

THE EAST AFRICAN JUDGES AND
MAGISTRATES ASSOCIATION

EAMJA NEWS



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The East African Judges And Magistrates Association Conference On Human Rights In East Africa

MAY 17 – MAY 22
2010 AT NGURDOTO
MOUNTAIN LODGE,
ARUSHA, TANZANIA



EDITOR'S NOTE

This is a special edition of the EAMJA publication which has been published through the collaborative efforts of our willing partners ICJ Kenya Chapter. It is a follow up to the EAMJA Annual Conference held on May 17th to May 22nd 2010 at the Ngurdoto Mountain Lodge in Arusha, Tanzania. It gives a summary of the presentations made at the said conference. The theme of the conference was "The Role of the National and Regional Courts in Protecting Human Rights."

We were honoured with the attendance of The President of the Republic of Tanzania, His Excellency, Joe Kikwete, who officiated the conference and urged the judiciaries of the East African States to be responsive to the new economic, social, cultural and political realities. On behalf of the EAMJA council we take this opportunity to appreciate His Excellency the President for his attendance and well delivered speech. We thank the three Chief Justices of Kenya, Tanzania, and Uganda who were present throughout the duration of the conference for their open support and commitment

to the growth of this association. Our host Hon. Chief Justice Ramadhan informed us that he was due to retire as the Chief Justice of Tanzania. We would like to take this opportunity to wish him well in his retirement.

The organizing committee did exemplary work and selected a perfect venue for the conference. We recognise the President of EAMJA Justice Fred Ochieng for his able leadership of the association. We are grateful of their efforts. We thank our partners and co sponsors of the conference ICJ Kenya for the support that they have given to the association. I single out the efforts made by Elsy Sainna who took up this publication as her own personal project. It is however unfortunate that the treasurer of the Association Justice Eliamani Mbise passed on shortly after the conference and was buried at her home in Arusha. She served the association from its formation with dedication and commitment. We recognize the efforts she made to grow and better the association. A speech was read on our behalf to the family, passing on our message of condolence. The late Lady

Justice Mbise is survived by three children and we pray that the Almighty will see them through in life.

Rwanda and Burundi have now joined the East African Community and we had participants at the conference from those countries. We welcome them on board as members of EAMJA. We look forward to their contribution that will surely be beneficial to all.

The next EAMJA conference will be held in Uganda in next year, 2011 on dates to be announced later. The subsequent EAMJA publication will be themed to the next conference. We invite you to send in your articles to the respective publicity secretary in your countries. You are all encouraged to visit the EAMJA website at www.eamja.org for more information on the association and current events.

Thank you all and God bless.

**Hon. WINFRIDAH BOYANI
MOKAYAH
PUBLICITY SECRETARY EAMJA**

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PRESIDENT'S ADDRESS

The 8th East African Magistrates' and Judges' Association Conference and Annual General Meeting was a great success with approximately 250 delegates from the five East African countries. Special mention must be made of the inaugural attendance of the Honourable Judges each representing Rwanda and Burundi.

Let me thank the dedicated members of the Judges and Magistrates Association of Tanzania (JMAT) for their willingness to give their time and talents, but most of all the warm hospitality. They raised the standard of hosting the EAMJA conference and their role in organizing the conference made it not just a success but a memorable one too. Special thanks also go to the Honourable the Chief Justice of Tanzania Augustino Ramadhani. To the EAMJA Council, I say a very big thank you for your hard work and dedication.

Sadly, we lost one of our council members who played a key role in facilitating the conference, the Honourable Lady Justice Eliamani Mbise who fell ill at the start of the Conference in May and passed away in June 2010. On behalf of EAMJA, I extend my sincere condolences to the family and judicial fraternity in Tanzania.

Wilfreda Mokaya, the EAMJA Publicity Secretary has worked hard to put this newsletter together, incorporating some of the papers presented; and I do appreciate her efforts.

My heartfelt appreciation goes out to the speakers who worked hard to prepare their papers, and also to discussants who ably steered the deliberations from the floor. The theme of this year's conference was "Human Rights In East Africa"; and these were the recommendations made by the delegates:

1 National courts of the East African Community (EAC) Partner States are urged to be mindful of the requirement to make references to the East African Court of Justice (EACJ) concerning the interpretation and application of the EAC Treaty and Protocols.

2 National officials and EAC organs are urged to ensure uniformity and consistency of interpretation of the EAC Treaty through the EACJ. To this end creation of parallel judicial and quasi-judicial bodies should be avoided.

3 East African Community law should be taught to students at universities and law schools and as continuing education to the Bench and the Bar throughout East Africa.

4 EAMJA should seek to participate appropriately in the ongoing debate about establishing a Tripartite Community embracing the East African Community (EAC), the Common Market for Southern Africa (COMESA) and the Southern African Development Community (SADC) with a view to contributing

to the definition of the states and jurisdiction of the court(s) of the Tripartite Economic Community.

5 Recognizing the need for all citizens to have access to justice, each partner state should have a clear policy and a comprehensive legal framework on legal aid. Specifically, the policy should address the need to accommodate victims of crime in the legal aid schemes.

6 Judiciaries should encourage and support the establishment of legal aid centres that provide outreach services and enhance access to justice, especially for people living in poverty and other vulnerable groups.

7 Recognizing that judiciaries have limited platforms from which they can speak, there is need for them to actively explore ways in which to maximize the use of those platforms. For example, since judiciaries speak through judicial pronouncements, they should ensure that these are available widely and on a timely basis. Other media, such as press briefings, open days and awareness

campaigns, should also be utilized to explain how courts work and the limitations they face in the dispensation of justice.

8 The Academia and the Judiciary need to co-operate in conducting comparative study on Constitutions for East African Community partner states and decisions on human rights in order to advance the development of human rights jurisprudence in East Africa.

9 Without compromising judicial independence, judiciaries need to co-operate with the Media and Civil Society in creating awareness among the people on protection and promotion of human rights.

10 Recognizing the role of courts in ensuring political stability especially during and after elections, the judiciaries should put in place a preparedness strategy for expeditious resolution of electoral disputes. In this regard, the governments in the EAC partner states are urged to provide adequate financial resources.

Apart from the resolutions, there were three main highlights from the conference. For the first time in the history of the conference it was opened by a president. His Excellency the President Jakaya Kikwete graced the occasion and delivered an apt speech in line with the conference theme. The other two highlights for EAMJA Council were the launch of the EAMJA Strategic Plan 2008-2013, and the launch of the EAMJA website www.eamja.org which members are encouraged to visit. The strategic plan can be viewed on the website.

I am tremendously honoured and privileged to serve as your Chairperson. And in all honesty, I can say that I am proud to

head EAMJA, whose membership includes Chief Justices, Court of Appeal Judges, High Court Judges and Magistrates. Thank you for your support and with your continued enthusiasm EAMJA shall soar!

Yours respectfully,

**Judge Fred Andago Ochieng
Chair-EAMJA**

SUMMARY OF PRESENTATIONS

THE ROLE OF NATIONAL AND REGIONAL COURTS IN PROTECTING HUMAN RIGHTS

PRESENTED BY MRS. FLORENCE SIMBIRI-JAOKO, CHAIRPERSON KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

The court is tasked with ensuring that the constitution and rule of law are protected, as well as being a guardian and expositor of fundamental rights. It therefore has special opportunities and responsibilities in the promotion and protection of human rights and the development of human rights jurisprudence.

Since the adoption of the Universal Declaration of Human Rights, intense standard setting and norm creation as well as the development of procedures and mechanisms for the promotion and protection of human rights has been witnessed at both the international and regional levels.

Africa has not been left behind and through the Banjul Charter has provided for a mechanism for



promotion and protection of human rights via the African Commission on Human and Peoples' Rights. The Treaty provides for Fundamental Principles that shall govern the achievement of the objectives of the Community. They include, among others, good governance, including adherence to the principles of

democracy, the rule of law, accountability, transparency, social justice, equal opportunities, and gender equality. In addition the African Court of Human and People's Rights has been established.

Regionally, the East African Court of Justice has been created under the East African Treaty, whose role is to ensure the adherence to law in the interpretation and application of and compliance with it. It has jurisdiction over the interpretation and application of the Treaty as well as other original, appellate, human rights and other jurisdiction, as will be determined by the Council at a suitable subsequent date.

In conclusion judicial officers should endeavor to ensure state commitments in the field of human rights a reality in the daily lives of citizens. The independence, impartiality and effectiveness of the judicial function should be jealously guarded with the clear understanding that any erosion of it can impact adversely on the overall human rights and governance framework of our communities.

THE ROLE AND PLACE OF MEDIA, CIVIL SOCIETY AND ACADEMIA IN SAFEGUARDING AND PROMOTING HUMAN RIGHTS IN EAST AFRICA

BY PROF. P.J. KABUDI, FACULTY OF LAW, UNIVERSITY OF DAR ES SALAAM

The Role of non-state actors in the promotion and protection of human rights is critical and crucial in ensuring that the state and state actors respect human rights and are held accountable for any violation against human rights committed by them.

The media in East Africa has been in the forefront of exposing human rights violations and therefore galvanising action against them. The media as part of the democratic institutions are crucial in the inculcation of the democratic culture that respects human rights. The civil society in East Africa

has played a critical role in bringing constitutional changes in East Africa and making the people aware of their human rights as well as galvanising action against violations. The growing robust and vigilant civil society in East Africa continues to play an important role in the development of human rights jurisprudence through legal aid schemes and taking up strategic cases to court.

The academia and academics in their teaching, research and offering public service have propounded and articulated issues that have contributed in the deepening of understanding of concepts of constitutionalism and human rights and their application in East Africa.

The constitutional and legal framework for promotion and protection of human rights in East Africa is based on a solid foundation. The ongoing constitutional reforms aimed at furthering democracy constitute a move on the right direction. Despite the ups and downs on the human rights situation in East Africa the Courts as guardians of the Constitution have played a positive role in vindicating human rights. The non-state actors have enabled many people to know their rights and have empowered them to seek redress against human rights violations in courts of law. The non-state actors have also pushed vigorously for constitutional reforms aimed at strengthening democratic institutions and protection and promotion of human rights in East Africa.

THE ROLE OF THE MEDIA, CIVIL SOCIETY AND INTELLECTUALS IN SAFEGUARDING AND PROMOTING HUMAN RIGHTS IN E. AFRICA

BY JOHN – JEAN BARYA, ASSOCIATE PROFESSOR OF LAW, MAKERERE UNIVERSITY, KAMPALA

The three actors (media, civil society and intellectuals) have some broad tasks that are common to them. All these actors are or should be interested in the popularizing and defending all the three generations of human rights. However civil and political rights are basic because they provide a basis for struggling for the others especially the socio-economic and cultural rights. While the intellectuals can define and articulate the issues around human rights, to have a broad reach and appeal the media and civil society would have to play a bigger role

All must work for a broad democratic framework and rule of law in the different countries because human rights of whatever nature cannot thrive in a dictatorship. In other words there is need for properly elected governments that strive to build institutions rather than rely on individuals or an individual. The latter concern is more obvious in the case of Uganda and Rwanda.

Of particular significance is the need to work for state institutions that see themselves and are seen by society as national institutions particularly the army, the police and the judiciary. The civil service and public enterprise bureaucracies must also be seen to be national rather than personal, or belonging to a narrow group in the nation. In this regard political, ethnic, religious or other criteria must be

minimized in the recruitment and appointment of personnel into all these state institutions. This is only possible if those holding state power accept the need for national institutions and if they do not then it becomes a broad political task to convince them or replace them.

Intellectuals have a responsibility to do research and move existing knowledge beyond the ordinary and pedestrian. Intellectuals (wherever located) should be a voice for change and progress. In this case they need to understand and translate concepts of human rights into contexts that East Africans can relate with. More particularly they need to identify those human rights that have not been enshrined in our constitutions and laws so that they become part of the political agenda. Of course there are also reactionary intellectuals: this paper is not speaking to those.

Intellectuals must also engage in public debate to shape public opinion especially on matters not so easily or commonly understood; for instance the majority of citizens in East Africa do not truly believe that the states owes them a duty to ensure all their rights are protected and actually enjoyed. Intellectuals should disabuse them of this notion and civil society and the media can then popularize it through mass communication.

On the other hand civil society can and should specialize in certain areas of human rights. The limitation in East Africa is that this has more been a

concern mainly of non-representative NGOs. But trade unions, Law Societies, organisations of professionals, farmers, artisans and organisations of all working people would be more relevant in articulating specific human rights issues. With all its weaknesses and limitations civil society can in alliance with political and (at times) progressive religious forces have an impact on specific human rights but also the broad democratic framework.

The media at the end of it all is the one concerned with popularization of human rights, identifying violations and violators and generally advancing the cause of human rights. This is why governments are interested in owning, controlling, censoring, or at times banning some media. It is the end point of the dissemination of ideas and propaganda. This is why journalists are harassed, imprisoned, charged with numerous offences, tortured and at times killed. Without an independent media there can be no articulation of issues of human rights violations. All democratic forces therefore must have an interest in defending media freedom.

In conclusion, it is obvious that civil society, intellectuals, and the media have a common interest in the definition, protection, and promotion of human rights. However they cannot act alone. They need to work with all those interested in human rights including but not limited to legitimate and progressive political parties, religious organisations and individual citizens.





ICJ KENYA'S EXPERT OPINION PAPER ON THE JURISPRUDENCE EMERGING FROM THE 2007 ELECTION PETITIONS

Elections are indeed an element of within the principle of rule of law; they are "...human rights events: first, because they give voice to the political will of the people involved; and secondly, because, to be truly free and fair...they must be conducted in an atmosphere which is respectful to human rights." An election petition represents a potential abuse of this basic constitutional right and as the final arbiter of the outcome of the electoral process the Judiciary has a weighty and solemn responsibility. However, as the allegations made by the petitioners betray, an election petition is only one part of a much longer process. To consider the role of the Judiciary in the electoral process one must consider the role of the Judiciary in the wider democratic process as well.

Election petitions predominantly revolve around the issue of service; respondents vehemently contest "any demonstration by the petitioner that the petition was properly served and thus demeaning election petitions to be rarely determined on the substance of the case but on the procedural questions of whether the petition is properly before the court.

In several cases, the importance of election petitions has been mentioned. It has been stated that election petitions are no ordinary suits. The court in several instances has said that though they are disputes in rem fought between certain parties, election petition are

nonetheless disputes of great public importance. This is because when elections are successfully challenged by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents' social and economic activities. The court has also stated that 'election petitions should not be taken lightly.' Instead of taking these positions to mean that the court ought to do its utmost to hear these applications promptly and on their merit because they involve the very democratic will of the affected people, it has taken this to mean that procedure must strictly be followed and the standard of proof must be relatively high and exactly achieved.

Concerning interpretation of the provisions of the National Assembly and Presidential Elections Act and its subsidiary legislation, the courts have continued to apply a strict interpretation of the provisions of statute.



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THE ROLE OF NATIONAL AND REGIONAL COURTS IN PROTECTING HUMAN RIGHTS AND DEVELOPING HUMAN RIGHTS JURISPRUDENCE: THE UGANDA EXPERIENCE

BY HON. MR. JUSTICE AMOS TWINOMUJUNI JUSTICE OF APPEAL, COURT OF APPEAL/ CONSTITUTIONAL COURT OF UGANDA.

All judicial power in Uganda is vested on the Uganda Judiciary by Article 126 of the Constitution. The protection and enforcement of the constitutional provisions on the human rights and freedoms is an exercise of judicial power and is to be exercised in accordance with the principles enshrined in the Constitution. However the main task of developing human rights jurisprudence falls on the three superior courts of record which are the High Court, the Court of Appeal/ Constitutional Court, and, the Supreme Court Experience in those two courts in the last fifteen years has shown that

a big percentage of cases filed in the Constitutional Court involve human rights issues. It is now well settled law that in the process of interpreting the Constitution and other legislation, human rights provisions of the law must always be treated as paramount in such away that where any law conflicts with a human right, such law must always give way and the human right be given precedence.

The Ugandan Constitution establishes a commission called Uganda Human Rights Commission whose main function is to investigate complaints against the violation of any human right. The Constitution sets up the Human Rights Commission Court which has the same powers as a court including the power to issue summons, question any person in respect to human rights violations and to

order any legal remedy or redress.

At the regional level, Europe, Americas and Africa have set up Commissions to enforce observance of Human Rights in those regions and a Regional Human Right Courts as arbiters and adjudicators on human rights related disputes, playing the same role at the regional level as National Courts play at the national level.

In the process these courts, especially those of the European and Americans have done tremendous work in the development of regional jurisprudence. The African Court of Human Rights is the youngest of them but it is hoped that it will play a very significant role in developing human rights jurisprudence in Africa.



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FACILITATING ACCESS TO JUSTICE THROUGH LEGAL AID; MODELS, LAWS, AND PRACTICES IN EAST AFRICA: A CASE OF UGANDA

BY MRS. HELLEN OBUWA,
SECRETARY UGANDA LAW
COUNCIL

Major international and regional conventions to which Uganda is a signatory, for example, the International Convention on Civil and Political Rights, the Convention on Economic, Social and Cultural Rights and the African Charter on Human Rights provide for the right to legal aid.

Legal aid is a human right and a key ingredient of the right to a fair hearing under Article 14 of the International Convention on Civil and Political Rights. The state as a key duty bearer to respect, protect, promote and fulfill human rights of citizens, is expected to provide legal aid to those who are unable to afford paid legal services to enable them seek legal redress. This obligation calls for a number of strategies including the establishment of functioning institutions and systems and enhancing access to legal aid.

Legal aid services in Uganda have for a long time been provided by both the State and non-state actors without any comprehensive policy backing from the Government. However, the right to legal

aid is contained in various laws including the Constitution, the Trial on Indictment Act, the Poor Persons Defence Act, the Magistrates' Court Act and the Advocates Act and Regulations relating to legal aid made thereunder.

The operational framework for the provision of legal aid is currently found in three main structures namely; the Justice Law and Order Sector (JLOS) on the supply side, the Legal Aid Basket Fund (LABF) on the funding side and the Legal Aid Services Providers Network (LASPNET) on the demand side.

Due to lack of a national legal aid policy and a comprehensive legal framework to guide legal aid service provision, legal aid services in Uganda are currently provided in an adhoc manner by state and non state actors. These actors use various models of service delivery that may not easily be categorized under the commonly known models in Africa such as the public defender, judicare and contract system.

Non-state actors providing legal aid include Civil Society Organisations, faith based organisations, humanitarian agencies, UN agencies, Community Based Organisations (CBOs), and International

Non Government Organisations (INGOs). Most of the legal aid service providers are largely issue or theme based depending on their mandate e.g. FIDA- rights of Women, Children; Platform for Labour Action- on rights of workers and labourers; Public Defender Association of Uganda- on rights of prisoners charged with capital offences.

The different models of service delivery used by non state actors include: legal aid clinics, out reaches, pro bono, and paralegal. Most of the providers offer both the primary and secondary legal aid under these models.

Non-state legal aid providers have been beset with a number of challenges which have limited their effectiveness, efficiency and impact. They include: inadequate funding, high staff turnover, limited capacity to conduct M&E, poor documentation of both financial records and activities, donor dependency, limited geographical outreach with no strategy for taking the services beyond the existing areas of operation and addressing quality issues coupled with lack of standards on legal aid which compromises quality of services delivered.

THE ROLE OF NATIONAL COURTS AND REGIONAL COURTS IN PROTECTING HUMAN RIGHTS AND DEVELOPING HUMAN RIGHTS JURISPRUDENCE

BY HON. JUSTICE HAROLD R. NSEKELA JUSTICE OF APPEAL, COURT OF APPEAL, TANZANIA AND PRESIDENT EAST AFRICAN COURT OF JUSTICE

The role of the courts in protecting human rights and in developing human rights jurisprudence, being at the regional or at the national levels is undisputable. At the national level, this role flows from the justification of the theory of separation of powers in a democratic society. Courts are established as forums to defend the people against the oppressive and unjust laws and practices, against laws and practices that are inconsistent with or in violation of the rights enshrined in the Constitution.

In Tanzania, the main means by which human rights abuses may be legally vindicated by victims is through the High Court. The High Court has played a significant proactive role in protecting human rights even when the Government was taking too long to provide for procedure for enforcement of human rights as enshrined in the Constitution.

The treaties establishing the regional courts do not necessarily have such a proclamation of rights. The Treaty for the Establishment of the East African Community (EAC) and the Treaty for the Establishment of the Southern African Development Community (SADC) share one common feature. They do not give an express human rights jurisdiction to the judicial bodies that they create.

However the former has been playing some sort of role –though arguably small- in the protection of human rights in East Africa. This role is expected to be more substantial after the Court's jurisdiction has been extended to human rights. The Draft Protocol to this effect is still under negotiations. Not to be left behind the Southern African Development Community Tribunal (SADC Tribunal) has concluded that it had jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law, which are the very issues raised in that particular application.

In conclusion the realization of human rights in the region will depend on the attitude of the judiciary towards the infringements and violations of peoples' rights by the State.

