the vessel is in safe hands.

Finally, we are pleased to see that the KLS publishing stable has birthed a new publication, with the newest entry, the East African Community and Regional Integration Journal being launched this year. This biennial publication joins the African Journal of Commercial Law launched in 2019. We remain committed to providing multiple publishing platforms to allow our readership to have their pick and broaden opportunities for the academy to publish. We commend and heartily congratulate the editorial team for making this vision a reality.

We wish you a happy and enlightening reading of this volume.

Omolo J.A.
Issue Editor



Published by:
Centre for Jurisprudence and Constitutional Studies,
Kabarak University, School of Law,
Private Bag-20157, Kabarak.
Telephone 020-2114658, 0729-223370, 051-2343234/5

ISSN 2707-1596



977-2707-1596