

Foreword:
Kabarak Law Review as a vanguard
of radical legal scholarship

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I am honoured to have been invited by the *Kabarak Law Review* Volume 2 (2023) student editors to write this foreword. *Kabarak Law Review* has emerged as an important scholarly journal publishing cutting edge scholarship from its students, faculty and leading scholars. In this issue for example, Professor Issa Shivji, one of Africa's foremost scholars, has an article in response to an inaugural lecture by Professor Justice Willy Mutunga, Chief Justice Emeritus and Professor of Public Law, Kabarak University.

That article together with Marion Joy Onchangwa's exchange with Professor Willy Mutunga, and Nadya Rashid's article reflecting on radical legal education in Kenya further demonstrates *Kabarak Law Review's* pre-eminence as the scholarly home of radical legal education in Kenya. As a law student at the University of Nairobi in the very turbulent late 1980s and early 1990s, with many of my peers, I thirsted for a radical legal education. For example, then conservative law professors like Jackton Boma Ojwang would intimidate students who confronted his defense of one-party rule by asking them to stand-up in class when they asked him probing questions. Professor Jackton Boma Ojwang defended one-party rule, in part arguing that whether

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or not Kenya should be a one-party state was a political and not a legal question. That question he argued, could not be discussed in his class on constitutional law.

The Faculty of Law at the University of Nairobi was so divided on this question of whether the then Section 2A of the 1969 Constitution of Kenya should be repealed that the teaching of constitutional law course was divided between Professor Jackton Boma Ojwang who defended one-party rule, on the one hand, and Professor Kivutha Kibwana who argued that Section 2A should long have been repealed to usher in multi-party democracy, on the other.¹ Professor Kivutha Kibwana invited Professor Githu Muigai to give a lecture or two in the class the year I took constitutional law. Professor Muigai taught us about the Constitution as a social contract. Both Professors Kibwana and Muigai gave us rather different views of the 1969 Constitution of Kenya than those of Professor Ojwang. I ended up being a research assistant for both Professors Kibwana and Muigai. This is another way of saying how influential our teachers are to our legal education and our career choices. Like Professor Kibwana and Muigai, I ended up studying in the United States for my graduate education, unlike Professor Ojwang who went to one of the bastions of conservative legal education, Cambridge University in the United Kingdom.

As a student, I wished to have had a journal like the *Kabarak Law Review* and to have intellectual leaders of radical legal education like Professor John Osogo Ambani and Humphrey Sipalla. It is a tribute to

¹ See for example, Kivutha Kibwana's critique of Jackton Boma Ojwang's argument in favour of extra-judicial executive power in a one party state to get a sense of the constitutional debates of the late 1980s early 1990s, Kivutha Kibwana, 'Legal limits of executive power in a one-party state,' *Nairobi Law Monthly*, available here: <https://nairobi.lawmonthly.com/legal-limits-of-executive-power-in-the-african-one-party-state/> (concluding that 'if we defer to Ojwang's formulation of legitimate exercise of executive extra-judicial power, his concept could be used as a reliable ally to bolster dictatorship,' *id.*) For an extended analysis, see James Thuo Gathii, 'The contested empowerment of Kenya's Judiciary, 2010-2015: A historical institutional analysis, Sheria Publishing House, 2016, especially chapter 5 tracing how activist lawyers litigated in a repressive one-party state-controlled judiciary in the 1980s and 1990s thereby creating the foundations for the 2010 Constitution of Kenya.

Kabarak University School of Law to have on its faculty such scholars, not to mention Professor Willy Mutunga, Professor Sylvia Kangara and other icons of radical legal education. The time is gone when law teachers who are challenged by students who hold more radical views than them proceed to intimidate, embarrass or to retaliate by giving them low grades. Without many generations of radical law teachers from the late Professor Shadrack Gutto, to Willy Mutunga, to Kivutha Kibwana and Kathurima Inoti who suffered detention without trial or who had to flee the country, the 2010 Constitution may not have been possible. Indeed, without radical legal publications like Gitobu Imanyara's *Nairobi Law Monthly*, the seeds of radical legal thought during the dark days of one-party rule may have been stamped out forever. Even more, without radical legal practitioners like Martha Karua, Martha Koome, James Orengo, John Khaminwa Khaminwa, Kamau Kuria, Pheroze Nowrjee, and others like them, radical legal thought would have long been buried under the weight of the repressive forces of the Moi dictatorship and succeeding governments.

Further, there are many unsung heroines and heroes of Kenya's, and indeed of the broader African legal academy whose vast and important contributions remain unknown and uncelebrated. In the 'Honour Your Elders' Section that has become a regular feature of the *Kabarak Law Review*, Elvis Mogesa Ongiri revisits the distinguished career of Taslim Elias Olawale who rose through the ranks of the Nigerian legal establishment to become the President of the International Court of Justice. Ongiri's article continues the radical legal education thread that runs through this issue of the *Kabarak Law Review* because of the critical lens through which he uses to analyse Olawale's contributions to international law.

When I studied international law at the University of Nairobi, the course was a dry doctrinal course and when I tried to ask why rules were skewed in a particular way in class, I was shut down. Hence, articles like Ongiri's are important. As a related point, as an international lawyer, I was pleased to see the articles on jurisdiction conflicts between the World Trade Organisation and other international trade dispute

settlement bodies (by Samson Muchiri) and civilian protection under Common Article 3 of the Geneva Conventions (by Kevin Kipchirchir). As a student at the University of Nairobi in the late 1980s and early 1990s, I did not have the exposure or guidance to have been able to write articles in these two areas.

The foregoing observations in my view go to show why journals like the *Kabarak Law Review* are important for providing students the opportunity not to be solely dependent on the information that comes from law teachers especially where that information is dated or merely doctrinal. Unlike in the early 1990s when I graduated from the University of Nairobi, students are no longer dependent on a few printed copies of primary texts (often held by teachers or in reserve in the library or their illegal copies!) or for that matter the information provided to them in class. The internet and online access – including on Afronomicslaw.org for international law – ² have changed the landscape, opening up previously unavailable sources and perspectives to students.

Further, *Kabarak Law Review* is freely available online further enhancing its utility in producing locally relevant knowledge that is not parochial or removed from the global production of knowledge. All the articles published in this Issue engage with some of the latest thinking in their respective subfields. I raise this point to emphasise why journals like these are needed. African universities have been too dependent on books and materials produced in Europe and the United Kingdom in particular. This is not because the United Kingdom, Europe – or North America for that matter – have the monopoly in producing legal knowledge. It is simply a colonial legacy that has to be sharply rejected.

We do not need Europe and Europeans, or for North Americans or non-Kenyans to continue to dominate the shelves of Kenyan law libraries and the pages of the journals and materials that they use to teach their students. After 60 years of independence from colonial rule, there is a tonne of scholarship and materials produced by Kenyans,

² See <https://www.afronomicslaw.org/> (is to amplify the voices and issues that are not often part of the conversation in international economic law relating to Africa and the Global South)

Africans or scholars from the Global South that are more relevant to our context and circumstances. Where there are gaps, it is upon us as scholars to identify them and produce the materials to fill those gaps in all subjects of law. African universities must not simply be conduits for the reproduction of knowledge products of the United Kingdom or other external sources.

The recent flourishing of law schools in Kenya sits in a major tension with the paucity of locally relevant publications. Every time I speak to a founding Law Dean of one of these schools, they emphasise how much money they had to spend to buy volumes upon volumes of English books to be in compliance with the Council of Legal Education's accreditation standards. There is no emphasis on stocking locally relevant legal knowledge. The standards merely provide that the libraries have stocked five legal titles per unit and the universities must spend at least 5% of their recurrent budget on libraries. These standards need to be changed to emphasise the production of locally relevant legal materials.

However, they can best be changed when there is a credible and significant amount of scholarly productivity that reflects our local circumstances. This is not an easy task when government support of higher legal education has continued to dwindle and the privatisation of education – making it a profit-making venture – has taken hold. It is this huge reduction in public spending and the privatisation of legal education that is undermining and undercutting the growth of domestic content in legal education. *Kabarak Law Review* is an example of rejecting legal education that is not relevant to our circumstances and instead embracing local legal content in a radical legal tradition. I hope Kabarak University continues to embrace and build on this trajectory so that it can become its exemplar for other universities in Kenya and indeed in Africa and the Global South.

Beyond international law, there is also a focus of domestic law in this issue. For example, Christine Wanjiku's essay examines the effectiveness of the investigative powers of the Independent Policing and Oversight Authority, (IPOA), in light of the fallen Kianjokoma Brothers, one of whom was a student at Kabarak University School of

Law. Wanjiku argues that given its institutional design, IPOA was set up for failure in exercising its mandate of promoting police accountability. This article is yet another tribute to radical legal education that has a very personal connection to Kabarak University, again illustrating the simple truism that merely teaching and writing about law in its abstract black letter approach is a profoundly alienating and decontextualised exercise removed from our lived realities.

The final section of the journal features a case commentary of the Supreme Court of Kenya's decision in *JOO V MBO* by Marvis Ndubi. The commentary analyses the dilemma in the division of matrimonial property in divorce. It argues that the dilemma arises because there is no predictable formula for sharing matrimonial property as well as due to the vagueness in of Article 45 (3) of the 2010 Constitution of Kenya. To resolve this dilemma, Ndubi proposes merging the 50:50 distribution formulae and the division based on contribution approach.

All the articles in this Issue continue to illustrate the *Kabarak Law Review's* commitment to fostering academic rigour, and advancing Afrocentric legal scholarship following a radical trajectory. I warmly welcome this issue of the *Kabarak Law Review*.

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