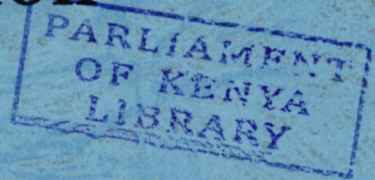


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REPUBLIC OF KENYA

Kenya Law Reform Commission



Seventh Annual Report

1st SEPTEMBER, 1988—31st AUGUST, 1989

PRINTED BY THE GOVERNMENT PRINTER, NAIROBI

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KENYA NATIONAL ASSEMBLY

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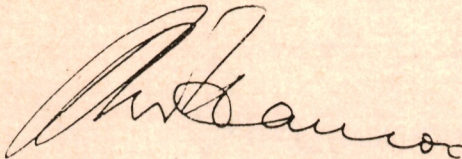
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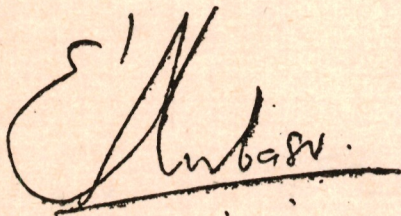
**KENYA LAW REFORM COMMISSION SEVENTH ANNUAL REPORT
1988-1989**

The Honourable Mr. Justice M. G. Muli, E.G.H., M.P,
Attorney-General's Chambers,
Sheria House,
P.O. Box 40112,
NAIROBI.

We the undersigned, having been appointed as Commissioners for Law Reform by his Excellency the President of Republic of Kenya, in accordance with sub-section (3) of section 3 of the Law reform Commission Act, Chapter 3 of the Laws of Kenya, have the honour to submit to you the Commissioners' Annual Report for the year 1988 to 1989.

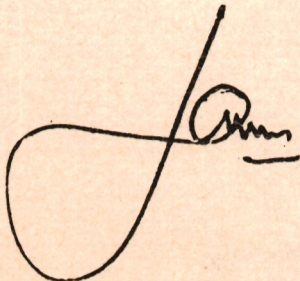


Hon. Mr. Justice A. R. W. Hancox—*Chairman.*

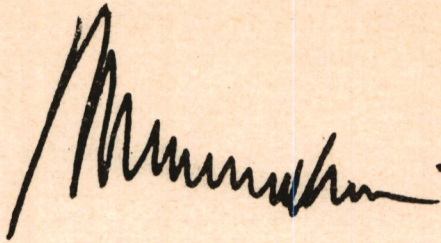


Commissioners

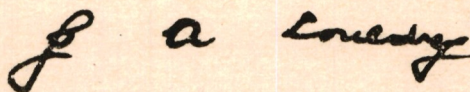
Hon. Mr. Justice E. O. O'kubasu.



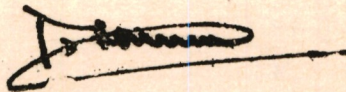
Hon. Justice Lady E. Owuor.

A handwritten signature in black ink, appearing to be 'G. K. Waruhiu', written in a cursive style.

Mr. G. K. Waruhiu.

A handwritten signature in black ink, appearing to be 'J. A. Couldrey', written in a cursive style.

Mr. J. A. Couldrey, O.B.E.

A handwritten signature in black ink, appearing to be 'J. F. H. Hamilton', written in a cursive style.

Mr. J. F. H. Hamilton, C.B.E.

A handwritten signature in black ink, appearing to be 'E. O. Abang', written in a cursive style.

Mr. E. O. Abang—Secretary.

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**THE LAW REFORM COMMISSION ACT CAP. 3, LAWS OF KENYA
SEVENTH ANNUAL REPORT TO THE HON. ATTORNEY-GENERAL
UNDER SECTION 3 (3) OF THE ACT**

SECTION I

CHAIRMAN AND COMMISSIONERS, PROFESSIONAL AND ADMINISTRATION STAFF

The Commissioners for Law Reform and the Secretary to the Commission have remained the same as recited in the Annual Reports for the years 1985 to 1986, 1986 to 1987, and 1987 to 1988. Since the period for which this report is compiled the Honourable Mr. Justice A. R. W. Hancox has been appointed Chief Justice by Gazette Notice No. 4460 of 1989 to replace the late Honourable the Chief Justice Mr. C.H.E. Miller who passed away on 5th September, 1989. The Hon. Mr. Justice E. O. O'kubasu. was appointed to replace the Honourable the Chief Justice as Chairman by Gazette Notice No 4940 of 1989. The other Commissioners are:

The Honourable Mrs. Justice E. Owuor.

Mr. G. K. Waruhiu.

Mr. J. A. Couldrey, O.B.E.

Mr. J. F. H. Hamilton, C.B.E.

A profile of the Commissioners is set out in the Sixth Annual Report.

Professional Staff

Mr. E. O. Abang, Secretary LL.B (Hons), Advocate of the High Court of Kenya.

Mrs. V. W. M. Kattambo, LL.B (Hons), LL.M., Advocate of the High Court of Kenya, Principal State Counsel.

Miss E. A. Olago, LL.B (Hons), Advocate of the High Court of Kenya, State Counsel.

Miss C. W. Munyao, B.A. LL.B (Hons), Advocate of the High Court of Kenya State Counsel.

Mrs. Z. N. Ndegwa, LL.B. (Hons), Advocate of the High Court of Kenya, State Counsel.

Mrs. N. W. Waweru, LL.B. (Hons), Advocate of the High Court of Kenya, State Counsel.

Mr. W. Nyarima, L.L.B (Hons) Advocate of the High Court of Kenya, State Counsel.

(There are two additional qualified officers assigned to the Commission since the period for which this Report is compiled, namely, Mr. V. Wahoro, Mr. J.L. Onguto and Mr. W. Nyarima who has left the Commission to join the Judiciary as a Magistrate.)

Administrative and Subordinate Staff

Mr. J. P. Kuria—*Executive Officer.*

Mrs. R. Rai—*Personal Secretary.*

Miss L. Gitonga—*Shorthand Typist I.*
Mrs. J. Ojijo—*Shorthand Typist II.*
Mrs. J. W. Kanja—*Copy Typist I.*
Mrs. S. Mauta—*Copy Typist II B.*
Mrs. K. Onsinyo—*Copy Typist II.*
Mr. J. M. Munyoki—*Clerical Officer.*
Mr. C. T. N. Ndwiga—*Librarian II.*
Mr. D. W. Musau—*Clerical Officer.*
Mr. Kuria—*Driver.*
Mr. C. Waweru—*Subordinate Staff.*
Mr. A. Irungu—*Subordinate Staff (now transferred to Attorney-General's Chambers).*
Miss J. Mbue—*Subordinate Staff (now transferred to the Attorney-General's Chambers).*
Mr. A. Odhiambo—*Subordinate Staff.*
Mrs. R. Otindo—*Subordinate Staff.*
Mr. J. Olewa—*Watchman.*

SECTION II

STATUTORY ESTABLISHMENT AND FUNCTIONS OF THE COMMISSION

The relevant provisions of the Act of Parliament which prescribes the composition, functions and duties of the Commission have already been set out in previous Annual Reports, and it is not necessary to repeat them here.

During the period under review the Commissioners continued to hold monthly meetings to consider suggestions for reform received from Government departments, professional bodies, non-governmental bodies and individuals. Many suggestions were gathered during provincial visits to Kisumu, Garissa and Mombasa. The Commission has made various recommendations for amendment of particular laws. These recommendations included, where possible, drafts of the relevant provisions. A regular report of the subjects initiated and pending before the Commission was submitted monthly to the Attorney-General. Following the outline classification adopted in the Sixth Report the Commission's practical achievements during the period under review were as follows:

- A. Pursuant to the programme of work mentioned in the Sixth Annual Report under this heading the Commission carried out work on the following areas:
 - (a) Land Law.
 - (b) The Law Relating to Companies.
 - (c) The Law Relating to the Environment.
 - (d) Drug Abuse Legislation.
 - (e) Laws Relating to children.
 - (f) Powers of Attorney.

The achievements of the Commission for the year are centred around these areas as well as others involving initiatives of other organisations. Pursuant to a reference by the Attorney-General, the Commission reviewed the Advocates Act, Cap. 16 and the Law Society of Kenya Act, Cap. 18, with a view to their modernization and revision. Other areas forming part of its achievements include participation in seminars, visits to the provinces and the submission of Draft Bills.

- B. The Commission was invited to participate in and make contributions to several Seminars, workshops and conferences. The Chairman, Commissioners and Commission Staff participated in a number of events namely:

The Second African Network for the Protection and Prevention of Child Abuse (A.N.P.P.C.A.N.) took place at United Nations Environment Programme Headquarters from 19th to 20th September, 1988. This Conference was held to review children's rights with a view to studying further the Geneva Convention on the Rights of the Child. The Chairman, Hon. Justice A. R. W. Hancox, Miss C. W. Munyao and Mrs. V. W. M. Kattambo

attended. The Chairman submitted a presentation on behalf of the Commission and chaired one of the group sessions.

A Workshop on Desertification Control held at Nyeri from 6th to 9th October, 1988. Miss C. Munyao attended the Workshop.

The Twenty-Eighth Regular Session of the Asian-African Legal Consultative Meeting at Kenyatta International Conference Centre Nairobi held from 30th January to 18th February, 1989. The Chairman, and the Honourable Justice O'Kubasu attended.

A Workshop on Children in Difficult Circumstances at the United Nations Environment Headquarters from 9th to 10th March, 1989. The Hon Justice O'Kubasu, Miss Olago, Mrs. N. Waweru and Mrs. V. Kattambo attended.

Workshop on Child Abuse and Neglect organised by the Kenya Medical Women's Association. The Workshop held at Kenyatta International Conference Centre on 2nd March, 1989 was opened by His Excellency the President of Kenya. The Chairman attended the opening ceremony and Mrs. Waweru and Mrs. Kattambo attended the Workshop as observers.

A Workshop on Environmental Management at the Outspan Hotel, Nyeri from 12th February to 1st March, 1989. The Chairman attended and chaired a group discussion regarding, legislation on inland waters.

The Consultation/Planning Meeting on Child Care services from 13th June, to 16th June, 1989 at Kenya Institute of Administration, Kabete.

A Workshop on the Environmental Sessional Paper at the Safari Beach Hotel from 30th July to 2nd August, 1989. The Chairman and Miss Munyao attended, the Chairman's address forms *Appendix XIII* to the report.

- C. Visits to the provinces for the purpose of obtaining the views of Wananchi, Administration, Provincial Heads and Members of the Legal Profession regarding problems experienced in their areas of responsibility.

The Chairman, the Hon. Justice O'kubasu, the Secretary, Mr. E. O. Abang and Mrs. V. Kattambo visited Kisumu in September, 1988. This was a follow up visit to that undertaken by the Chairman, Hon. Justice O'Kubasu and the Secretary to the Commission from 27th to 30th April, 1988. And referred to in the Sixth Annual Report. The purpose of the visit was to hold public sessions which had not been possible to organize during the April visit due to the elections. The Chairman's report on the visit is attached hereto on Appendix IIA.

On 22nd November, 1988 the full Commission, the Secretary and Mrs. Z. Ndegwa visited Garissa and held closed and open meetings with the Deputy Provincial Commissioner and other

Provincial Heads of Departments, and met in public discussion to receive suggestions from the inhabitants of the area. The Chairman's report is attached as Appendix V.

The full Commission visited Mombasa from 28th to 30th November, 1988, where meetings were held with the Provincial Commissioner, Heads of Departments, the Mombasa Law Society and members of Public.

The Chairman, and the Secretary to the Commission, a Research Officer, Mrs. N. Waweru and a Secretary Miss. K. Onyimbo visited Mombasa from 21st to 24th June, 1989. They held an open discussion with the Chairman and members of the Mombasa Law Society at the Conference Room of the Oceanic Hotel, the major purpose of which was to explain the provisions of the new Advocates Bill and to receive suggestion on in particular, the Rent Restriction Act, Cap. 296. This was a follow up of a visit in November, 1988.

- D. Draft Bills and other recommended provisions were sent to the Attorney-General for consideration.

SECTION III

THE PROGRAMME OF WORK

As mentioned in the Sixth Annual Report, the Commission does not have the capacity to undertake the eminently desirable objective of reforming all the Kenyan laws due to the limited human and other resources at its disposal. Submission to the Attorney-General of the items comprising the Programme of Work was intended to fulfil the responsibilities of the Commission in the circumstances particularly with respect to the areas that are in most urgent need of reform. The list of items submitted was intended to be flexible due to changing circumstances that sometimes alter the priorities of the Commission. Thus, the programme of work did not preclude the Commission from considering other important matters raised during provincial visits and in its ordinary day to day work.

(a) Land Law Reform

A seminar on this subject was held on 11th and 12th June, 1987. The Commission is still working on the proposals received at that seminar. A number of areas touching on land law have been dealt with. This is discussed in section VI herein. A special Commissioner's meeting was convened on 7th November, 1988 to consider the Land (Amendments of Law) 1988 which had been published on 21st October, 1988, the drafted minutes of that meeting appear as Appendix IV hereto.

(b) The Law Relating to Companies

This area of law continued to receive active consideration by the Commission. Suggestions in a paper prepared by Commissioner Mr. Waruhiu were accepted in principle and Research Staff summarized proposals for reform received on the subject. Miss Teresa Ojiambo, a lecturer at the School of Law, offered her assistance and the benefit of her recent experience in this field and is currently working in liaison with the Commission.

(c) The Law Relating to the Environment

The Commission continued to contact outside environmental agencies in order to facilitate development of law in this area. Apart from participating in relevant seminars on the law and policy on the environment, the Commission Staff prepared a draft and a draft Clean Air Bill National Environment and Management Bill. The former was presented by the Chairman at the Workshop to discuss the draft Sessional Paper on Environment and Development held in Mombasa from 20th July to 3rd August, 1989. The Clean Air Bill is still under consideration by the Commissioners before further circulation.

(d) Drug Abuse Legislation

The subject continued to receive active consideration by the Commission. Case Reports were monitored and a cuttings file opened in order to maintain a complete record. The ongoing review took account of legislation in other jurisdictions particularly Australia. Draft Legislation entitled Trafficking in Specified Substances Bill covering all drugs and the tracing of

the proceeds thereof was prepared by Commissioner Mr. Hamilton, and is under active consideration.

The Chairman and Commissioner Hamilton attended a meeting of the Kenya Committee for Prevention of Drug Dependence held on 20th March, 1989 and established contact with the Chief Pharmacist.

The Commission was represented in this at two International Workshops dealing with the subject in May 1989 and June 1989

(e) Laws Relating to Children

During the period under review the Chairman and Commission staff were engaged in various activities involving other agencies working with children. A part from participation in the various initiatives of relevant agencies the Commission submitted a new Part II, to be added to the Children and Young Persons Act, Cap. 141, enabling immediate action to be taken in areas of child abuse. This was in response to His Excellency the President's concern expressed in his speech at the opening of Parliament on 21st March, 1989. The relevant draft containing the Commission's proposals and other proposals of the Children's Department were sent to the Chief Parliamentary Counsel and is discussed in section VI of this Report. In addition, drafts for a Register of Child Abuse Cases were submitted to the Children's Department by the Chairman.

The problem of mothers being sent to prison has been of very topical interest not only with regard to the children who accompany them but also with respect to those who are left behind. Those left behind have to fend for themselves and sometimes their siblings. This often leads to criminal activity when they find their way to the streets in search of livelihood.

The detrimental consequences of the exposure of the child to prison environment have been brought into sharp focus in various recent workshops centred on children's rights. Attempts to influence penal policy to change the plight of such children have been incorporated in recommendations which encompass the treatment of women in the criminal justice process.

In reaction to some of the recommendations with regard to the treatment of children in prisons the Commission organized a meeting with the Director of Children's Services, the Assistant Commissioner of Prisons in Charge of Women's Affairs and a representative from the African Network for the Prevention of Child Abuse, Neglect and Abuse.

The meeting discussed draft proposals by the Commission aimed at the reduction of the period during which the child should be with the mother in prison; establishment of mother and baby units in relevant institutions; and establishment of consultation between the Children's and Prison Departments with the possibilities of placement inside and outside prison. The proposals under consideration if accepted will result in amendment to the Prisons Act, Cap. 90. For these purposes the Chairman obtained facsimile from London of the Regulations relating to Mother and Baby Units within the prisons in the U.K. A summary of the discussions with the Prisons officer appears at section VI parts 5 and 6 (Post).

On 11th August, 1989 four research officers visited Langata Women's Prison and observed the facilities available at the prison, including the remand section.

The purpose of the visit was to assess the facilities provided to children who accompany mothers to jail.

Inquiries have been made with the New Zealand Judiciary and Authorities with regard to open prisons, the results of which are as yet inconclusive, but a summary of the system used there has been sent to the Registrar of the High Court, at the request of the late Honourable the Chief Justice C. H. E. Miller.

(f) Powers of Attorney

A copy of the Powers of Attorney Bill drafted by Commissioner Mr. Hamilton was submitted to the Attorney-General and the Chief Land Registrar. The most important aspect of the Bill is the creation of enduring power of attorney, which is intended to survive any subsequent mental incapacity of the donor, as in many other jurisdiction in the Commonwealth is already the case. As stated in the Sixth Annual Report, it is hoped that the new Bill will be introduced in Parliament soon.

SECTION IV

CONTRIBUTIONS TO EVENTS ORGANIZED BY, AND CO-OPERATION WITH OUTSIDE AGENCIES AND ORGANIZATIONS

As mentioned under section II the Commission participated in several seminars, workshops and conferences.

1. The Commission was represented at the *Second A.N.P.P.C.A.N. Workshop on the Rights of the Child* held at the United Nations Environment Programme Headquarters from 19th to 20th September, 1988. As stated earlier the Workshop was held to review Children's Rights with a view to studying further the Geneva Convention on the Rights of the Child. The Chairman, Hon. Justice A. R. W. Hancox gave a presentation on behalf of the Commission. In his presentation he dealt, *inter alia*, with the functions of the Commission; the importance of consultation with relevant and interested parties in specific areas of law, and the utilization of experience and expertise from resources outside the Commission; the Commission's programme of work in which laws relating to children featured as the fifth major subject; participation by the Commission in previous initiatives to discuss the Geneva Convention, and other matters related to children, especially those who have problems with the law and are victims of the law through their parents' lawlessness. During the workshop reference was made to the seminar in June 1984 promoted by the Commission on the laws relating to Children, and in a full report which has been sent to the Attorney-General summarizing the Commission's activities on this subject in the intervening period.

The full text of the presentation is attached as Appendix I hereto.

2. A Commission's Officer attended the *Workshop on Desertification Control* held in Nyeri from 6th to 9th October, 1988.

The seminar was opened by the Hon. Minister for Environment and Natural Resources. It was organized by the National Environment Secretariat (N.E.S.) and the Scientific Advisory Committee (S.A.C.). SAC was constituted under NES in 1978 and held its first meeting in 1987 on realizing that there was a need for broader participation as the issues involved were very complex. The Paper submitted to the Workshop is attached as Appendix III to this Report.

3. The Chairman was kindly requested to prepare the Attorney-General's *address to the Annual Meeting of the Association of Kenya Insurers* on the subject of Challenges to the Insurance Underwriters in Developing Countries on 25th November, 1988.
4. The Chairman and Commissioner Justice E. O'Kubasu attended the *Twenty-Eighth Regular Session of the Asian-African Legal Consultative Meeting at Nairobi* from 13th to 18th February, 1988. The meeting discussed, *inter alia*, issues such as the dumping of toxic wastes off developing countries' coasts; the report of the International Law Commission; the Law of the Sea; the status and treatment of refugees; liberation of Palestinians in violation of international law; criteria for

distinction between international terrorism and national celebration movements; the concept of peace zone in international law; extradition of fugitive offenders; the debt burden of developing countries; trade law matters; the organization's (i.e. A.A.L.C.C.'s) regional centres for arbitration; legislative activities of UN and other organizations concerned with International Trade Law; the legal framework for industrial joint ventures; and the centre for research and development of legal regimes applicable to economic activities in the developing countries.

5. *The Workshop on Children in Difficult Circumstances* at UNEP Headquarters from 9th to 10th March, 1989. The Workshop, was a follow up of an earlier Workshop on the same theme, with emphasis on street children, held on 24th and 25th October, 1988. Its main objective was to discuss the situational analysis reports of three towns namely Nairobi, Mombasa and Kisumu. The Workshop deliberated on the three reports and other matters raised in the course of discussions in Working Groups.

A critique of the three reports by Mr. Fabio Dallape, the keynote speaker, observed that the problem of street children could not be attributed wholly to economic causes and that a majority of the children affected were involved in some form of economic activity. However, the magnitude of these problems was such that they could not be solved at once and it was important to prioritize and use available resources to deal with them. Furthermore, solutions had to be realistic and geared towards helping children in their own environment. He stressed the need to alert policy makers on the seriousness of the problem.

A national Plan of Action identified policy and advocacy strategies to be taken. It was recommended that the Kenya Law Reform Commission should review laws affecting children and in particular consider its codification, and specific issues namely a compulsory requirement that the Government should call for a probation officer's report in all cases before sentencing; the problem of children accompanying mothers to jail; and children taken for hospital treatment when unaccompanied by parent(s). It was also recommended that advocacy on children's rights was necessary at the level of the public, professional persons and groups in particular research, institutions, and at the parental level. As mentioned earlier the Commission has undertaken initiative to deal with the problem of children accompanying mothers to jail and those left behind when their mothers are jailed. Two officers of the Commission, Mrs. N. Waweru and Mrs. V. W. M. Kattambo, have since been co-opted on the Legislation and Enforcement Subcommittee as part of a Task Force created after the Workshop to implement the Plan of Action for Nairobi. The Committee has since its inception examined the legal aspects of the situational analysis reports and has embarked on a number of legal studies.

A full report of this Workshop is attached as Appendix VII to this Report.

6. *The Workshop on Child Abuse and Neglect* organized by the Kenya Medical Women's Association held on 2nd March, 1989. This was an important activity to the Commission in view of its already ongoing research on children's laws.

The Workshop was officially opened by His Excellency the President, who has shown a great interest in matters pertaining to care and protection of children. Later, at the State Opening of Parliament on 21st March, 1989, he noted with concern the increasing incidents of child abuse and neglect, in particular the fire incidents in which many children have lost their lives, largely due to carelessness of those responsible for their care. He pointed out the need to make necessary provisions in the law to handle areas dealing with child abuse and neglect. In this respect the Children and Young Persons Act (Cap. 141) was identified as the appropriate law on which to target the necessary amendments. The Commission's recommendation on Child Abuse referred to earlier were largely a reaction to the Presidential pronouncements on this occasion and needless to state, the many modes and incidents of abuse of children which have been brought to light lately.

7. *A Workshop on Environmental Management* at the Outspan Hotel, Nyeri from 12th to 15th March, 1989. The Chairman attended and chaired a group discussion regarding legislation on Inland Waters.
8. *The 15th Session of the UNEP Governing Council Meeting on the Environment* from 15th to 26th May, 1989. A Commission's Officer, Miss C. Munyao attended the meeting and participated in preparing Kenya's intervention under Programme II sub-programme 2 on Environmental law. Other areas discussed at the meeting included agenda 7 and 8 concerning the atmosphere, water, terrestrial ecosystems, oceans, the lithosphere, human settlement, human welfare and health, energy industry and transportation, peace, security and the environment, environmental assessment, environmental management resources, environmental awareness and technical and regional co-option.
9. *The United Nations Narcotic Drugs Division Workshop on the Utilization of Community Resources for the Prevention and Reduction of Drug Abuse for African Countries with English Expression* held from 22nd to 26th May, 1989. The Workshop was the first of its kind to be organized in Africa and had as its main theme the utilization of community resources for the prevention and reduction of the increasing problem of drug abuse. Delegates from the participating countries emphasized the drug problem and that Nairobi is fast becoming a distribution centre because of its geographical convenience and commercial efficiency.

The opening and closing speeches were made by the Assistant Minister for Health and by the Hon. Attorney-General respectively,

and underscored the legislative measures already under way to deal with the present shortcomings in the law especially with regard to trafficking in narcotic drugs, powers of searches and tracing property bought with the proceeds of sale of such drugs. Commissioner Mr. Hamilton, has prepared the first draft of the relevant Bill for consideration. This is referred to in section VI part 7. (post).

The Commission's Report on the Workshop is attached and is marked appendix VIII.

10. *The Consultation/Planning Meeting on Child Care Services* held from 13th to 16th June, 1989 at Kenya Institute of Administration, Kabete.

This meeting was sponsored by UNICEF and attended by Government Officers and non-governmental organizations involved in programmes dealing with children and youth.

It was officially opened by the Minister for Home Affairs and National Heritage, who commended the organizers for creating a forum that would facilitate dialogue between the Children's Departments and organizations dealing with children in difficult circumstances. He made special mention of areas which required attention, namely, the development of common standards in establishing new institutions; the development of criteria in monitoring services to children in difficult circumstances; the co-ordination of relevant agencies; and the co-ordination of after care services to children leaving institutions such as children's homes. A Commission officer Mrs. V. Kattambo gave a short presentation on the legal protection of children and youth generally, placement of children under the Children and Young Persons Act (Cap. 141) the Guardianship of Infants Act (Cap. 144) the Adoption Act (Cap.43) the advantages of legal adoptions with respect to parental responsibility and the rights of the child who on adoption assumes the rights of a natural child. This presentation and a short report of the meeting are included as Appendix IXA and IXB of this Report.

11. *The Inter-Regional Working Committee on South-West Asian Heroin Traffic Transitting Africa* held at the Kenyatta International Conference Centre from 20th to 22nd June, 1989. The meeting, which was organized through the sponsorship of Interpol General Secretariat, was officially opened by the Attorney-General, Mr. Justice Mathew G. Muli, and attended by participants from Asia, Western Europe, North America and Africa. Its main theme was heroin traffic transitting through Africa and the participants were principally Heads of Anti-Narcotics Services in various countries.

In his speech, the Attorney-General underscored, inter alia, the adverse effects of heroin, namely, suppressed hunger leading to malnutrition; suppressed cough reflex which can result in chronic bronchitis; pre-natal complications and problems during birth; serious infections in children; high mortality; and heart diseases. He also mentioned the inadequacy of Kenya to address the drug trafficking of today and the efforts underway to rectify this shortcoming. The Report on the Workshop is attached as appendix X hereto.

12. *The Workshop held to discuss a draft Sessional Paper on Environment and Development held in Mombasa from 30th July to 3rd August, 1989,* addressed itself to the contents of the draft with a view to including any information which may have been overlooked or otherwise omitted. The Chairman introduced to the participants a framework of the Environment Bill on which the Commission is working in order to assist the participants to focus on the end result of the Sessional Paper. The participants agreed that it would be necessary to hold a Workshop to examine the final draft Sessional Paper and also to enable them to make an input as to the contents of the Environment Bill.
13. The meeting discussed the 1989/1990 Plan of Action of the Task Force on Children in Difficult Circumstances in which the Commission is represented by two research officers. The Task Force is carrying out legal studies which may have implications necessitating law reform.

SECTION V

VISITS TO PROVINCIAL CENTRES

As stated in Section II (c), the Commission made several visits to provincial centres during the period under review. The first of these visits was to Kisumu from 28th to 30th September, 1988. The second was to Garissa on 22nd November, 1988. The third and fourth visits were to Mombasa from 28th to 30th November and a follow up visit on 21st to 24th June, 1989.

(a) Kisumu Visit 28th to 30th September, 1988

Although the main purpose of the visit was to hold public sessions which it had not been possible to organize during the April visit earlier in the year, meetings were held with the Provincial Commissioner and provincial heads of departments at provincial headquarters. Later there were meetings with members of the judiciary, the Law Society and public. At the meetings, the Chairman outlined the objects of the Commission and explained its achievements with regard to issues raised during the previous visits in April 1988. He also explained the programme of work submitted to the Attorney-General and reacted to questions and submissions.

Two substantive issues were raised at the meeting with the provincial heads:

Firstly, the difficulties which the land adjudication officer and his officers experience in the preparation of the land adjudication register under the Land Adjudication Act (Cap. 284.)

Concern was expressed with respect to the elaborate objection procedure laid down under the Act, which enabled a person to occupy land which was not theirs and to continue to do so by perpetuating their objections. The land adjudication officer considered that various time limits in various sections of the Act should be connected up so that at least there was a time certain within which all objections could be disposed of. It was noted that under the present situation, a person objecting could hold up preparation of the Register and its conclusion after any rectification under section 26, for the whole of the demarcation section concerned.

The second was in relation to Fisheries:

The fisheries officer pointed out that people who produced crops from the land could obtain subsidies loans and other benefits from the government and financial institutions in respect of their crops and produce but that similar provision did not exist with respect to persons engaged in fisheries as a source of livelihood. The meeting learnt that despite the difficulty in defining water for purposes of determining title, fishermen do form co-operative societies and are therefore in a position to receive finance as a collective body. It was not really possible to amend the existing legislation in any practical way to deal with the problem raised.

At the meeting with the members of the Law Society and the Judiciary, the Magistrates Jurisdiction (Amendment) Act 1981 was referred to briefly. A brief containing matters pertaining to Matrimonial property legislation

was circulated. The brief had been the subject of a meeting with the representatives of the National Council of Women of Kenya discussed in Section V (3) of the Sixth Annual Report.

The Public Session dealt with various pieces of legislation. Compulsory attendance at barazas under the Chiefs Authority Act (Cap. 128) was criticized. There was a general consensus that the wide powers given to chiefs under the Act should be limited, reduced and shared with other administrative officials.

There were various questions on the Law of Succession Act (Cap. 160) touching on matters of intestacy. There were also numerous complaints relating to arrests under the Trespass Act (Cap 294.) The Vagrancy Act (Cap. 58) and the Penal Code (Cap. 63) particularly on the issue of delays in prosecution. An Acting Resident Magistrate Mr. Miseda spoke at length on problems raised by indefinite or prolonged remand of people. It was noted that sometimes non-production of a person may be a cover up for injuries inflicted during custody. He requested that there be a provision either under the Penal Code or the Criminal Procedure Code to curtail indefinite remand of persons.

Another problem raised in the public session was with respect to unexplained deaths where the police take the body from where it is to have a postmortem performed under section 286 (2) of the Criminal Procedure Code. To avoid considerable inconvenience, expense and distress caused to relatives by the failure of police to return a body from where it came, it was agreed that the Commission consider insertion of some provision that would empower the police to return the body.

Other legal issues raised were in respect of an oversight in the marginal note to Rule 28 of Order XXI of the Civil Procedure Rules relating to conjugal rights and the incorporation of law as a subject in schools.

The Chairman's report of the Kisumu session forms Appendix II hereto.

(b) Garissa Visit 22nd November, 1988

The one day visit to Garissa was the Commission's first visit to the North Eastern Province since the Commission was set up. Meetings were held with the Deputy Provincial Commissioner, other Provincial heads of Departments, County Council officials, and members of public. There were closed and open sessions.

Submissions and questions were received with respect to specific legislation as well as matters touching on law generally.

It became immediately apparent that the problems encountered, so far as law reform and enforcement of laws were concerned, were quite different from those in any other provinces so far visited.

Various issues were raised. These included problems arising from the limits of the jurisdiction of the second class District Magistrate, in particular, the inability to deal with cases involving sums in excess of KSh. 10,000 which must consequently be referred to Nairobi resulting in vast expense to the

litigants; publication of advocates charges; Court orders for maintenance of a deserted wife and family, and the anomalous precondition that a decree holder pay subsistence for the debtor into Court before the debtor is committed to civil jail; custody of very young children which necessitates an insertion in the Guardianship of Infants Act (Cap.144) in order to ensure that such children are placed under the custody of the mother; legal representation of a person accused of robbery with violence since it is a capital offence as in murder cases where arrangements have been made to provide legal aid for the accused; the taking of statements or confessions of accused persons by magistrates instead of a police officer and more use by Courts of extra-mural penal employment provided for under the Prisons Act (Cap. 90) section 68 schedule XII.

Other issues related to the problem of children accompanying mothers to prison referred to earlier; exemptions under the Exchange Control Act (Cap. 113); penalties under the Chief's Authority Act (Cap. 128); Compulsory primary education; restrictions under the Employment Act (Cap. 226) with respect to employment of children in industrial undertakings; procedure before detention of mentally sick persons; rent tribunal; penalties under the Survey Act (Cap. 299); the Land Control Act (Cap. 302); repeal of the Stock and Produce Theft Act (Cap. 355); branding of animals under the Animal Diseases Act (Cap. 364); forfeiture of goods seized under the Imports Exports and Essential Supplies Act (Cap. 502); and that possible area of conflict between that Act and the Customs and Excise Act, (Cap. 472); the conflict between Islamic and Statute law in particular the Law of Succession Act (Cap. 160); trespass and withdrawal of criminal cases by the Attorney-General.

One of the substantive issues raised during this visit was in respect to the conflict between Islamic law and Kenyan Statute Law, particularly on the issue of inheritance. It was suggested at the public meeting that the rules of intestacy on inheritance rights of female and male children should be maintained. Expression of this view in a predominantly Islamic community did not come as a surprise.

The question of conflict between Islamic law and the Law of Succession Act (Cap. 160) to which all persons in Kenya are subject, as mentioned by the Chairman at the meeting, has been under considerable debate since the moves to codify the Law of Succession by the setting up of the Commission on the Law of Succession by the late President Mzee Jomo Kenyatta in 1967.

During the deliberations of the Commission, Muslims, especially of Coast and North Eastern Provinces argued unanimously and forcefully that the Muslim Law of Succession is divinely ordained in the Holy Quran and is consequently incapable of change by man. They said that any change however small, in the Islamic Law of Succession would contravene section 22 (1) of the Constitution in that it would encroach on a Muslim's right to "manifest, propagate, teach, practice or observe" the Muslim religion. (Paragraph 22 of the Report of the Commission on the Law of Succession, Government Printer.)

The Commission felt that the ongoing debate in the matter warranted further treatment and that the Attorney-General should be informed. A report of the visit to Garissa classified under the various statutory headings on which the meetings centred is attached as appendix V to this report.

(c) Mombasa Visit 28th to 30th November, 1988

This visit was a follow-up of the visit in 1986. Specific issues raised in earlier meetings were discussed and further recommendations on reform received.

Specific legislation, namely, the Mazrui Lands Trust Act (Cap. 289); the Trespass Act (Cap. 294); the Chief's Authority Act (Cap. 128); the Land Adjudication Act (Cap. 284); the Law of Succession Act (Cap. 160'); the Magistrates Jurisdiction Amendment Act (No. 14 of 1981); the Education Act (Cap. 211); the Local Authorities Act (Cap. 265), the Wildlife (Conservation and Management Act (Cap. 376); the Liquor Licensing Act (Cap. 121); the Statute Law.

(Miscellaneous Amendments) Act 1987; the Rent Restriction Act (Cap. 296); the Public Health Act (Cap. 242); the Exchange Control Act (Cap. 113); the insurance Motor Vehicles Third Party Risks) Act (Cap.405); the Penal Code (Cap 63); the Government Lands Act (Cap. 280); the Customs and Excise Act (Cap. 472); the Registered Land Act (Cap. 300); the Wakf Commissioners Act (Cap. 109,) were discussed. Issues were raised with regard to poaching and possession of firearms, drug abuse legislation, the need to reward police informers, the need for a Kenyan enactment to deal with Admiralty cases, the Marriage Bill, arrest of women at night, rates payable in respect of church plots, and the hearing of land cases.

These matters were dealt with in meetings held, firstly with the Provincial Commissioner, Heads of Departments, Members of the Law Society and finally leaders and members of public.

The Mazrui Lands Trust Act (Cap. 289) discussed with the Provincial Commissioner was singled out as a problem area. The Act was enacted in 1931 to provide for the establishment of a Mazrui Lands Board of Trustees with powers and control over the lands of the Mazrui family, which had originated from Oman.

The Provincial Commissioner had raised the matter of repeal of this Act with the Attorney-General in view of the fact that it legislated for only a particular and very limited class of persons. It was now considered to be obsolete.

It is to be noted that since the compilation of this report the Attorney-General has published the Mazrui Lands Trust (Repeal) Bill, 1989 intended to implement the recommendation to repeal it. The memorandum of objects and reasons of the Bill state that titles to the land in question, estimated at 2,716 acres, can be issued to the persons entitled thereto, after repeal of the Bill.

There were issues of special interest in the Coast Province for example the problem of squatters and trespassers was identified as a big problem in Mombasa involving both private and government land. The problem arises

mainly because large areas of land have not been adjudicated upon and are lying idle, thereby attracting squatters. This led to the recommendation for enhancement of penalties under the Trespass Act (Cap. 294).

The Muslims in Mombasa expressed similar sentiments to those of the Muslims in Garissa regarding the Law of Succession Act (Cap.160) which they find out of step with the arrangements provided under the Koran on matters of succession. This was raised in the meetings held with the Provincial Commissioner and members of public and leaders. Appropriate amendment for exemption of the Islamic community was recommended, and has since been discussed in depth in the monthly meetings of the Commission, and by the Chairman with the Chief Kadhi on the June 1989 visit to Mombasa and has received approval in principle as regards intestate succession.

The proposal by the Chief Kadhi that similar provisions be made for Muslims as regards testate succession was not approved by the Commission and the Chairman has sought guidance from the Hon. Solicitor-General as regards Government Policy on this question. The list of the suggested amendments in this regard appears at the end of paragraph (o) to this section (post).

The Magistrate's Jurisdiction Amendment Act (No 14 of 1981) continued to present problems of implementation. It was recommended that the elders be appointed by independent people and not by the parties to the disputes, because where two elders were appointed by each side they tended to support the party who appointed them and the District Officer as Chairman was nearly always called upon to decide the matter.

The Rent Restriction Act (Cap. 296) was also cited as a source of hardship. The Commission has received many proposals on this Act. As stated in the Sixth Annual Report (Section VIII paragraph (9) some of the hardships relate to abuse of the Act by landlords, and the pegging of rents to uneconomical levels. At the meeting with the members of the Law Society the recommendations submitted earlier by Mr. Kasmani a Magistrate, the problems of joint landlords on repossession under section 14 (1) were summarized, and discussed. It was agreed that a limited liability company should not continue to enjoy protection under section (1) (9) (iii) of the Act. The Commissioners were asked to consider the suggestion of a second appeal to the Court of Appeal from a decision of the High Court under section 8 of the Act, and the Court of Appeal decision in *Odongo and Others v. Savings and Loans (Kenya) Limited*, Civil Appeal 22 of 1987 empowering this was analysed. The Chairman proposed a limited right of second appeal with leave but the Commission did not favour this. It was also proposed to delete the existing proviso to section 15, and the proposal by the Chairman to draft a further proviso to this section was defeated by a majority. The problem of service of documents under section 32 of the Act was highlighted and an appropriate amendment drafted by the Chairman.

The public meeting identified problems arising from separate ownership of plots and buildings thereon and also ownership of houses by the National Housing Corporation which is exempted from the Act. In these instances tenants were said to be unprotected.

The effect of a transaction which the Exchange Control Act (Cap. 113) declares illegal was considered. It was recommended that relevant provisions in the Banking Act (Cap. 488) and the Exchange Control Act should be studied and recommendations made in order to prevent loss of foreign exchange. Since then the Commission has proposed a new section 29 A to the Banking Act to prevent defendants setting up breaches of statutory provisions by way of defence to actions to recover loans and other moneys advanced. The proposed provisions will be discussed further in the next section of this report. The revival of the Marriage Bill was suggested so was the recognition of a common law marriage and cohabitation for a certain period of time, in order to avoid the suffering of children.

There were complaints regarding misuse of power under the Chief's Authority Act (Cap. 123), the lengthy period taken to determine land cases and *ultra vires* actions of Wakf Commissioners appointed under the Wakf Commissioners Act (Cap. 109), with power to deal with property dedicated in accordance with Muslim Law. The Commission subsequently made proposals, in line with the request to amend the Wakf Commissioners Act and the Civil Procedure Rules, in order to deal with questions arising from the Act, and the Chairman submitted appropriate drafts of a new section 16A to (Cap. 109) and a new Rule 34 in Order XXXVI of the Civil Procedure Rules to the Attorney-General. These are set out in extenso in the next section of this report. The Chairman also requested re-consideration of the Court of Appeal decision in *Wakf Commissioners vs Mohammed bin Oujabu Civil Appeal 83 of 1983* in this connection.

Other issues raised in the meeting are under consideration. A record of the visit is attached as Appendix VI.

(d) Mombasa Visit 21st to 24th June, 1989.

The Commission made another visit to Mombasa as a follow up of the visit in November, 1988 discussed above. Among the issues discussed were those touching on the Public Health Act (Cap. 242), the Advocates Act (Cap. 16), the Rent Restriction Act (Cap. 296), the Magistrate's Jurisdiction (Amendment) Act (No.14 of 1981), the Wakf Commissioner's Act (Cap. 109) and the Law of Succession Act (Cap. 160).

The members made a visit to Mr. Ludindi, the Public Health Officer for Mombasa, who had made representations to the Commission on a previous visit and had presented two memoranda which consisted of two documents namely (i) Legal Aspect of Private Medical Institutions and (ii) a chart showing in sequence the provision of the Public Health Act (Cap. 242), together with an indication as to whom the power or duty under the Act is vested for the purpose of enforcing and carrying out its provisions.

The Chairman dealt with the first memorandum in which Mr. Ludindi had illustrated the present unsatisfactory state of the law regarding private, nursing, maternity and other homes not maintained out of public funds. Mr. Ludindi had pointed out the absence of regulatory powers in respect of such premises as opposed to licensing of private medical practitioners under the Medical Practitioners and Dentists Act (Cap. 242). It was agreed that there

was a need for subsidiary legislation to regulate private medical institutions throughout the country and Mr. Ludindi's proposals formed a useful basis for such legislation.

The Chairman forwarded a draft which included a suggested definition of the term "hospital" which had been found wanting in Mr. Ludindi's view. He also dealt with the definition of the word "owner" in the Public Health Act. This definition does not cover Government thereby resulting in the serious disadvantage that a public health enforcement officer cannot proceed against the Government in respect of public hospitals. The Chairman felt that this was a policy issue and it had to be assumed that the Government would fulfill its obligations in any other respect.

In their meeting with members of the Law Society, the Commissioner dealt with a number of issues including section 32 of the Rent Restriction Act raised by Mr. Kasmani during the Commissioner's previous visit in November, 1988. The Chairman read out a draft he had prepared to rectify the anomaly identified with respect to personal service to the tenant under the section.

The Chairman also presented a draft amendment to deal with the point raised in *Dodhia vs Jos Hansen* 1979 KLR 118, that the benefit of statutory protection should only extend to an individual, domestic occupier. The proposed amendment was aimed at the definition of "tenant" in section 3 by adding the words "but does not include a company incorporated under the Companies Act or any Corporation." This would also necessitate deletion of the word "company" in paragraph (g) (iii) of section 14. (This amendment has now been effected by Act 20 of 1989).

The meeting was also informed of the Commissioners' views on matters raised in the previous visit regarding a second appeal to the Court of Appeal from the Tribunal's decision. These are set out in paragraph (c) of this section.

The Chairman's proposed amendment to deal with the problem of repossession under paragraph (e) of section 14 (i) in the case of joint landlords, was as follows:

"In the event of there being more than one landlord, then by any one of them."

It was hoped that this would solve the present anomaly regarding repossession in joint ownership cases. In addition to the above, the meeting considered the issue of notice to the tenant under section 15 of the Act which confers wide discretion on the Tribunal to interpret liberally any notice under the section. It was felt that the period of notice should be definite but should be extended by the Tribunal if there is good and sufficient cause. See paragraph (c) of this section (ante).

The Chairman discussed the Commission's proposed Clause 3 of the Land Disputes Tribunal Bill, aimed at dealing with the unsatisfactory operation of the tribunal or elders handling land disputes. The proposed Clause would enable a case to be filed in a separate registry instead of having to go through the courts as at present. This proposal was made in

view of the Court of Appeal's decision in *Khayadi vs Aganda* 1988 (KCA) 133, in which it was stated by Gachuhi J.A. that the procedure was lengthy and caused delays.

The advocates Bill was discussed and concern raised with regard to lack of limitation of time within which a complaint should be brought under the new proposed *Part x dealing* with the Complaints Commission. The Chairman proposed a provision to rectify this by providing the period of 12 months within which the complaint may be entertained after the occurrence of the act or omission complained of.

The meeting also discussed Clause 32 on qualification for practice on own behalf, and Clause 12 (a) stating that no person shall be admitted as an advocate unless he is a citizen of Kenya.

The Bill was also mentioned at the meeting with the Provincial Commissioner. The Provincial Commissioner welcomed the proposed Complaints Commission and the new proposed offences under Clause 80 entitled "betrayal of trust." This reflected His Excellency the President's concern on the conduct of a limited number of advocates expressed at the 10th Nyayo Era Celebration.

Other proposals made by the Commission since the previous meeting included as already stated, the repeal of the Mazrui Lands Trust Act (Cap. 289) increased penalty for disobedience to a chief's order under section 18 of the Chief's Authority Act (Cap. 128;) proviso to sections 10 and 11 of (Cap. 128) that a chief or assistant should not issue any order or direction to persons resident in their area requiring them or permitting them to perform duties or ceremonies contrary to local customs or traditions unless an opportunity has been given to persons representative of public interests to make representations regarding it; and separate provisions for Muslims under part V of the Law of Succession Act so as to enable application of Muslim law to intestate succession. The Provincial Commissioner proposed increased penalties under the Wildlife (Conservation and Management) Act and in particular forfeiture of animals and a fine, in order to curb illegal grazing in the National Parks.

The meeting with the Chief Kadhi considered the proposed amendments to the Wakf Commissioners Act and the Law of Succession Act (Cap. 160). With regard to the Succession Act the Chief Kadhi proposed that the Muslim community should be exempted not only from the provisions of intestate succession but also provisions relating to testate succession thereby enabling application of Islamic law to Muslims in all matters pertaining to inheritance. The Chairman proposed provisions to be inserted after section 25 of the Act, namely:

- 25 (1) Notwithstanding any of the provisions of this part all testamentary dispositions made by a person of Muslim faith shall conform in all respects to the law of the Holy Quran.
- (2) Testamentary gifts or dispositions of real or personal property shall be void if and in so far as they offend or are

contrary to the provisions of the Islamic Law of Succession and testamentary disposition.

The Chairman's report of the visit is included as Appendix XI.

SECTION VI

LEGISLATIVE DRAFTS AND PROVISIONS SUBMITTED TO THE ATTORNEY-GENERAL'S CHAMBERS, AND THOSE WHICH HAVE EITHER BECOME LAW OR ARE IN THE PROCESS OF CONSIDERATION FOR THIS PURPOSE

1. The Advocates Act (Cap. 16) and the Law Society of Kenya Act (Cap. 18)

These Acts were examined in depth and compared with the United Kingdom Solicitors Acts 1957 and 1974, and with the Royal Charter establishing the Law Society in England in 1845. The Commissioners held four special meetings for the purpose of amending the Advocates Act (Cap. 16) and another meeting with the Honorable Attorney-General. The final Bill submitted by the Commission to the Attorney-General has been amended on a number of occasions to introduce changes. The first Bill was published on 19th May, 1989 and the latest version was published on 6th October, 1989. (It became law on the 15th December, 1989 (except section 32).

The main changes introduced by the Bill are the creation of a Senior Counsel appointed by the President for tendering exemplary service to the legal and public service, and the establishment of a Complaints Commission which will have the duty of receiving and considering complaints regarding the conduct of any advocate or firm of advocates.

2. The Bill contained proposed amendments to four Acts of Parliament, namely: the Government Lands Act (Cap. 280); Registered Land Act (Cap. 300); the Registration of Titles Act (Cap. 281) and Land Titles Act (Cap. 282).

The Commissioners held a special meeting held to discuss this bill which was aimed at examining the Government's point of view as well as that of practising advocates and the public.

The objects of the Bill were to provide for the revision of rent of urban land and prohibition of the sale of land to non citizens.

A memorandum sent by Kagwe and Co. Advocates on behalf of the Conveyancing and Property Committee of the Law Society to the Chief Parliamentary Counsel with a copy to the Commission was considered together with a proposed draft by Commissioner J.F.H. Hamilton. There were similarities in the proposals made by the two parties.

The Commission considered extensively the issue of revision of rent and as part of the revision, the alteration of the periods in a lease between which the rent would be revised.

The new provision was contained in a proposed new section 10 in the Government Lands Act. The Commissioners preferred the retention of the existing section 10 and suggested revision of the rent provisions as a replacement to section II.

Mr. Hamilton's draft provided as part of section 11, the periods into which the 99 years term was to be divided and the annual rent to be paid.

His suggestions in the draft took account of the retroactive effect of the proposed provisions which was considered as unacceptable and impracticable. The proposal by Mr. Hamilton accepted ten year revisions of rent rather than, as previously, that which appear to have been 30 year periods. Section 11 has now been repealed and replaced by Act 16 of 1988.

Another matter that was subjected to detailed consideration was in relation to the valuation of the land prior to increase of land rent payable under the proposed section 11. The commissioners agreed that the method of valuation under the Valuation for Rating Act (Cap. 266) should be used for the new valuation for the revisions of rent under the new Bill, empowering the Commissioner to adopt that method. This would involve an addition to Clause 3 which proposed a new section in the Government Land Act.

The Commissioners noted the provision on notice by the Commissioner for Lands to the lessee setting out the revised value of land, Subclause (4) of Clause 188 of the proposed amendment to the Government Lands Act was considered inappropriate and inconsistent with the aim of the section which was to ensure that the lessee had fair notice of the increase. The Commissioners felt that a provision which provided that a lessee should have no defence if there was no notice would not be of any benefit to the Government and would cause unfairness and hardship in some cases.

The Commissioners considered the application of the proposed new section 29 in the Government Land Act to agricultural land and felt that this necessitated a suitable amendment to the Memorandum of Objects and Reasons to insert the words "and agricultural" in the appropriate places.

Other matters considered by the Commissioners in connection with the Bill were Clause 2; new sections individual to each of other three Acts in question namely a new section 33 (4) in the Registration of Titles Act, (Cap. 281,) and a new section 63 A in the Land Titles Act (Cap. 282). They also discussed miscellaneous provisions in the new draft, and sanctions against persons who knowingly procure or obtain registration in favour of non-citizens, contrary to the provisions of the Bill.

A draft of the Commissioners' proposals was sent to the Attorney-General on 10th November, 1988 and was subsequently discussed with the Chief Parliamentary Counsel. A record of the Commissioners special meeting of 7th November, 1988 is included as Appendix IV hereto.

3. *The Banking Act (Cap. 488)*

The Commission suggested amendments to the Banking Act to prevent Defendants setting up breaches of statutory provisions by way of defence to actions to recover loans and other moneys advanced. The proposed provisions were:

A new section 29 A, as follows:

1. If any money or valuable consideration has been given or received, or any advances loan, credit facility, in contravention of any of provisions of this Act, such money, valuable consideration, advance, loan, credit facility, guarantee or liability shall be recoverable as a civil debt from the person who

receive or otherwise benefits from the same, notwithstanding such contravention.

2. The provisions of subsection (1) of this section shall be without prejudice to the liability of any person to be prosecuted for an offence under sections 3 (2), 27, 28 or 29 of this Act.

The Banking Act, 1989 (Act No. 9 of 1989) has subsequent to the compilation of this Report, been published in the Kenya Gazette Supplement dated 22nd September, 1989. It incorporates the above proposal by stating in section 29 that "no contravention of the Act or the Central Bank Act shall effect or invalidate in any way any contractual objection between an institution and any other person." It is intended that this sub-section will apply with retroactive effect to the Banking Act (Cap. 488) repealed by the new Act and Central Bank of Kenya Act (Cap. 491) The new Act is not yet operational).

4. *The Wakf Commissioners Act (Cap. 109)*

The Chairman has submitted proposals to amend the Wakf Commissioners Act, (Cap. 109) which had been requested during the Commission's visit to Mombasa in November, 1988. The proposed new section 16A to the Act reads as follows:

"Any person who has reasonable grounds to believe that any Wakf is not being administered, or that any property or assets which are the subject of any Wakf, are not being or have not been, administered or disposed of in accordance either with the intention of the matter of the Wakf, or of the law appertaining to Muslims, may apply by originating summons to the Court (to determine the question as to whether the Wakf is being properly administered, or (as the case may be) or to inquire into the administration of the Wakf to the disposal of any property or assets thereunder)."

Another proposal to complement the above is the insertion of a new Rule, 3H, in Order XXXVI of the Civil Procedure Rules as follows:

1. An application by any person for the determination of any question arising under sections 14, 16 or 16A of the Wakf Commissioner's Act may be made by Originating Summons, supported by Affidavit, setting out the grounds for such application.
2. The Court shall direct on whom and in what manner the summons shall be served.

This latter proposal is intended to shorten procedure for determination of any question arising under the section of the Act outlined.

5. *The Children and Young Persons Act (Cap. 141)*

Recommendation has been made for the insertion of a new Part in the above Act, as Part 11A, entitled *Protection of Children Exposed to Abuse or Danger and Removals to Places of Safety*. This is to enable immediate action to be taken in cases of child and infant abuse, neglect, assaults and

other circumstances which expose a child or infant to risk of moral or physical danger.

The Part if enacted, would make it mandatory for a children's officer, police officer or other authorized officer who has cause to believe (whether on information or otherwise,) that a child or infant is exposed to abuse or danger, to take the child to a place of safety. The place of safety includes a children's home, an approved society, an approved institution, an approved mission, a gazetted hospital or an establishment run by the Government or a local authority for the benefit and protection of infants or children.

Thereafter, the officer shall make a report to the Juvenile Court or the Director of Children's Services.

The Director of Children's Services is to exercise a quasi-judicial function, concurrent with the juvenile courts authority, where a report is sent to him, to keep the child in a place of safety for as long as is necessary for the child's welfare. There is however a safeguard to ensure that the case of a child kept in a place of safety pursuant to the Director's order is reviewed by a juvenile court after one month in the first instance and thereafter at intervals of not more than three months.

There is further safeguard to ensure that the parent or guardian of an infant or child taken to a place of safety is informed of the whereabouts of the infant or child. The parent or guardian is also given an opportunity of being heard before the order for continuance of a child in a place of safety is made, and of applying for the discharge of a child from a place of safety.

Provision is also made to ensure that any abused infant or child in need of medical treatment or care is attended to by making it mandatory for a medical officer or gazetted hospital to provide the appropriate treatment, care, and necessary hospital accommodation for the child presented for treatment by a children's officer, police officer or other authorized officer. This provision is intended to overcome the difficulty currently experienced whereby an infant or child presented for medical treatment cannot be attended to unless accompanied by a parent or guardian.

When an infant is taken or kept in a place of safety the Director or Children's Officer will have parental responsibility for the infant or child during the period in question. This recommendation together with other amendments proposed by the Children's Department of the Office of the Vice-President have been submitted to the Chief Parliamentary Counsel and are in the course of drafting.

6. *The Prisons Act (Cap. 90)*

A meeting held in the Chairman's Office on 11th July, 1989, considered the Commission proposals on the problems of children accompanying mothers to jail and accepted the proposal to amend the above Act by reducing the period within which a child can be with a mother in prison from four years to three years or until arrangements for its proper care outside prison are concluded whichever shall be the earlier. The rationale behind the reduction in the age limit was that at the age of four children are well aware of their environment, and the impact of prison and inmates is detrimental to their mental development and approach to life.

With regard to the creation of mother and baby units the Commission's alternative proposals were considered and the provision accepted was that in every prison into which female prisoners are received there shall be set apart a mother and child unit.

This provision is intended to recognise the necessity for the subdivision of female prisoners into those with children and those without, as in the United Kingdom Prison Rules in which provision for special mother and baby units have been made. It also conforms to some extent with the 1989-1993 Development Plan. Chapter 10 paragraph 72, which admittedly refers to the special accommodation being outside prisons, but nonetheless recognises the need for separate accommodation. It is also in keeping with the Geneva Convention on the Rights of the Child, Article 6 of which stresses the undesirability of children of any age being confined in prison. The power of the Minister to make rules under the proposed paragraph is to enable comprehensive rules to be made for diet, nurseries, medical care and all other numerous matters which need to be covered in such Regulations, both within and outside the prison.

The third proposal of the Commission providing for liaison between the Children's Department and Prison Departments was also discussed and accepted. This proposal was considered important particularly with respect to women serving long sentences. It is necessary to find ways of caring for the children of such prisoners through methods such as fostering, institutional care or placement with willing relatives.

The proposals have been submitted to the Chief Parliamentary Counsel vide letter dated 12th July, 1989.

7. Trafficking in Specified Substances Bill

The above legislation covering all narcotic drugs and the tracing and confiscation of proceeds thereof was drafted by Mr. Hamilton and has been submitted to the Chief Parliamentary Counsel for implementation.

In addition proposal has been made regarding minimum sentences in drug cases.

8. Enduring Powers of Attorney

This topic has already been covered in section III (f) (ante)

9. The Registered Land Act (Cap. 300)

In the Sixth Annual Report (section VII (4)) the Commission referred to its proposal to include section 153A in the above Act in order to deal with the situation arising where a chargor has died, and no representation has been taken out in connection with his estate. The proposed amendment, made as early as July, 1987, was intended to cure the unsatisfactory position of the charge in such circumstances.

The difficulty which arises is that the notice, which is a condition precedent for the realization of the security by the chargor cannot be served on anyone, and precludes the lender from exercising his remedies under the Act by enforcement of the charge.

The effect of the proposed section 153A is to provide for substituted service of the notice together with the form of advertisement to be inserted in the Press, and a certificate of compliance with the requirements of the new section, to be completed by the person giving the notice under sub-section (2) thereof. These would be in the Third Schedule of the Act. (Since the compilation of this report a remainder has been sent to the Chief Parliamentary Counsel to look into the matter).

10. *Mazrui Lands Trust Act (Cap. 298)*

This Act has been discussed in section V (c) (ante).

SECTION VII

CONCLUSION

No separate part has been included here to deal with the matters arising from the Fifth Annual Report as significant further developments have taken place in those topics in the period under consideration.

The Chairman would like to reiterate his Tributes expressed at section IX of the Sixth Annual Report.

In the future the Commission will concentrate aggressively on the many areas of Kenya Law which still require reform and it is hoped that, with the improvement of funds available, staff and service that all the laws from Chapter 1 to 540 will be brought suitable up to date in line with Kenya's needs.

Accordingly the Kenya Law Reform Commission has the honour to submit its 7th Annual Report to the Honourable the Attorney-General under the Law Reform Commission Act (Cap. 3).

PRESENTATION BY THE KENYA LAW REFORM COMMISSION TO THE SECOND ANPPCAN WORKSHOP RELATING TO THE SITUATION OF CHILDRENS' LAW IN KENYA.

The Kenya Law Reform Commission is a relatively new creation in Kenya, having been established by statute in 1982. Its first active contribution to the increasingly important topic of Child Law was the Seminar organised by the Commission entitled "The Law as it relates to children," which was held in Nairobi in June, 1984, at which the Honourable Attorney-General was the Guest of Honour.

A full account of the matters discussed and the objectives achieved at that seminar is attached hereto as Appendix I. It will be seen that this comprises a very extensive review of the situation as it then existed, and the recommendations made in order to overcome the unsatisfactory situations that were extensively canvassed at that seminar.

Since that seminar the subject of children and the monitoring of various decisions, both judicial and administrative, which affect the topic, have been kept under constant research and review by the Commission in pursuance of its powers and duties under *Section 3 (1) of the Law Reform Commission Act (Cap. 3)*, which are to keep under review all the Laws of Kenya to ensure its systematic development and reform, including in particular the integration, unification and codification of the law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments and generally its simplification and modernization, and for that purpose:

- (a) to receive and consider any proposals for the reform of the law that may be made or referred to them;
- (b) to prepare and submit to the Attorney-General programmes for the examination of different branches of the law with a view to reform, including recommendations as to the agency by which that examination should be carried out;
- (c) to undertake, pursuant to any programme approved by the Attorney-General, the examination of particular branches of the law and the formulation, by means of draft Bills of otherwise, or proposals for reform therein;
- (d) to prepare, at the request of the Attorney-General, comprehensive programme of consolidation to facilitate the exercise by him of his powers under the Revision of the Laws Act, and to undertake the drafting of Bills pursuant to any programme of consolidation approved by him;
- (e) to provide advice and information to ministries and departments in the Government with regard to the reform or amendment of the branch of the law appropriate to that ministry or department.

Since its inception the Commission has received many proposals for reform from the Attorney-General, Government ministries, private organizations, and individuals. It has also initiated work on a number of laws which the Commissioners have considered potential areas for reform. One such area is the law relating to children.

It is important to mention at the outset that the Commission is committed to the policy of consultation with relevant or interested parties in specific areas of law, and although to date the Commission has not participated in joint research work with any individuals or institutions outside the Commission, every effort has been made to utilize the experience and expertise of resources outside it.

The laws relating to children and the desirability of streamlining and amending them forms the fifth major point in the Programme of Work submitted to the Attorney-General for approval under section 3 (2) of the Act.

The next occasion on which the Commission participated in a major event relating to the topic of children was the first ANPPCAN Conference held at the United Nations Environment Programme headquarters at Gigiri from the 9th to 11th May this year, 1989 when the Chairman was invited to close the Workshop, at which the Commission had been substantially represented. This Workshop was intending to study the Draft Geneva Convention on the Rights of the Child, intended for presentation to the General Assembly in November next year, to which it made a very substantial contribution, and resolved that there should be a special African Chapter on the Rights of the Child, which formed the subject of the paper presented by Mr. Amos Wako on Tuesday the 10th of May, 1988.

In his closing address the Chairman referred to the 1984 Seminar, and, emerging there from, the importance of standardizing the definitions of the word "child" and the ages at which the various definitions should cease to apply. He also dealt with the importance of an identity for a child culturally, nationally and internationally, the vital need for education, the effect on children of wars and disturbances, and the issue of the unborn child.

The foregoing is intended to deal with the second paragraph of the stated objectives of the present Workshop, namely, Review of the Socio-Cultural Protection of Children's rights.

As regards the first objectives, namely, a review of the various statutory provisions protecting children's rights in Kenya, there is attached as Appendix II hereto, a table showing the present laws relating to children in Kenya together with a list of all the Acts which affect children in one way or another although their specific purposes are to legislate for other matters. It will be seen that these are very widespread, and that any meaningful attempt at standardization and rationalization will be a massive task.

In addition to the Commission's involvement in the Seminar and the two workshops relating to children, Mr. Justice O'Kubasu co-ordinated a workshop on the subject of Criminal Justice and Children in April, 7th to 11th 1986 at the Kenya Institute of Administration. The report on this workshop is available, we understand, in the UNICEF's Office at UNEP

Headquarters, but the preface to the workshop will give some idea of its main objectives. At that time it was agreed that a high level workshop be held in order to make a comprehensive analysis of the problem and come up with guidelines for future strategies in dealing with children who have problems with the law as well as those who become victims of the law due to their parents lawlessness e.g. children who accompany their parents to prison and children who are abandoned as a result of their parents' imprisonment.

The main objects of the workshop were to:

1. Sensitize the participants on the plight of children in prison and the application of the law.
2. Create awareness of social, psychological and economic factors that lead children into problems; and
3. Identify strategies for future training and development of criminal justice personnel.

The question of children and matters connected therewith fall under the Office of the Vice-President and Ministry of Home Affairs while Criminal Justice matters fall under the Office of the Attorney-General. Hence this Workshop was organized jointly by UNICEF Kenya Programme, Office of the Vice-President and Ministry of Home Affairs and Office of the Attorney-General.

The Workshop concentrated on matters pertaining to children but discussions also touched on adult offenders and the application of the law.

It was hoped that the resolutions passed and other sentiments expressed during this workshop will benefit children in this country and elsewhere.

Mr. Justice O'Kubasu also attended a meeting on the Convention of the Rights of the Children at Geneva in January this year, which was to some extent a preamble to the first ANPPCAN Conference held in this country in May. His very helpful report is attached as Appendix III to this presentation. The results of all these workshops and meetings will eventually be included in the final Draft of the Convention scheduled for adoption by the General Assembly in November, 1989.

Last but not least, the Commission has made visits to the Coast, Nyanza, Western, Eastern and Central Provinces during the past three years, in the course of which a number of suggestions relating to the laws relating to children were received. A summary of the results of these visits is attached hereto as Appendix IV.

**THE VISIT BY THE KENYA LAW REFORM COMMISSION TO
KISUMU ON THE 28TH AND 29TH SEPTEMBER, 1988.**

On the first day, Wednesday, we were present at a meeting between Provincial Heads of Department at the Provincial Headquarters Kisumu which began at 10.00 a.m. The Chairman of the Kenya Law Reform Commission addressed the meeting at the invitation of the Honourable Provincial Commissioner, re-stating generally the objects of the Kenya Law Reform Commission and of the Act under which it is constituted, *Chapter 3 of the Laws of Kenya*. He summarized the matters which had been raised at the previous meeting on the 28th April, 1988 and stated those which had been attended to between the two meetings. He also stated the various achievements of the Commission in the interim period, including the programme submitted to the Attorney-General, and the ten points thereof, and he circulated two papers, one showing the projects undertaken by the Commission with an updated version of the state at which those had been reached, and tables of statutes, which are relevant to the programmes submitted to the Attorney-General.

When the discussion was laid open to the meeting by the Provincial Commissioner, two matters of substance were raised which were of importance to the departments concerned, and which merited consideration by the Commission. The first was raised by the Land Adjudication Officer for the Province, and concerned the difficulties which he and his officers experience in the preparation of the Land Adjudication Register for the adjudication sections with which he is concerned under the Act. Cap. 284. He was concerned about the elaborate objection procedure, and its several stages, laid down under the Act, enabled persons to occupy land which was not theirs and to continue to do so by perpetuating their objections. Thus because of the time limits specified in the Act, and the gaps therein, it was possible for an unscrupulous person to hold up preparation of the register for a considerable period of time, and, moreover, to occupy the land to which he was very probably not entitled, develop it and put improvements on it, thus delaying the ascertainment of the true position and be concerned in the same section.

The Adjudication Officer referred us to *section 21 (3)* of the Act whereby, after the adjudication committee appointed under section 6 has decided on the various matters laid down in section 20, any person who was affected by such a decision could, within fourteen days complain to the executive officer, upon which the executive officer would be obliged under subsection (4) to refer the complaint to the adjudication board appointed under Section 7. There are no specified time limits under either of the two sections 21 and 22, within which the Committee or the Board, shall determine matters referred to them. Both these procedures are prior to the preparation of the adjudication record referred to in part IV of the Act, Section 23. Once the objections have been resolved and the adjudication record completed according to the forms specified in *Section 19*, it is then combined with the demarcation map prepared by the survey officer under *Section 16*. These collectively form the adjudication register in accordance with Section 24 of the Act. Once the adjudication register is completed then

a person affected may object to it under *Section 26*, and then there is a sixty day limitation period after which the adjudication officer may proceed to determine the objection. Once he has determined the objection, a person aggrieved has yet a further chance of objection by way of an appeal under *Section 29* to the Minister, which has now been delegated to the Area District Commissioners under sub-section (4). There, also, there is a 60 day period for objection.

The Land Adjudication Officer who addressed us considered that the various times should be connected up under the Act so that at least there was a time certain within which all objections could be disposed of. Under the present situation, a person objection after any rectification under *section 26*, for the whole of the demarcation Section concerned.

I would observe, in relation to this last point, that under *section 27* subsection (3) (b)—an objection *section 26* does not apparently hold up the preparation of the register for the non-objectors because under that third paragraph the Director of Land Adjudication is entitled to certify that It has become final subject to any outstanding appeals. So there is a provision for a certificate of finality notwithstanding that any appeals may still be outstanding under *section 29*. However, there does not appear to be issues where there are outstanding objects under the preceding sections, as opposed to an appeal under *Section 29*. The Commission promised to consider this matter and to communicate with the Land Adjudication Officer to see if the difficulty could be overcome by amending the provisions of the Act.

The second matter raised during the meeting in the Provincial Commissioner's Office was in relation to fisheries. The Fisheries Officer pointed out that people who produced crops and so on from the land could obtain subsidies, loans and other benefits from the Government and financial institutions in respect of their crops and produce, but that there was no such provision in relation to those who derived their livelihood from the produce of the water—that is to say fish. The Chairman pointed out that the difficulty in that respect was that water was generally incapable of being the subject of any title under any of the Acts which might apply, because it was not able to be defined in a way that land could be.

The meeting was informed, however, that fishermen do form co-operative Societies under the Co-operative societies Act (Cap. 490) and there is no impediment to a Society receiving financial assistance as a collective body even though it could not be secured on land or produce. Under that Act "Agricultural Produce" includes the produce of fisheries. After discussion it was felt that it was not really possible to amend the existing legislation in any practical fashion to deal with the problem raised.

The same afternoon the Commission met members of the Law Society, Magistrates and Judiciary in the Sunset Hotel and various matters were raised. Mr Onywera, the Chairman of the Law Society for Kisumu, complained that inadequate notice had been received of the meeting and said that had they received separate and adequate notice, other than through the Provincial Commissioner, then the afternoon session would have been better attended.

The Chairman reviewed the functions of the Law Reform Commission and the various matters which had been discussed on the previous visit, and it was stated that one of the amendments to the Magistrate's Jurisdiction (Amendment) Act, which had been drafted previously, had not yet been submitted, due to an oversight. The Chairman explained the Programme of Work submitted to the Attorney-General, circulated the chart showing the state of various projects undertaken by the Commission, and explained individual amendments which had been achieved since the previous visit in April, and there was general approval of the course taken. The Chairman also circulated the brief which had been given to the National Women's Council of Kenya with various examples on National Matrimonial Property Legislation in other countries, including judgments given in this country, with a view to providing some protection and security to a woman whose marriage or relationship might subsequently break up.

On the following day, the 29th of September, the Commission held a public session at 10.00 a.m. in the Municipal Hall. Various subjects were raised by the members of public. There were complaints about the wide powers given to chiefs under the Chief's Authority Act (Cap. 128) particularly under sections 10 and 11 thereof. There were complaints also that people who fail to attend barazas called by chiefs could be charged with offences before court and that this had happened in individual cases, even though none of the paragraphs in sections 10 or 11 specifically envisaged compulsory barazas. The general consensus was that there should be a curtailment of the wide powers given to the chiefs under these two sections, that some of them should be transferred to District Officer's or District Commissioner's, and that if a chief issued a general notice requiring people in his area to comply with certain directions, which was published, or notified generally, then such a direction should only be valid for a set or certain period, probably a year, after which it should be renewed, but should not be valid in perpetuity.

Various questions were raised under the *Law of Succession Act (Cap. 160)* which were dealt with by the Chairman, who explained that there existed adequate provisions under the Act for devolution of property on an intestacy to the surviving wives, and children of a deceased under the Act, and that there was no need for amendment. Questions of conflict between that Act and Customary law were raised and complaints were made that frequently a more distant relative such as a brother in law, might attempt to take possession of the deceased's property to the prejudice of the family. It was felt that this was not really a matter for legislation, but for enforcement of the Act and civil remedies in the courts.

Numerous complaints were received that the police were being a little too assiduous in arresting people under the *Trespass Act (Cap. 294)* and also arresting people for loitering or offences allied to vagrancy under the various provisions of the *Vagrancy Act (Cap. 58)* and the *Penal Code*. People were not given an opportunity for explanation or in the case of trespass, particularly on railway land, an opportunity to provide the reasonable excuse which is set out in section 3. The Chairman pointed out that in section 9 subsection (3) there was a safeguard built in, which required that a person arrested under the Act should be taken with all due

speed before a magistrate and should not be detained without a warrant for longer than is necessary. It was felt that some time limit should be imposed by the Act, within which a police officer would have to take a person before a Judicial Officer, and 72 hours was suggested as a reasonable period. Mr. Miseda, a former Magistrate, now an acting Resident Magistrate, who is pursuing legal studies with a view to future qualification and practice, spoke at length on problems raised when the courts are asked to remand people, indefinitely in some cases, by police who are simply not ready with the case, and, in one or two instances, as a cover-up for injuries inflicted on the person concerned during custody, possibly accompanied by interrogation. He instanced the case of a man who had been paralysed by ill-treatment and who had had to go to the hospital, and it was only after he had received treatment in the hospital he was brought to the court in a disabled condition. It was pointed out to Mr. Miseda that of course no magistrate should sign a remand warrant, or an extension thereof, unless he actually sees the person or the accused in Court. He requested that there be some mandatory provision in the Penal Code or the Criminal Procedure Code which would make it clear that a magistrate should not remand a person indefinitely, and unless he is satisfied that the case would be brought within a reasonable time. At the moment the discretion is the other way that is to say the magistrate has a discretion to remand, and there is no direction not to remand in certain circumstances.

During the afternoon session, which commenced at 2.30 p.m., a member of the public raised another problem under the Criminal Procedure Code, namely when there is an unexplained death and the police take the body from where it is to have a post-mortem performed under section 386 subsection (2). He said that considerable inconveniences expense and distress was being caused to relatives by, in some cases, the failure of the police to return the body from where it came. The District Officer, Mr. Kusimba, who assisted the Commission in its deliberations, stated that in most cases, in practice, the authorities did return the body to the relatives or place concerned, but that there might be difficulties, for example where the body was found by the roadside after, say, a traffic accident, or where the owner had locked up his premises after the death so that it was not possible to return the body to where it had been found. The Chairman pointed out that it was difficult from a practical point of view to require the police to return the body, by inserting a further subsection in *Section 386* making it a mandatory duty for them to do so, particularly in view of the questions of expenses involved, and the limitation on vehicles and manpower which they have, which are required for more pressing matters. Nevertheless it is recognised that in Nyanza and Western Provinces in particular, the population revere their deceased relatives greatly, and that some provision which would ensure that the deceased was returned to his family would be very much welcomed.

After a lengthy discussion it was agreed that the Commission would consider the insertion of some provision which would empower the police to return a body, if practicable to do so, rather on the lines of the latter part of subsection (2) for the forwarding of the body for a post-mortem in the first instance. Other matters which were raised were an oversight in the marginal

note to *Rule 28 of Order XXI of the Civil Procedure Rules* relating to conjugal rights, the provisions for which have been deleted in the substantive Rule by *Legal Notice 119 of 1975* (at page 432 of the 1975 subsidiary legislation); and for Law to be included as a subject, at least in its elementary respects, for pupils in schools, so that they may have some idea of the legal structure, and of legal principles to equip them better when they enter the mainstream of life after completion of their education. Finally the District Officer promised to consider a complaint which had been made by one of the members of the public present, regarding the authority of chiefs, and also he said that in practice many of the orders issued by chiefs are made on instructions of an administrative officer such as the District Officer or the District Commissioner. After the two public sessions the Chairman thanked the members of the public for coming along and closed the meeting.

SEMINAR ON DESERTIFICATION CONTROL HELD AT NYERI ON
6TH TO 9TH OCTOBER, 1988

In 1977, a Seminar on desertification was held in Nairobi to provide a national forum to identify the causes, extent and consequences of desertification in Kenya. At the seminar it was noted that the lack of a clear policy on desertification helped to accelerate the process of desertification. It was agreed that a long term policy should prevent and arrest the advance of desertification and where practicable to reclaim desertified land for productive use. In June, 1985 the Protocol concerning protected areas in wild Fauna and Flora in the East African Region was signed. Kenya was a party to this Protocol. Under the Protocol provision was made under:

Article 3—for the protection of endangered flora.

Article 8—for the establishment of protected areas.

Article 10—for protection measures including—

- (a) the organization of a planning management system and.
- (j) the regulation of trade in and import and export of
plants parts which originate in protected areas;

Article 12—for the consideration of traditional activities in promulgating protection.

Article 14 and 15—for publicity, education and information.

The above mentioned Seminar and Protocol serve to show the concern currently being directed at desertification in Kenya.

The causes of desertification are well known and include:

- (1) *Population*—the rapidly growing population has led to a corresponding increase in the demand for land and land resources, the decrease in available land has in turn led to overgrazing in not only the unprotected areas but also in the protected areas.
- (2) *Ecologically Unsound Crops*—Crops unsuitable to the Kenyan climate and ecosystem have been introduced into agriculture leading to rapid deterioration in the fertilizers and pesticides causing even greater damage to the soil.
- (3) Vulnerability of irrigation, and alkalinity of the soil.
- (4) Socio-economic problems such as:
 - (a) Over-exploitation e.g. the mangrove forests which are being over exploited as individuals attempt to improve their standard of living;
 - (b) Traditional activities of the community e.g. wood fuel is still the most easily available fuel to persons living in rural areas, and the building of bomas which in northern Kenya is one of the most serious causes of desertification.

- (c) Industrial development-some industries use wood as a raw material while others produce effluents which pollute the air, land or water thus destroying or causing damage to large tracts of land.
- (5) Inadequacy of the Law, its enforcement and the management of natural resources. As may be noted from the appendix to this paper, of the Acts contained therein, (23) were enacted before Independence. Many of the pre-Independence statutes were enacted by the colonialists solely for the purpose of exploiting the natural resources. They are not adequate conservation of those resources today.

The approach to environmental law, in general, is fragmentary leading to overlapping and anomalies, and thus the law on desertification is the same.

Questions also arise concerning the awareness of those charged with the enforcement of the law. How well do they know the laws which they are charged with enforcing. The management of natural resources is also questionable. Just how effective are the environmental impact assessments?

Steps have been taken in an effort to prevent further desertification including:

- (1) intensifying agriculture, soil management;
- (2) Crop husbandry;
- (3) Irrigation.

The following may also be considered;

- (4) Elevating the socio-economic problems that lead to desertification.
- (5) Enacting laws which adequately provide for the protection of the environment; and co-ordinating the laws to remove the anomalies.
- (6) Public awareness and the education, mainly, of those who are charged with the enforcement of the law;
- (7) The proper management of natural resources and paying heed to the environmental impact assessment statements.

In a recent seminar held on "Law and the Environment" in which the Kenya Law Reform Commission was represented, the participants agreed that a co-ordinated; integrated, comprehensive legislative national policy is urgently required as far as regards environmental Law. It therefore stands to reason that any policy on desertification should be in line with the national policy on environment. At the same seminar it was also resolved that there are far too many statutes that touch on environmental law and there is a need to harmonize this legislation so as to bring it under the national legislative policy. The same observation may be made in this instance.

LAWS TOUCHING ON DESERTIFICATION—CONTROL

CHAPTER	ACT	DATE OF COMMENCEMENT
1.	314	THE ELECTRIC POWER ACT 30.3.20
2.	315	THE ELECTRIC SUPPLY LINE 12.8.14
3.	324	THE PLANT PROTECTION ACT 28.9.37
4.	321	THE CROP PROTECTION AND LIVESTOCK ACT 29.3.36
5.	325	THE SUPPRESSION OF NOXIOUS WEEDS ACT 1.8.45
6.	326	THE SEEDS AND PLANT VARIETIES ACT 1.1.75
7.	327	THE GRASS FIRES ACT 15.1.42
8.	332	THE COCONUT PRESERVATION ACT 17.10.15
9.	345	THE FERTILIZERS AND ANIMAL FOODSTUFFS ACT 4.8.67
10.	385	THE FORESTS ACT 1.3.42
11.	386	THE TIMBER ACT 24.5.71
12.	376	THE WILDLIFE (CONSERVATION AND MANAGEMENT) ACT 13.2.76
13.	243	THE RADIATION PROTECTION ACT 1.11.84
14.	115	THE EXPLOSIVES ACT 1.7.31
15.	411	THE KENYA POSTS AND TELECOMMUNICATIONS ACT 31.12.77
16.	397	THE KENYA RAILWAYS CORPORATION ACT 20.1.78
17.	204	THE PROTECTED AREAS ACT 8.9.49
18.	299	THE SURVEY ACT 31.12.61
19.	391	THE KENYA PORTS AUTHORITY ACT 20.1.78
20.	382	THE TOURIST DEVELOPMENT CORPORATION ACT 9.11.65
21.	63	THE PENAL CODE 1.8.30
22.	372	THE WATER ACT 7.5.52
23.	346	THE PEST CONTROL ACT 15.5.84

RECORD OF SPECIAL MEETING OF COMMISSIONERS FOR LAW REFORM HELD ON MONDAY, 7TH NOVEMBER, 1988

The Land (Amendment of Laws) Bill 1988, which makes amendments to four Acts of Parliament, namely the Government Lands Act (Cap. 280). The Registration of Titles Act (Cap. 281). The Land Titles Act (Cap. 282) and the Registered Land Act (Cap. 300), was submitted to the Law Reform Commission for its consideration, and the Commissioners convened a special meeting which was held in the Conference Room on Monday, the 7th of November, 1988. The object was to deal with all its provisions, and consider them from the point of view not only of the Government, but of the Practitioners in the profession, and also the public, with a view to making detailed comments and suggestions on the provisions contained in the Bill.

A Memorandum dated the 27th of October, 1988, was sent by Kagwe and Co. , on behalf of the Conveyancing and Property Committee of the Law Society of Kenya to the Chief Parliamentary Counsel, with a copy to the Law Commission, containing a redraft of certain of the provisions in the Bill, mainly relating to the second object thereof, which is to control the transfer of land to persons who are not citizens of Kenya. Mr. Commissioner Hamilton also submitted a draft in which he used the framework of the present proposed Bill, and which, so far as the second object is concerned, is on similar lines to that submitted by the Conveyancing and Property Committee of the Law Society.

It will be noticed that so far as the first object of the Bill is concerned, namely, providing for the revision of rent of urban land, and, as part of that revision, the alteration of the periods in leases between which the rent shall be revised, the new provision is contained in a proposed Section 10 of the Government Lands Act, but it was felt that it was more suitable to retain the existing Section 10, which provides for the length of the term, simpliciter, and to place the revision of the rent provisions as a replacement to the present Section 11; thus, in the proposed subsection (d) of Mr. Hamilton's draft the periods into which the 99 year term is to be divided, and the annual rent to be paid, are specified in the proposed subsection (2) of Section 11, namely that the lease shall be divided into periods, the first of which shall expire on 31st December, 1988, and shall thereafter form ten year periods until the end of the lease. It also provides that the annual rent shall be payable in advance on the 1st of January each year, starting with the 1st January 1989, rather than the 1st of January, 1988, which is the operative date stated in the proposed Bill. The reason for this is that while, obviously, revision of annual rent of any existing lease will to some extent involve retroactive obligations, it is felt that if this was to apply to the commencement of the new system, that such retroactive legislation would be not only unacceptable but impracticable. To do so would involve a recalculation and

repayment of different rents for a period, 9/10ths of which has expired, namely the calendar year 1988. The new proposal by Mr. Hamilton accepts that, in future, ten year revisions of rent, rather than, as previously, that which appear to have been 30 year periods, although these only to have been applicable (though not stated in any statute) since the late 1960s. The rest of the draft of that section, namely Section 11, deals with the mechanics of payments and revision of the annual rents payable under these leases.

The next substantive provision which merited detailed consideration related to the valuation of the land which would necessarily precede any increases of land rent payable under the proposed Section 11. The view was put forward that it would be undesirable to have two separate bases for the valuation of land, and the Commissioners agreed that the method of valuation adopted under the Valuation for Rating Act, (Cap. 266) should be utilised for the new valuations for the revision of rents under the new Bill, empowering the Commissioner of Lands to adopt that method. While this is not an ideal solution it was suggested that the most convenient way of doing this would be to add a new subsection (2) to the existing Section 18A providing:

“For the purposes of the valuation required by this Section the Commissioner, “(meaning the Commissioner of Lands)” may adopt the valuation made by the local authority under the Valuation for Rating Act, Cap. 266”.

As regards 18B of the proposed new Bill (which forms part of Clause 2B of the draft) the provision requiring the Commissioner to cause notice to be served on the lessee, setting forth the revised value of the land was noted by the Commissioners. Under subsection (2) it is provided that if within 3 months of the date of the notice the lessee notifies the Commissioner that he has an objection to the new valuation then such objection shall be referred to and determined in accordance with the *Arbitration Act*. (It was not thought possible or advisable, to incorporate the provisions relating to the valuation court in Cap. 266). In subsection (3) of the proposed Section 18B there is provision for the Commissioner to extend the time for objection if the lessee can satisfy him that a notice which should have been served upon him has not in fact been served.

Subsection (4), which appears in the proposed draft Bill was felt by the Commissioners to be inappropriate, as it militated against the whole purpose of the proposed Section 18B. In other words the purpose of that Section was to ensure that the lessee whose rent was to be increased had notice of the increase, and a provision which provided that he shall have no defence if there is no notice would seem to be wholly inconsistent with the purpose of that Section. In any event in cases of doubt the normal evidential rules would apply, so that if the Commissioner was able to show that the notice had been sent, then it would be deemed to have been delivered, in the ordinary course of post, to the lessee; in practice therefore it was not felt that subsection (4) would be of any benefit to the Government, and would in fact cause unfairness and hardship in some cases.

As regards the proposed Section 29, which forms subclause (c) of Clause 2 of the proposed Bill, the Commissioners noted that the new provisions fall within Part IV of the Act, namely Disposal of *Agricultural Land*, rather than in Part III, which relates to the disposal of land within townships. If therefore this provision is to be inserted, and the Commissioners were generally in agreement that the proposal should be retained, it would follow that the long title and the Memorandum of Objects and Reasons stated in the new Bill would have to be suitably amended to accord therewith. In this connection therefore, the Commissioners proposed amendments to the Long Title, by inserting in line 4 thereof after the word "urban" the words "and agricultural"; the Memorandum of Objects and Reasons at the end, would also require a consequential amendment, and it was suggested that in the second line of the Memorandum of Objects and Reasons the words "and agricultural land" should be inserted, more particularly because at the present moment there is statutory provision in Section 30 of the Principal Act for remains of rents after every 30th year, and the new Section 29, if accepted, would reduce this period, and increase from 3 to 10 the number of revisions that would take place for the duration of a lease of agricultural land.

The next Section which engaged the attention of the Commissioners, appears as subclause (d) of Clause 2, whereby it is proposed to insert a new subsection, namely (2A), and this has been substantially redrafted by the Law Society's Conveyancing and Property Committee, and added to by the Commissioners, the object of which was to make all the provisions relating to the various Acts which are to be amended as uniform as is possible in the circumstances. Mr. Commissioner Waruhiu raised the point that the word "land" in the proposed subsection (a) of Section 2A should include any interest there in, but it was pointed out that this would more properly fall within the definition section under part VI, miscellaneous provisions, in which the definition of land would run as follows:

"Land" means land or any interest therein is agricultural land within the meaning of the Land Control Act".

Mr. Commissioner Waruhiu was satisfied with that amendment but he also raised a further amendment to subsection (b) of the Section 2A suggesting that after the word "lease" in line 2, the words "or any interest therein" should be included, and this was accepted by all the Commissioners. It was suggested in this connection by Mr. Commissioner Waruhiu that we should include a new subsection (2B) as a subclause covering the fraudulent procurement or obtaining of registration by a person in contravention of the purpose of the section, that is to say the conveying of land or interests therein, or leases or interests therein, to noncitizens. After deliberations the Commissioners decided that this would also more conveniently be placed in Part VI under the heading 'Miscellaneous Provisions and it has been drafted accordingly as a new Clause 7.

The Commissioners then turned to the new sections which are individual to each of the other three Acts in question, namely a new Section 33 subsection (4) in *Registration of Titles Act*, (Cap. 281,) a new Section 63A in the *land Act* (Cap. 282) and a new Section 86B in the *Registered*

Land Act (Cap. 300). It will be observed that there are differences in the existing Bill as published, for example in the Registration of Titles Act the word "Company" is mentioned in subsection (4), in the Land Titles Act "Company" is not mentioned at all in Section 63A, while in Section 86B of the Registered Land Act the words "private company" are mentioned. The purpose of the draft submitted by Mr. Hamilton is to make all these provisions uniform, and the only amendment which occurred in discussion between the Commissioners was in line 3 to Section 86B in the draft which would then read as follows:

"shall not register any transfer, lease or *other instrument*."

In Section 63A of the Land Titles Act after the word "lease" there should be inserted the words "or any interest therein". Furthermore, it was observed by the Commissioners that logically these amendments should fall in the order in which the Acts of Parliament are numbered, so that the amendment to the Registration of Titles Act should now become Part III, the amendment to the Land Titles Act should remain as Part IV and the amendment to the Registration Land Act should become Part V.

The next matter which was considered was under the heading Miscellaneous in Part VI of the new draft. The extension of the definition of "land" has already been mentioned, but under the definition "controlled transaction" it was felt that at the end of the substantive part of that definition, that is to say before the subparagraphs (a) to (g), and after the words "Registration of Titles Act" there should be inserted words similar to the which, fortuitously appear in the *Land Control Act (Cap. 302)*, in the recently restored paragraph (c) of Section 6, subsection 1, of that Act. Those words are "the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company within the meaning of Section 30 of the Companies Act, or Co-operative Society within the meaning of the Co-operative Societies Act (Cap. 490), which for the time being owns land. This last major amendment arose because of an apprehension expressed by Mr. Commissioner Waruhiu that unless these words were included there would be a loophole in the proposed Act permitting citizens to acquire or form private companies and then to transfer shares therein to non-citizens, thus enabling those non-citizens to have an interest in land and defeating the object of the amending law. After this provision had been considered Mr. Commissioner Waruhiu said that he was satisfied with the present proposals which the Commission would put forward.

To cover the matter of persons who knowingly or. There seems to be an omission been placed under obtain registration in favour of non-citizens, contrary to the provisions of the amending Bill, it was proposed that a new Clause 7 be inserted instead of, that which was initially proposed by Mr. Commissioner Waruhiu, namely subsection (2B) to Section 107, and this new Clause 7 should be as follows:

"Any person who knowingly procures or obtains a registration in favour of himself or of any other person of any title to any land or interest therein, or to any lease or any interest therein, in contravention of this Act, shall be liable to a fine of or to imprisonment not

exceeding years, or to both such imprisonment and fine and shall in addition be liable to forfeit any interest so procured or obtained"

It was felt that in the case of such an eventuality the rectification provisions of Section 143, subsections (1) and (2), contained in the Registered Land Act would be the most appropriate, and that has been done, so far as Subsection (1) is concerned (which would become sub-section (2) of the proposed new section), in the fourth line delete the words "(other than a first registration)" and add the words "so procured or" between the words "has been" and "obtained" in that one. Subsection (2) of Section 143 of the Registered Land Act should be incorporated in to as subsection (3) of the new proposed Section, which forms Clause 7. Quite naturally the penalties have been left blank, in the Draft, because that is not the function of the Commissioners, but of Parliament.

Naturally the existing Clause 7 of Mr. Hamilton's draft will have to be renumbered as Clause 8, the Clause relating to Presidential Exemption will become Clause 9, and the subsequent provisions will become Clause 10, instead of Clause 9 as at present. (NB: The Clauses 8 and 9, as renumbered, are based on Sections 23 and 24 of the Land Control Act in order to achieve consistency in providing for Presidential Prohibitions and Exemptions.

**VISIT MADE BY THE KENYA LAW REFORM COMMISSION TO
GARISSA IN THE NORTH-EASTERN PROVINCE ON TUESDAY 22ND
NOVEMBER, 1988**

The Commissioners arrived at Garissa Airstrip at approximately 10.00 a.m. and we were welcomed by the Deputy Provincial Commissioner, Mr. Chanjoa, and various members of the Provincial Administration and Police. We first met, in the Provincial Commissioner's Office, the Senior heads of departments including the Provincial Police Officer Mr. Kiogora, Major Langat of the Kenya Army, the Deputy Provincial Criminal Investigation Officer, the District Commissioner, the Provincial Special Branch Officer, the 2nd class District Magistrate and the Deputy Officer Commanding Police Division. This was in effect a closed session, because matters of security needed to be discussed, in the absence of the other Provincial heads of Departments.

This was our first visit to the North-Eastern Province since the Commission came into existence in 1982. It became immediately apparent that the problems encountered, so far as law reform and enforcement of the laws were concerned, were quite different from any of the other Provinces so far visited.

Being close to the Somalia border, and the Province, in the minds of many of the inhabitants at any rate, being therefore, partly oriented towards that country, especial problems of security are encountered because of the ability of the inhabitants to move into Somalia and to be accepted as natural inhabitants of either country that is to say Kenya or Somalia. The Provincial Police Officer stated that many problems arise because Kenya Nationals enlist in the forces of the Somalia Republic, and may even serve for ten years, after which they would return to Kenya and might engage in subversive or other anti-Government activities, or those to the prejudice of law and order, or at least be in position to utilise the knowledge of military procedure and training which they had acquired during the period of their service in Somalia. No problem arose with Ethiopia because that country would not enlist Kenya Nationals in its Armed Forces.

It was noted that the law at the present moment (Section 68) (b) of the Penal Code) does not render it an offence for a National of Kenya to enlist in the armed or Police services of a foreign state, unless that foreign state is either at war with Kenya or at war with another country to which Kenya is friendly.

There was general discussion about that question, as to whether an offence of Foreign Enlistment should be created in relation to a person enlisting in the forces of a country which is not at war with Kenya, or any of its allies, by the amendment of Section 68 of the Penal Code, or as Commissioner Mr. Hamilton suggested, an amendment to *The Preservation of Public Security Act, Cap. 57*.

Accordingly the Chairman prepared two drafts of suggested amendments, to Section 68 of the Penal Code, the first by deleting the words

"commits a misdemeanor" in the first line of that section, and adding at the end of it that is to say after paragraph (e):

"Shall unless he proves to the satisfaction of the court that such engagement or continuance thereof was involuntary, be guilty of an offence and liable to imprisonment for ten years [(this was the penalty suggested by the persons present at this closed meeting)]".

The Second amendment to section 68, which this course would involve would be to (b);

by deleting in the third line the first word "or", and inserting the words, after the word 'naval', the words "police or administration forces" and by deleting the words "at war with any friendly state.".

The other amendment which the Chairman proposed was by inserting a new section, No. 3A in the *Preservation of Public Security Act, (Cap. 57)* which would read as follows:

"Any person who, with intent to prejudice public security or the maintenance of Public order within Kenya, enlists, or accepts any engagement, in the Military, Naval, Air, Police or Administrative forces of any foreign country, shall be guilty of an offence and liable to imprisonment for 10 years. "Provided that such enlistment, or acceptance of any such engagement, or the continuance thereof, shall be proof of an intent to prejudice public security, or the maintenance of public order, within Kenya unless the contrary is shown".

Because of its contiguity to Somalia, the North-Eastern Province frequently has trouble with persons who are Somalia Nationals, who are also relatives of Kenya Citizens, cross the frontiers and attempt to pose as citizens of Kenya and obtain Identity Cards, which is clearly against the interests of the security of the State.

The present *Section 14* of *Cap. 107* covers persons who knowingly or wilfully make false statements in relation to registration, or to the possession of Identity Cards, but it was felt by those present that the law did not sufficiently cover persons who assisted others to break the law, whether by providing them with their own Identity Card or assisting them to obtain a false identity card.

The present *Section 14* of *Cap. 107* covers persons who knowingly or wilfully make false statements in relation to registration, or to the possession of Identity cards, but it was felt by those present that the law did not sufficiently cover persons who assisted others to break the law, whether by providing them with their own Identity card or assisting them to obtain a false identity card. Accordingly the Chairman proposed a draft subsection (2), which would be inserted in section 14, consequentially causing the remaining sub-sections to be renumbered as sub-sections (3), (4) and (5) respectively:

The Draft would be as follows: "any person who knowingly assists or aids any person who is not a citizen of Kenya to be registered under this Act, or to obtain or be in possession of an identity card, shall be guilty of an offence and liable to a fine not exceeding 10,000/= or to imprisonment for a term

not exceeding five years, or to both such fine and imprisonment." (The penalty was suggested by Deputy Provincial Police Officer and other Officers present).

After these amendments and suggested drafts, and other matters relating to public security, had been discussed the Commission moved into open session with the Provincial heads of departments in the Provincial Commissioner's Board Room, and this meeting started at approximately midday. The Commissioners were provided with the brief containing thirty one items of suggested amendments to various Acts which will be taken seriatim. The matters raised, as in the case of the Closed Session with the Senior Officers responsible for security, emphasized the problems which are peculiar to the North-Eastern Province, and, indeed, are distinct from those which the Commission had encountered on its other external visits. The first matter raised was by the Magistrate, Mr. Gicheru who is a professional 2nd class District Magistrate. He said that there are considerable difficulties because of the limits of his jurisdiction in Civil cases, which at the moment are confined to cases in which the subject matter is shs. 20,000/= or less. Accordingly, people who wish to file suit for amounts in excess thereof have to take their cases to Nairobi, the nearest practicable centre, which results in vast expense to the litigants. It was suggested that his jurisdiction should be increased to 100,000/=.

In addition to this it was hoped Garissa was of sufficient importance to merit the appointment, if this should be possible, of a Senior Resident Magistrate, or, at least, a qualified Resident Magistrate for the whole area. The parties do, on occasion, the magistrate estimated ten percent of the cases heard, have representation the advocates, and this causes problems for the District Officers and District Commissioners, who at present have to exercise Civil Jurisdiction in Wajir and Mandera, the two other centres in the Province.

As was stated in Kisumu, in relation to the Magistrate's Jurisdiction (Amendment) Act, District Officers and District Commissioners have many administrative duties and can ill be spared for judicial work, in which in any event they are not fully qualified. The Chairman undertook to communicate with the Honourable Chief Justice to ascertain if it was possible to consider sending a qualified Resident Magistrate to the area. (Since the visit the Chairman has contacted the Registrar of the High Court and the answer to this query is contained in the letter to the Provincial Commissioner dated 23rd November, 1988 Reference 3/5/4 Vol. 1).

The second matter raised was under the Advocates Act, (Cap 16). The questioner asked that the charges made by the lawyers should be published, so that people who wished to bring actions would know where they stood as regards legal costs. The Chairman informed him that the scale of charges is published as part of the Kenya Laws, namely the subsidiary legislation, under Chapter 16, at page 59 thereof. The charges permitted are contained in Schedules 1 to X set out at the end of the Order. The Chairman however pointed out that under rule 22 it was open to an advocate in all cases to make an agreement with the client as to remuneration under section 49 (1), or may alert to charge an instruction fee in accordance with schedule V,

which leaves the amount open, provided that the client agrees before-hand. The Chairman said that copies of the Remuneration Order would be sent to the Provincial Commissioner for his convenience.

The third matter raised related to a deserted wife and family, where the husband or father did not maintain them and she obtained court orders for maintenance for herself and the Children. In default it occurred many times that the husband would not pay, under the order and would be committed to a prison by way of execution under Sections 40 to 42 of the *Civil Procedure Act* and Order XXI Rule 34 of the *Civil Procedure Rules*. The pre-condition for civil jail confinement is that the decre-holder pays subsistence for the judgement debtor into Court before-hand, and, by definition, the wife being destitute and without support from her husband cannot pay the subsistence. The Chairman promised to consider this and to raise with the Attorney-General the possibility of an amendment to Rule 34 (1) of Order XXI covering this situation.

As regards the second part of item 3 on page 1 of the Brief it was pointed out that the vast majority of the population in the Province embraces the Moslem religion, under which, by the law of the Holy Koran, the father has exclusive rights over the children, however young they may be. The Children's Officer, Miss Musyimi—suggested that there should be a provision over-riding the religious law, inserted in the *Guardianship of Infants Acts, (Cap. 144)* and the Chairman considered that it might be possible to insert a provision, as a new subsection (4) in Section (3) of that Act, providing that in the case of the break up of a marriage or the termination of a relationship, as the case may be then the mother should have care and control, or custody, of very young children. There was some discussion as to the age up to which this should be because Moslem religious law holds that at the age of seven a child can then make up its mind as to with which parent he or she wishes to stay. After discussion it was considered that the proposed provision, if inserted in Cap. 144, should at least give the mother care and control up to the age of ten.

The next item is on page 2, No. 6. It concerns the question of representation for a person accused of robbery with violence, which is still a capital offence under Section 296 (2) of the Penal Code. The Chairman pointed out that where as in the case of murder, for which legal aid is available to the accused, and which is tried in the High Court, and thus there is only one appeal to the Court of Appeal, in a case of robbery with violence there are two appeals, first to the High Court, consisting of two Judges, and then to the Court of appeal on the second Appeal, which might in some measure compensate for the lack of legal representation at first instance.

The questioner however said that the absence of legal representation at the inception of a robbery case, might render the defence case so untenable that, no matter how many appeals there were, this would be a great disadvantage. The Chairman promised to consider this matter. The second part of item (6) had already been dealt with in closed session, as had the suggested amendments to sections 28 to 31 of the *Evidence Act (Cap. 80)*, which was originally raised by Mr. Kiogora, the Deputy Provincial Police

Officer. He had suggested first, that confessions and statements should be taken by a magistrate only, and not by a police officer, and secondly, that, if taken by a police officer, the accused should have a third party present so as to confirm that there was no violence or improper inducement. The third party should be requested to sign a certificate to that effect if that was the case.

Neither of these suggestions was pursued, however, because, from a practical point of view, the only available magistrates in the Province were from the administration, who have little time enough for such judicial duties as they have to perform at the moment without having to be involved in the taking of police statements.

The second proposal had certain disadvantages, as well as advantages, it was pointed out that if the accused person had the right to nominate the person present, then the risk would be run of having a witness who was hostile to the police in any case, which would thus affect the validity of the confession or statement when it came to be proved in court.

The next item concerned short custodial sentences under the Prisons Act (Cap. 90). In some countries, it is recognised that a short sentence often serves no useful purpose, unless it is required to administer a "short, sharp, shock" to the prisoner. It was suggested that more use should be made of Extra Mural Penal Employment under part XII of the Prisons Act, section 68, but the Magistrate Mr. Gicheru, stated that he already made considerable use of these provisions, wherever possible.

As regards mothers being sentenced to imprisonment when they have very young children, the undesirability of children accompanying their mothers into prison had been extensively canvassed at the first A.N.P.P.C.A.N. Conference at UNEP Headquarters from May 9th to 11th, 1988, and the Chairman so informed the meeting. Mrs Justice Owuor however, said, that if she had ever found herself in that position she would, on balance, prefer the child to be taken with her, rather than be left to the mercy of strangers, or even relatives. It was decided to await the results of the two A.N.P.P.C.A.N. Conferences on the Rights of the child, because Article 6 of the proposed Geneva Convention deals with the issue of a child who is separated from its parents as a result of state action, which of course is the case if a mother is prosecuted, convicted and sent to prison. The next two items were not considered because the outlying Districts Act, (Cap. 104) was erroneously thought to have been repealed, and the other matter, relating to Registration of Persons, had been considered in the closed Session.

Item 11—The Exchange Control Act (Cap. 113)

Under Section 3 (1) of the *Exchange Control Act Cap. 11* all dealings in foreign currency are prohibited, but under Section 33 the Minister for Finance has power to exempt either transactions or currencies from the operation of the Act. This was done in relation to Ethiopian dollars and Somali somalos within the North Eastern Province and other specified Districts by regulations made under Section 33, in 1968 (L.N. 246/68). Persons responsible for security in that area considered that this exemption

gave a licence to people who crossed the border frequently to possess currency and trade in it contrary to the provisions of the Act, and also encouraged smuggling between the three countries concerned, namely Ethiopia, Somalia and Kenya. The Chairman was accordingly requested to consider the repeal of the exemption conferred by L.N. 246/68.

Item 12 was abandoned, and as regards item 13, *the Chief's Authority Act, (Cap. 128) which had been discussed extensively during the Kisumu visit, it was suggested that it would assist the Administration if the maximum sentence for disobedience to a Chief's order, under Section 10 and 11, could be increased from its present level prescribed by Section 13, to a fine of KSh. 1,000 or three months imprisonment in default. There was nothing behind this other than the fact that the value of money has fallen and therefore penalties should keep in step with that fact.* As to item 14, the Immigration Act, it was recommended that three more posts should be gazetted as entry points under section 17 (a) of the *Immigration Act (Cap. 172.)* This is not really a matter for Law Reform, but a matter for the Minister concerned with Immigration.

The next, substantive matter raised, item 15, related to compulsory primary school education. The Education Officer and all those present at the meeting agreed that compulsory education is desirable up to a certain age. However, the implications of this have to be fully considered. It was stated that in Mandera only forty-four girls were sitting for the K.C.P.E. examination, which was an extra-ordinarily low number in relation to the population. Many children are of course employed in the herding of animals, cattle, and so on, in the Province, and doubtless it would affect the subsistence of many families if such children were to be obliged to attend school under the sanction of criminal penalties against their parents.

Mr. Justice O'Kubasu, however, informed the meeting that there was a new Bill already in existence regarding education, and it was felt that the question of compulsory school education is of such national and widespread importance that this must be left as a matter of policy to the Government, the Minister and the Departments concerned. It was not felt that the Law Reform Commission could make any substantive recommendations in this respect, as the authorities were obviously aware of the problem.

Item 16 was to make some extent related to the previous one, the present provision in the *Employment Act (Cap. 226)* mainly restricting the employment of children in industrial undertakings. There was a suggestion by the Children's officer that this prohibition should be extended to all undertakings, but, again, the problems of children working domestically and herding the family animals would have to be seriously considered. The next two items were not discussed, because the first is a matter of policy for the Government and is under active consideration, and as regards the second, Commissioner Mr. Hamilton stated that this matter, *The Pharmacy and Poisons Act (Cap. 244,)* forms part of the extensive legislation he is drafting relating to trafficking in drugs and general provisions regarding dangerous drugs and poisons. The same applies to item 19, *The Dangerous Drugs Act (Cap. 245).*

The meeting accordingly moved to consideration of item 20, the *Mental Treatment Act (Cap 248)*. The question was raised by the Deputy Provincial Police Officer regarding the extremely lengthy procedure presently required before any person can be detained as a mentally sick person under the Act. Frequently persons obviously insane have to be taken into custody to prevent them from doing harm to themselves and others, but it frequently transpires that there are so many steps to be taken in the process of obtaining reception or detention orders, that these cause embarrassment and difficulty to the persons attempting to obtain an Order; this arises particularly if there is a risk of an assault or some other offence being committed by the mentally sick person.

Mr. Justice O'Kubasu informed the meeting that there had recently been a Seminar at Silver Springs Hotel, Nairobi, regarding mental health, and that certain draft proposals had been put forward designed to achieve a compromise between on the one hand a mentally sick person, and, on the other hand, the lengthy process which a person taking someone into custody as insane had to go through at the moment in order to obtain a reception order under part (VI) of the Act. Even in the case of temporary treatment under section 9, an application has to be made to a mental hospital, and it is manifest that mental hospitals do not exist everywhere in the Republic. Accordingly, the procedure, even for temporary treatment, could take a considerable amount of time; despite the practical urgency of the situation. These problems seem to be more administrative than legal but, as a result of the draft proposals for mental health which had been made recently, the meeting reached no conclusion on this item.

As to Item 21, the Rent Restriction Act (Cap. 296) this forms one of the matters which is contained in the monthly schedule of subjects under consideration by the Commission. Various suggestions have been received for the amendment of this Act and they have been recorded in that schedule. However, the point was made that rent restriction questions do arise in the North Eastern Province, and it would be of considerable assistance if a Tribunal under the Act could be established in the Province. At the moment the nearest Tribunal is in Meru which is too far away for practical purposes. The Chairman promised to consider this matter in tandem with the proposal regarding a Resident Magistrate, to be taken up with the Honourable The Chief Justice in due course.

The next Item, 22 related to the enhancement of penalties under the Survey Act (Cap. 299), in particular section 29, for tampering with survey marks. The meeting considered that the present penalties under section 29 (b) were inadequate and should be increased to a fine of KSh. 10,000 although no proposals were made for the custodial maximum sentence. The first portion of that item was not readily understandable because section 26 which is quoted relates to an entirely different matter.

The meeting therefore moved to consider item 23, *The Control Act (Cap. 302)*. The Chairman outlined recent matters which had been taking place in relation to this Act, in particular regarding the amendment to the definition of "share", and the restoration of the requirement of permission as set in paragraph (c) of section 6 (1) of the Act. However, it was stated

that the whole of the Act is under consideration at the moment with the possibility of its amendment or repeal. However, it was noted that there have been cases pending before Land Control Boards for a long time, which created considerable hardship within the Province.

Items 24 and 25 were not considered, at the request of the Deputy Provincial Commissioner, and item 26, the Stock and Produce Theft Act (Cap. 355) was therefore referred to next. It was suggested this Act, which in effect, imposes collective penalties in certain instances, and allows for secure of property, not only of persons suspected but of the families and of others where tribes or groups of people are found to be concerned with the theft of stock, or with bloodshed between tribes or groups of people, was obsolete and should be repealed, in view of the fact that adequate penalties are now provided for stock theft under section 278 of the Penal Code. No conclusion was reached on this item.

The difficulty with the next Act considered, the *Branding of Stock Act*, (Cap. 357), was that it is at present difficult to enforce, and is inconclusive because registration of a brand is not necessarily compulsory under the Act. Neither is it an offence, by virtue of Section 21, for any stock owner to mark his stock with a distinctive mark to signify ownership, subject to the restrictions in the proviso to Section 21. The meeting reached the conclusion that Section 9 of that Act should be enforceable, and that is to say animals should not be branded anywhere other than in the places specified in sub-paragraphs (a) and (b) of Section 9.

The next matter, the *Hide and Skin Trade Act*, (Cap. 359) was not really a matter for law reform since there already exists power in the Minister responsible to make rules regulating prices to be paid to producers of Hides and Skins under paragraph (i) of Section 21 of the Act.

The next Act, the *Animal Diseases Act*, (Chapter 364), was also inconclusive, as regards the discussion, because while there is a restriction for animals infected with notifiable diseases, and controlling their movement from or into an infected area, the proposal was that animals should not be moved by night under any circumstances, whether the animals are diseased or otherwise. It was pointed out by several persons at the meeting that, as the climate in North Eastern Province is generally very hot, it was much more convenient for tribesmen and herdsmen to move their animals by night rather than by day; no recommendation was made in this respect. The next two items 29 and 30 were not considered, and, as regards item 31, the meeting felt that the *Imports Exports and Essential Supplies Act*, (Chapter 502), should be brought into line with the *Customs and Excise Act*, (Cap 472,). Under the latter Act goods and conveyances which are prohibited, uncustomed, or otherwise illegally in the country, can be forfeited under Sections 196 and 197. It was felt that similar provisions, should apply to goods seized under sections 14 and 15 of (Cap. 502) to permit forfeiture in such cases. The Chairman promised to consider this matter and decide if a recommendation should be made.

The memorandum submitted by the Manderla District dated 18th November contained several further items, but these have in the main been covered in the brief submitted by the Provincial Commissioner's Office of

the same date with the exception of the proposals regarding the *Agriculture Act, (Cap. 318)*, all the other matters have been dealt with, it is considered that most of the matters in item 4 of the Manderu submission are of Government and Ministry policy and do not require any action by the Kenya Law Reform Commission at this stage.

Recommendations submitted by the Garissa Country Council in a separate memorandum dated the 22nd November, 1988 will be considered by a Research Officer and reported on in due course. Returning to item 4 on the main brief from the Provincial Commissioner, relating to the Preservation of Public Security Act Cap. 57), this is a special provision regarding the North Eastern Province. Mr. Hamilton is considering the matter and will be sending in his comments in the course. As soon as they are received they will be added as an Appendix to these notes, together with a record of any action that is taken.

In the afternoon of the 22nd November the Commission proceeded to the public offices of the Township and met a number of the members of the public who were invited to submit their suggestions and proposals to the Commissioners, all of whom were present. Each person putting a question gave his name and the District from which he came.

The Honourable the Deputy Provincial Commissioner introduced the Commissioners and the Chairman spoke to the persons assembled, following which the Chairman addressed the meeting. He explained the purpose of the Law Reform Commission, the powers and functions which it has under Cap 3), generally its achievements in the last year, and traced its history and progress since its establishment in 1982.

The first member of the audience to address the Commission was Councillor Suleiman Mahmoud of Manderu. He mentioned the conflict between Islamic Law as dictated by the Holy Koran and Kenyan Statute Law. He said that under Islamic Law when a person died his children inherited in different proportions, namely the male children would inherit twice that which the female children would get. He maintained they should not have equal shares. However Mr. Ali Ibrahim from the same area maintained the opposite, that male children and female children should have equal rights on succession. The Chairman stated that under the *Law of Succession Act* (Cap. 160), to which all persons in Kenya were subject, as with any other law, if no will was left certain rules were laid down as to succession to property, and that no differentiation was made between male children and female children. If a will was left then, subject to certain provisions for safeguard heirs and successors would take according to the will. At this stage Commissioner Mr. Hamilton interjected to say that was it not the case that under Sheria Law a moslem was allowed to make a will disposing of one quarter of his property, only, as he liked, but the rest had to be dealt with according to Islamic Law. The meeting confirmed that this was the case.

The next person to address the Commission was Mr. Gure from Garissa. He said that he had full confidence in the laws of Kenya, and also in Parliamentarians elected to the Legislative assembly. He said that the

differences between Kenyan and Islamic Law were very little, and agreed to the extent of ninety five per cent. At the same time he also observed the religion of Islam, which he maintained should stand, particularly as regards the law of succession, already mentioned by Councillor Mahmoud. Further questions were directed to the Commission regarding the question of trespass in special Districts and whether there was a curfew, but it was stated that no curfew applies anywhere in Kenya at the moment. Infact it has not done so except during for a brief period after the abortive coup in 1982. (In this connection Mr. Couldrey has written in stating that the depth of feeling regarding Islamic Law as to Succession amongst Muslims in this Province is such that the Attorney-General should be informed of it. He and Mr. Hamilton both support different treatment as regards the Muslim Community in this respect).

The next question was from Mr. Mohamed Rashid Ahmed of Mandera; he asked why, after a nolle prosequi had been entered by the Attorney-General, or after a case was withdrawn under Section 87 (a) of the Criminal Procedure Code, it was possible for a person to be recharged for the same offence. The Chairman informed the questioner that most countries adopted provisions of this nature, so that if a witness was unavailable, a charge was defective, or, for some other reason, a case could not be proceeded with, it was necessary to have a residual power in the prosecution to be able temporarily to withdraw the case and proceed again if the appropriate evidence was available, and that this was a necessary attribute of the enforcement of justice. The door is still open for the accused person to apply for a complete withdrawal and an acquittal under section 204 of the Criminal Procedure Code, or for the state to offer no evidence.

The next questioner, Mr. Idris Mohamed wanted to know if there was a restriction as to whether a person elected to Parliament needed to be qualified in English, and this question was answered by Mr. Justice O'Kubasu who stated that Swahili was now a valid language for members of Parliament, but that it was necessary to have a certificate of having attended the appropriate classes, and proficiency in Swahili.

The matter of Rent Tribunal was again raised; Councillor Bilalha stated that there are many cases in which people occupy plots of land without paying rent and it was difficult to enforce payment. The Chairman repeated that they would raise the matter of the establishment of the Rent Tribunal for the area concerned.

The final question was raised by Mr. Hassan Ahmed and related to marriage and divorce, and, in particular, the question of Muslim customary law. He was informed that this matter did not really fall within the ambit of the Law Reform Commission's duties or powers. (See Mr. Couldrey's letter above referred to).

With the appropriate speeches of thanks the Chairman ended the meeting, and the Provincial Commissioner formerly closed it, thanking the Commissioners for having visited Garissa.

**THE VISIT BY THE KENYA LAW REFORM COMMISSION
TO MOMBASA ON THE 29TH AND 30TH NOVEMBER, 1988**

The visit was a follow-up of a previous visit in 1986 and its specific purpose was to discuss specific subjects raised in earlier meetings and to receive further recommendations on law reform.

Meetings were held with the Provincial Commissioner, Heads of Departments, Members of the Law Society, leaders and members of public.

1. Meeting with the Provincial Commissioner

The meeting discussed a number of issues raised in respect to the Mazrui Lands Act (Cap. 289), the Trespass Act (Cap. 294); the Chiefs' Authority Act (Cap. 128), Land adjudication Act (Cap. 284), the Law of Succession Act (Cap. 160), the Magistrate Jurisdiction (Amendment) Act (No. 14 of 1981). Apart from problems raised under specific legislation the meeting discussed cases involving poachers and possession of firearms.

(a) The Mazrui Lands Act (Cap. 289)

The Provincial Commissioner informed the meeting that the Act had created a lot of problems in the administration of the lands affected by it. The Act was enacted in 1931 with the aim of providing for powers and control over Mazrui land of establishing a Mazrui Lands Board of Trustees.

The Act provided special protection to the Mazrui family which had originated from Oman and was therefore discriminatory and unnecessary. Quite apart from this there were the problems of squatters on the land and communal land ownership which was inimical to current economic practices that promote individual ownership.

Reference was made to *Civil Case No. 230 of 1981* where the problem of Mazrui Land was dealt with. Although the P.C. had written to the Attorney-General on the issue recommendations were made that the Act should be repealed and the land surrendered to Government for demarcation and distribution to those currently occupying it.

(b) The Trespass Act (Cap. 294)

The problem of squatters and trespassers was said to be a big problem in Mombasa. This involved both private and Government land. The problem was basically that large areas of land had not been adjudicated upon and were lying idle thereby attracting squatters. It was recommended that penalties under the Trespass Act should be enhanced to enable authorities to deal with the problem effectively.

(a) The Chiefs' Authority Act (Cap. 128)

It was pointed out that only chiefs can make orders under Sections 10 and 11 of the Act and that penalties for disobeying such orders

under Section 18 are very low. Recommendations were made that the power under section 10 and 11 should be conferred on all administrative officers and that penalties for disobeying orders be a term of imprisonment not exceeding one year and a fine not exceeding five thousand shillings (sh. 5,000.00). It was noted that similar recommendations had been received from other Provinces.

(d) Poaching and Possession of Firearms

It was noted that offenders convicted for poaching and possession of firearms got very lenient sentences. Two relevant cases in Nairobi Courts were cited. It was recommended firstly that there should be a way to ensure that courts gave deterrent sentences; secondly the Attorney-General should be asked to apply for enhancement of sentences, and thirdly judicial officers should give special attention to cases involving poachers, wildlife and possession of firearms.

(e) The Land Adjudication Act (Cap. 284)

The meeting discussed Section 25 (c) of the Land Adjudication Act (Cap. 284) which provides that after the adjudication register has been completed any person who is not satisfied with the register can raise an objection under Section 26 within 60 days of the date upon which the notice of completion of the register is published.

(f) The Law Succession Act (Cap. 160)

The Law Succession Act (Cap. 160) featured in the discussions when the P.C. reported that the Muslims were unhappy with its provisions which did not match with the arrangements provided under the Holy Koran. Appropriate amendment was suggested.

(g) The Magistrates' Jurisdiction (Amendment) Act (No. 14 of 1981)

The P.C. also informed the meeting about the problem in applying the Magistrates Jurisdiction (Amendment) Act (No.14 of 1981). It was recommended that the appointment of elders should be made by independent persons for example the D.C.s and not by parties to the dispute. This would eliminate bias.

2. Meeting with Heads of Departments

This meeting dealt with memoranda containing recommendations from various Government Departments, the Municipal Education Officer, and the Municipal Public Health Officer. Verbal suggestions were also made.

(a) The Magistrates' Jurisdiction (Amendment) Act (No. 14 of 1981)

They commented on the unsatisfactory implementation of the Magistrates' Jurisdiction (Amendment) Act. In addition to recommendations already made it was suggested that the Act be amended to enable elders to be appointed by independent people. Remuneration should also be provided to the elders to ensure impartiality.

(b) *The Education Act (Cap. 211) and the Local Authorities Act (Cap. 265)*

The conflict between these two Acts with regard to administration of education was noted. Thus under the Education Act, local authorities are empowered to manage only primary education within the municipalities and not post primary institutions. The municipal education committees do not have the same powers as district education committees and their composition is different.

The district commissioners are chairmen of District Education Boards in their respective areas while councillors are chairmen of Municipal Education Committees. It was recommended that the conflict should be removed so that local authorities have control over both primary and secondary schools. It was proposed that Municipal Education Committees should have the same powers as those of the District Education Boards under Cap. 311, the Chairman of any Municipal Committees should not be a politician (Councillor) but the district commissioner of the area concerned; and the title grade and functions of the Municipal Education Officer be similar to those of the District Education Officer. However, the District Commissioners may work only in Nairobi and Mombasa and not any other municipalities whose boundaries were not well defined as districts.

(c) *Drug Abuse Legislation*

Mr. Hamilton informed the meeting that he was working on drug abuse legislation to deal with the drug abuse problem that was becoming serious in Kenya. One of the aims of the legislation is to provide for severe punishment for offenders. The exercise, he pointed out, involved a comparative study of relevant legislation in other countries such as U.S.A. and Australia.

(d) *Reward to Police Informers*

It was suggested that law should provide for reward to police informers. This did not get favourable response at the meeting. It was noted that police had their method of rewarding informers and if the rewards were left open the informers would be identified and that would not be useful.

(e) *The Wildlife (Conservation and Management) Act (Cap. 376)*

It was recommended that sitting allowance should be provided to members of the Wildlife Compensation Committee created under Section 62 (2) of the Wildlife (Conservation and Management) Act (Cap. 376) wildlife.

Another recommendation under the same Act was that the law should not only cover poachers but also persons financing and, doing business with them.

(f) *The Liquor Licensing Act (Cap. 121) and Statute Law (Miscellaneous Amendments) Act 1987*

The O.C.P.D. (Urban) Mombasa stated that the Statute Law (Miscellaneous Amendments) Act 1987 which amended the Liquor

Licensing Act (Cap. 121) by removing Sub-section 2 of section 34 hampers arrests of persons drinking after hours. The amended provision should therefore be reintroduced. The meeting was however informed of the Commission's exercise to consolidate the Act with Tradition Liquor Act (Cap. 122).

(g) *The Rent Restriction Act (Cap. 296)*

The meeting was also informed that the Commission is reviewing this Act which was cited as a source of hardship to those concerned.

(h) *The Public Health Act (Cap. 242)*

The Municipal Council Public Health Officer recommended a definition of hospital which is non-existent in the above Act. He noted that the term "Owner" as defined in the Act excluded "Government" and it was therefore difficult to enforce the Act against the Government. He cited the example of the Coast General Hospital whose buildings are in a bad state but a notice to repair cannot be served on the Government, which owns it, in view of the exclusion of the government from the definition of owner. The meeting noted the difficulty on the part of the public health officer to sue the Government and considered the matter a policy issue.

3. *Meeting with members of the Law Society*

The meeting considered the Rent Restriction Act, Cap. 296; the Exchange Control Act; (Cap. 113) the Insurance (Motor Vehicles Third Party Risks) Cap. 405; and Admiralty cases; the proposed marriage Bill; the Penal Code Cap. 63.

(a) *The Rent Restriction Act (Cap. 296)*

Recommendation to amend the Rent Restriction Act (Cap. 296) submitted by a Mombasa advocate Mr. Kasmani, in the meeting and previous correspondence to the Commission were discussed.

It was agreed that a limited Company should not enjoy protection under Section 14 (1) (9) (1) of the Act as decided in *Dodhia v. Jos Hansen & Soehne KLR. (1979)* since it meant that the Company could continue using premises for occupation by its successive employees.

Mr. Kasmani suggested yet again, that there should be an appeal to the Court of Appeal from a decision of the High Court under section 8 of the Act. The commissioners were against this suggestion. He also suggested that the requirement under Section 32 that documents be served personally on the person concerned should be removed as it is sometimes difficult to get the people and even if registered post is used the person may claim later that he did not receive the documents.

After discussion it was suggested that it would be sufficiently served "personally" on the person if service is done in accordance with the Civil Procedure Act (Cap. 21) Order V Rule 17 i.e. substituted service. The Chairman drafted the proposed amendment.

(b) *The Exchange Control Act (Cap. 113)*

The effect of a transaction which the Exchange Control Act (Cap. 113) declares illegal was considered. An example was cited under section 32 (4) where a bank or financial institution could easily lend money to a company which is directly or indirectly controlled by non-residents. Having taken the money and perhaps having siphoned it out it can plead in the Court that the company cannot be asked to repay so that the bank or financial institutions which have such dealings would be able to recover the money. It was agreed that relevant provisions in the Banking Act and the Exchange Control Act should be studied and recommendations made.

(c) *The Insurance (Motor Vehicles Third Party Risks) Act (Cap. 405)*

The Commission was requested to study this Act with a view to resolving the question of liability where a person who is not an agent of the insured nor authorised by him takes a vehicle and causes an accident.

(d) *Admiralty Cases*

Mr. Juma, an advocate suggested enactment of Kenya legislation to deal with admiralty cases to eliminate dependence on English legislation. He was requested to assist in drafting the appropriate legislation.

(e) *The Marriage Bill*

Miss Otunga, an advocate, suggested that the Marriage Bill should be revived as it had good provisions and aimed at providing uniform law on marriage and divorce. She also suggested that a common law marriage and cohabitation for a certain period should be recognised as forms of marriage in order to avoid the suffering of children.

(f) *The Penal Code Cap. 63 (Contempt of Court)*

Confusion with regard to procedure and jurisdiction of subordinate courts with regard to contempt of court cases was noted. This centred on Section 121 of the above Act. To eliminate the confusion it was suggested that subordinate Courts should have no jurisdiction in such cases as the summary trial should be removed.

3. *Meeting with Members of the Public and Leaders*

There were two public Sessions in the P.C.'S boardroom. Legislation and issues tackled during these meetings included the Rent Restriction Act (Cap. 296), arrest of women at night, the Government Lands Act (Cap. 280), the Law of Succession Act, Cap. 160; the Chief's Authority Act (Cap. 128,) Church plots, the Customs Act (Cap. 472) the Registered Land Act (Cap. 300), determination of land cases, and the Wakf Commissioners Act (Cap. 109).

It was reported that at the Coast there is a problem with ownership of plots, Landlords and tenants. In some cases the plot owner is different from the owner of the buildings on the plot. In those circumstances, the owner of

the plot pays ground rent to the Municipal Council and the Landlord pays rent to the owner of the plot.

The Rent Restriction Act does not protect the owner of the buildings. Tenants cannot therefore be assisted by the Act. It was recommended that ways be found to protect both tenants and owners of the plots. The Chairman promised to check if the Leasehold Reform Act of United Kingdom could be adopted to rectify the situation.

It was also noted that the National Housing Corporation which owns houses in urban centres is exempted from the Rent Restriction Act. Thus tenants are disadvantaged when they have problems because they cannot go to the Rent Restriction Tribunal.

Several views were expressed on the recommendation to bring the Corporation under the Act. It was not clear whether the body is treated as other government bodies (for example local authorities' houses are exempted from the Act) or whether it was exempted because it is unlikely to be a landlord for the purposes of the Act. The Commission was to study the matter and make appropriate recommendations.

(b) Arrest of Women at Night

The meeting was informed that there is no law which allows the police to discriminate against women when conducting arrests at night. This was however, a matter to be taken up with relevant police authorities. The Chairman promised to look up the United Kingdom Act which allows for men "opportuning for women" to see if it could cater for the situation.

(c) The Government Lands Act (Cap. 280)

It was suggested that 99 year leases under the Act should be reduced and those which expire should not be renewed in order to enable more people own land. It was also recommended that plots on lease by Government should not be sold.

The complaint on unfair allocation of government land was said not to be a matter for law reform.

(d) The Law of Succession Act (Cap. 160)

Members of the Muslim Community made strong representation against certain provisions of the above Act which, they argued, did not conform to provisions of the Holy Koran thereby causing Muslims to act against their religion. They recommended that they be exempted from the Act.

(e) The Chiefs' Authority Act (Cap. 128)

The Chairman of Kwale County Council, Mr. Disci Ivores complained that sometimes this Act is misused by chiefs for example where they force people to act contrary to their customs and traditions. In this respect he recommended amendment of Sections 11 and 12 of the Act. The Chairman suggested a draft proviso to the two sections to meet the complaint.

(f) *Church Plots*

There was a complaint by Rev. Mogendi that Churches are paying very high rates for church property other than that on which the church is built, for example houses for priests. It was recommended that non-income generating property should be exempted from payment of rates a matter that may require amendment of Valuation for Rating Act (Cap. 266).

(g) *The Customs and Excise Act (Cap. 472)*

The D.C. Mombasa recommended that the powers vested in customs officials to arrest and detain those in contravention of the Act should also be vested in police officers and Administration police officers. A similar recommendation had been made in 1986 but not acted upon by the Commission.

(h) *The Registered Land Act (Cap. 300)*

It was recommended that Courts should have power to order alteration of the first registration under Section 143 (1) of the Act.

(i) *Land Cases*

Councillor Ramtu complained that land cases took a long time to be heard. Ways should be found to deal with this.

(j) *The Wakf Commissioners Act (Cap. 109)*

This Act provides for the appointment of Wakf Commissioners, and prescribes their powers and duties. Wakf means the religious, charitable or benevolent endowment or dedication of any property in accordance with Muslim law.

There were strong submissions by members of the Muslim Community that the Act is not being followed in that Wakf Commissioners are acting beyond their powers by, for example, leasing some of the property for 99 instead of the statutory one year period. The result is that the property is used for purposes not permitted under the Act for example running a bar.

Some people have threatened to cancel their Wakfs because of the Commissioners' conduct.

It was observed that suit can be instituted for a declaration that the Wakf Commissioners have acted beyond their powers and such suit can be simplified by application of Originating Summons. This would however, necessitate amendment of the Civil Procedure Act 0.XXXVI Rule 3.

It was also noted that Section 14 can be enhanced to ensure that consent from heirs is sought before property is leased for more than one year.

The M.P. for Kisauni Mr. Said Hemed was asked to study the Act and send his comprehensive recommendations to the Commission for consideration.

The Chairman made a draft proposal for amendment to Section 16 of the Act.
He thanked everyone for their contributions.

WORKSHOP ON CHILDREN IN DIFFICULT CIRCUMSTANCES, UNEP HEADQUARTERS, GIGIRI ON 9TH TO 10TH MARCH, 1989

This Workshop was sponsored by UNICEF in collaboration with the Children's Department. It was a follow up of an earlier workshop on the same subject held on 24th and 25th October, 1988 as part of planned action on urban basic services, with a special component on child survival and Development programme. The programme is undertaken jointly by the Government of Kenya and Non-Government Organizations with the support of UNICEF. The workshop in October, 1988 had the following objectives:

- (1) To define the problem of children in difficult circumstances (specifically the street wandering child).
- (2) To understand the situation analysis concept and its application to the problem at hand.
- (3) To lay out a possible plan of action for situation analysis of three towns in Kenya i.e. Nairobi, Mombasa and Kisumu.
- (4) To suggest possible national strategies of intervention to control or prevent the problem with reference to its causal factors.

That workshop brainstormed and noted that the wandering child concept should be developed to cover other children in difficult circumstances.

Studies were carried out in three towns in accordance with the first two objectives. The reports emanating from the studies were presented at the workshop.

Mr. Fabio Dallape delivered the key note address and stressed firstly, the importance of collaboration between the Government of Kenya and Non-Governmental Organizations in dealing with the problem of children in difficult circumstances; secondly the need for advocacy on children's rights at the parental, governmental and professional levels.

KISUMU

The study in Kisumu, inter alia, examined migration patterns, street life, family background of the children and areas of concentration for example markets, lake shores and slum areas. It concluded that the problem of street children was acute in Kisumu. Some of the causative factors highlighted were lack of adequate schools, socio-economic problems, and lack of recreational facilities. It was therefore, recommended that the wandering child phenomena should be minimized or eradicated by uplifting of socio economic status of families and improvement of rural facilities. Recommendations touching on the law included revision of the Children and Young Persons Act (Cap. 141) to provide more protection for children's rights. It was also suggested that the Education Act (Cap. 211) should provide for compulsory education. This would make it easy to proceed

against parents who do not take their children to school or who withdraw them from school without reasonable cause.

MOMBASA

The Mombasa study was incomplete. However, information collected showed that the phenomenon of street children was not as prominent as in other towns.

The study revealed a link between the street child phenomenon and the problem of meeting basic needs due to poor family conditions. Many of the children interviewed seemed to have come to the street because they wanted to fill the financial gap existing in the family. The fact that they engaged in some kind of occupation meant that they had the desire to be self-sufficient.

The study established that little time had been given to the children concerned to make them realize their difficult situation. All of these interviewed were aware of the constraints against their future desires and expressed a wish to go back to school.

The study recommended involvement of children themselves in changing their situation. This may involve identifying a few types of projects dealing with each particular group of children in difficult circumstances in Mombasa. For example, the cassava or icecream vendors could be organised into recognisable groups and assisted financially to improve the packaging and marketing of their products. The study concluded that this approach required that these projects meet the needs expressed by the interviewed children and ensured that they made contribution in order to guarantee acceptability.

NAIROBI

The Nairobi report showed that the street children phenomenon is acute. The research team in Nairobi analysed data of existing research findings especially in slum areas. Information contained in local dailies was also studied.

As in the other two studies causes of the street child phenomenon were traced to inadequate family conditions, inter alia, poverty, lack of parental care due to the parents' death, parents' separation, and the parents' sense of irresponsibility; lack of proper counselling and guidance; lack of sex education, rural urban migration, complex social structure and capitalism which promotes a class society where those who are rich remain so while the poor remain poor.

The study emphasized that most of the complaints from the public were mixed but mainly negative. The scholars' view was that the problems emanated mainly from environmental and psychological factors. The general attitude of scholars appeared sympathetic and their suggested solutions included parental education, family planning programmes; after care services; alleviation of poverty; suspension of certain educational requirements with respect to poor children e.g. school fees, and uniforms; up-grading of slums; public education to stop tipping street children; and

improvement of the standard of living in the rural areas to discourage mass-rural urban migration.

Other solutions provided in the mass media included the setting up of rehabilitation centres; helping boys to form associations for car shine to foster a sense of belonging; fencing parking areas and assigning attendants to each parking lot to eliminate parking boys, discouraging people from tipping; tracing the children's parents and charging them with offences of irresponsibility.

Case studies carried out included the Mukuru Dump Youth, the Machuma boys and parking boys. The *Mukuru Dump Youth* eat and sleep at the major City Commission dump. Their reasons for being there included lack of any other source of income, free food from the dump (this includes expired products), lack of harassment, lack of other shelter, poor parents, death of parents in their infancy, imprisonment of parents and lack of school fees.

On the whole the relationship between those boys and the community around them is very poor. They are literally in a world of their own where they suffer many hardships including diseases such as malaria, tetanus and venereal diseases. Their environmental conditions have led to drug abuse on a very high scale.

Each of the boys interviewed preferred to engage in respectable employment. They also expressed a wish to obtain identity cards which they have been denied because of dubious background.

The Machuma Boys survive from collecting scrap metal, paper, and bottles and tins from the Eastland estates for sale to middlemen. Most of the boys were found to be from slum areas and were school dropouts for reasons which included lack of school fees or uniform, expulsions, lack of food at home, lack of shelter because the house burnt down, or imprisonment of the siblings. The parents are generally unable to supply them with basic necessities. Most brew chang'aa which results in their arrest and imprisonment leaving the children behind.

The *Parking boys* consulted were or had been in the streets where they engaged in various activities to earn a living such as selling charcoal and cast off vegetables, doing gymnastics, collecting and selling paper. Some were employed by market stall owners to clean dishes, stalls and run other errands. In turn they were allowed to sleep inside the market. The boys suffered from skin and venereal disease which were difficult to heal due to their living conditions. Their relationship with the community was bad as society looked down upon them.

It was stressed that preventive measures were important. More attention to the problem was required than had been the case.

Critiques of the Three Situational Analysis Reports

A critique of the three Reports by the key speaker Mr. Dallape Fabio, a former Director of Undugu Society, observed that the street child phenomenon could not be attributed to purely economic causes. There were other causes. He also observed that majority of the affected children

were involved in some form of economic activity. The problems highlighted in the Reports could not, however, be solved at once. There was need to prioritize and to use available resources to come up with solutions. It was important to arrive at realistic solutions and approaches for example training the children in marketable skills. It was also important to provide solutions geared towards helping children in their own environment. He concluded by advocating small experiments in order to find the best solution; the need to plan for advocacy, use of the media to sensitize the public and specific groups for example the business community, in order to provide resources and critical analysis of city planning requirements in respect of certain facilities for example classrooms and houses. On the whole he felt that indicators should be given to policy makers on the seriousness of the problem.

Three Working groups formed to discuss further the reports came up with a plan of action for each of the three centres. One group came up with a national plan of action which identified issues, policy and advocacy matters to be tackled.

The policy issues to be tackled further included education, health shelter, food and social amenities all of which were seen as basic needs.

It was recommended that;

- (a) A Task Force should be formed to look at the implications of compulsory education.
- (b) Health services should be provided for all. In particular outreach services should cover all deprived children. Relevant law e.g. by-laws on garbage disposal should be enforced.
- (c) There was need for a policy on provision of shelter for no or low income families and also the need to study existing programmes on provision of housing for low income families with a view to making them viable.
- (d) Recreational facilities should be availed by relevant authorities.
- (e) The Children's Department should be elevated to a family ministry with emphasis on children, women and youth.
- (f) The Kenya Law Reform Commission should review laws affecting children and in particular consider;
 - (i) Codification;
 - (ii) Compulsory requirement for probation officer's reports before sentencing;
 - (iii) Children accompanying mothers to jail; and
 - (iv) Children brought for treatment unaccompanied by guardians.
- (h) There was need for advocacy at three levels,
 - (i) public awareness through the mass media, barazas/District focus, churches, non Governmental organisations, and educational institutions.

- (ii) Advice by professionals and professional groups e.g. business people should help in setting up income generating activities; U.N .B .P., FAO., W .H .O. research institutions, Law Reform Commission, A.N.P.P.C.A.N. should give professional help e.g. through research.
- (iii) Creation of awareness on parental responsibility.

WORKSHOP ON THE UTILIZATION OF COMMUNITY RESOURCES FOR THE PREVENTION AND REDUCTION OF DRUG ABUSE FOR AFRICAN COUNTRIES WITH ENGLISH EXPRESSION NAIROBI 22ND TO 26TH MAY, 1989

This Workshop, the first of its kind to be organized in Africa by the United Nations Division of Narcotic Drugs, was attended by participants from Lesotho, Mauritique, Malawi, Uganda, Zambia, Sierra Leone, Ethiopia, Mazambique and the host country, Kenya. The Law Reform Commission representatives attended as observers in aid of the ongoing study on drugs legislation.

The Workshop was opened by the Hon. Assistant Minister for Health and was closed by the Solicitor-General on behalf of the Attorney-General.

The Director of the U.N. Division of Narcotics Dr. Ramos Galino made opening remarks in which he stressed, inter alia, the need for reliable assessment of the nature and extent of the drug abuse problem; illicit traffic in drugs; and the need to involve "all living forces of society which can contribute" towards programmes for drug demand reduction. These remarks formed the backbone of the theme of the workshop namely, the utilization of community resources for the prevention and reduction of drug abuse.

The Nairobi meeting was one in a series of meetings organized by the U.N. Division of Narcotics aimed at exchanging experiences and evaluation of methodologies in participating countries which have been successful or effective in the utilization of community resources for the prevention and reduction of drug abuse. Delegates attending the Workshop presented position papers stating, where evident, what community resources such as non-governmental organizations, religious groups, learning institutions, professional organizations and intergovernmental organizations, had contributed towards efforts to curb and reduce drug abuse.

The presentation on Kenya was made by Mr. Willy Muya, the Chief Consultant, psychiatrist and Director of Mental Health in the Ministry of Health.

He stressed the strategic position of Kenya in respect of communication links with the rest of the world; and the overall socio-economic distabilisation of the society leading to stress and consequently the demand for emotional support. The scenario is poor and the stage set for drug abuse, trafficking and real commercialisation. Kenya has become an important transit point for illicit drugs especially in three specific centres namely, Mombasa, Malindi and Nairobi.

He emphasized that there is a real problem of drugs and drug abuse. He also observed that a study carried out in 1982, in ten different secondary schools, in rural and urban settings, had revealed frequency of abuse of substances in descending order to be alcohol, tobacco, cannabis and Khat. The study also revealed that females abused "medical" drugs while male students abused non-"in-medical" drugs. He also observed that Khat has been found to be among the top three to four drugs of addiction.

The Social consequences of drug abuse are alarming. there have been many alcohol related crimes and mental illness directly traced to drug abuse. Although these have served as indicators of abuse there has been no systematic collection and collation of information from a multisectoral viewpoint and no system of community action against drug abuse. However, Kenyans are aware of the problem and there are many organizations which have responded by coming up with programmes aimed at control of drug abuse. There is impact on some of the work being done. Nevertheless, Dr. Muya underscored the need for a baseline survey to assess the epidemiology of substances abuse.

There is evidence to show that enforcement agencies know areas where abuse is prevalent and it should therefore be possible to carry out proper research.

He argued that in spite of the above, it would be useful to have an umbrella body to co-ordinate the activities of various bodies involved in control and prevention of drug abuse. So far the existing intersectoral body has no mandate to handle drug matters on behalf of other bodies. Views have also been expressed about the need for a rehabilitation centre to deal with drug addicts.

The backbone to the legislative machinery is the pharmacy and poisons Act (Chapter 244-Laws of Kenya) and Dangerous Drugs Act (Chapter 245 - Laws of Kenya) dealing with regulations pharmaceuticals. This law is not comprehensive and is currently under review. The first draft Bill has been prepared by the Kenya Law Reform Commission.

Specific Projects

On the whole there has been a segmented approach to the issue of drug abuse but in the last one year there have been attempts to work as a group. These attempts are largely responsible for the creation of the multisectoral task force mentioned earlier.

The Ministry of Health has an active drug inspectorate which has a law enforcement division that looks into violation of legislation in collaboration with the police and customs department. It provides in-service training on drug identification to police and customs officials. It also examines records kept by drug agents for example manufacturers, wholesalers and retailers.

The main objective of the drug inspectorate is to curb illicit drug sale or use. At the moment it is checking on the importation of mandrax. Guard inspectors operate even at District levels.

The *Division of Mental Health* collaborates with other relevant organs involved in the prevention and control of substance abuse. *The Primary Health Care Unit*, also within the Ministry of Health, facilitates in, among other things, baseline surveys and public education. In future the Division will be used to prevent and reduce drug abuse. Thus improved rehabilitation and treatment of addicts is already under way.

The *Customs Department* is active at major ports of entry and seizures are analysed by the Government Chemists.

The provincial administration has been very active in the destruction of cannabis sativa plantations and courts have collaborated in meeting out deterrent sentences in accordance with existing laws.

The *Children's Department* also plays a part in rehabilitating children who are victims of drug abuse. The Director of the Children's Department, Mrs. A. Mugambi, pointed out that there are various institutions where children are sent for rehabilitation. A recent survey into the records of offences committed by children showed that out of 2,500 cases there were only 9 cases of offences related to drugs. The offence related to drug trafficking and not the taking of drugs. This was mainly because children used by drug traffickers could not be suspected.

However, although children committed to institutions were not there because of drug offences there were many cases of drug use and drug addicts. No drug tests are carried out on the children and the addicts have sometimes escaped from the institutions because they cannot do without the drugs.

The Director mentioned the proposed formation of Children's District Advisory Committees and their possible role in looking into the problem at hand.

The *Prisons Department* provides relevant services to inmates and liaises with the *Probation Department* where necessary vocational training is given. Hospitals, and the *Ministry of Education* are also participants in the Government's efforts to curb drug abuse. The former provides treatment to detoxification level, maintenance treatment, follow up and surveillance where possible whereas, the latter provides preventive education on drugs abuse.

Other efforts are made by Non-Governmental Organisations (N.G.O.). There is no satisfactory directory on N.G.O.s involved in drug prevention, control or management. However, few are known to engage in various very useful activities.

The *National Christian Council of Kenya (N.C.C.K.)* has social workers who deal with alcoholics. In 1972 the council set up a committee on family life education which has conducted many activities, for example seminars on the effects of alcohol on family life. Relevant courses and seminars are also organized for teachers. Booklets containing information on drug abuse have been published in spite of limited resources.

The *Salvation Army* has established homes for people in need, such as destitutes and, orphans and community based projects on rehabilitation and health education. It advocates total abstinence from alcohol and drugs except on medical prescription.

The *I.C.P.A. Kenya National Commission* is another organisation in prevention of alcohol and substance abuse. It has sponsored limited research, held meetings in Kenya, participated in the I.C.P.A. World Congress in Brisbane, in 1988 and enjoys a working relationship with WHO. It has been working together with the Ministry of Health and WHO towards the "No smoking day." It was noted, however, that Kenya has not

implemented the* recommendations of WHO not to advertize beer and cigarettes.

The *Seventh Day Adventists Living Centre* conducts courses in stopping smoking and given adequate resources it could be more effective.

The *Alcoholic Annoymous (AA)* and *N-Anon* is making its impact felt among alcohol addicts but should be strengthened.

It was recommended in the Kenya presentation that a lot can be done to improve the present situation. The International Council on Alcohol and Addictions (I.C.A.A.) based in Switzerland has over the years assisted in the training of personnel in the field of substance abuse. The recently trained personnel could be channelled to enhance the programme of prevention and reduction of demand.

Training institutions and schools should be assisted to include substance abuse in their curricula; and social institutions and advocacy groups such as *Maendeleo ya Wanawake*, *Nurses Associations*, *Kenya Medical Associations*, *Kenya Association and Religious Organisations* could provide an important entry point for preventive programmes.

The Workshop made a number of recommendations namely:

- (a) Professional workers should be properly trained before their involvement in preventive educational programmes. The initial training should specifically include the sensitization of public awareness on drug reduction programmes for it's strongly believed that prevention is the best treatment in the field of drug abuse.
- (b) drug awareness, information and educational programmes for parents who need to be served as the basic role models for children, should be given priority in order to mobilise parents for the positive community action required in drug abuse prevention and control programmes.
- (c) Effective school programmes involving students, parents and the Community should be encouraged in order to meet the required objectives. For example, the Parents Teachers Associations could help a great deal in this context.
- (d) Programmes encouraging the participation of youth in the local prevention activities, which in turn facilitate in their potential of bringing youth together to share common aspirations, needs, interests and social integration of youth should be widely encouraged. Importance should be placed on deglamourising drug abuse and encouraging the positive involvement of youth in developing the communities in which they live, as they could play vital roles as communicators, counsellors and community manpower and ultimately be leaders.
- (e) Priority considerations should be directed towards more intensified involvement and voluntary participation of religious, Cultural, Scout and other social groups in order to put emphasis on the strengthening of positive family values moral standards which could help the children and youth to resist the temptation of illicit drugs usage and to ensure flexible community interest programmes;

(f) The recognised, or registered voluntary social organisations (N.G.Os) should be mobilised within their respective areas of competence to develop possible prevention and demand reduction action programmes aimed at reducing the prevalence and incidence of drug abuse within the immediate community.

Prevention and drug reduction may involve talks, seminars, workshops, public displays, and anti-drug slogans, group therapy, taking care of addicts etc.

The Workshop considered drug abuse to be a complex social problem requiring a comprehensive response in which medical treatment plays an important part but not a dominant one.

It was stated that the most pressing problem is that of helping the recovering addict to readjust to everyday demands and conditions of work and life. In this process, the mobilisation of all available resources in the community, even as non-governmental organisations and religious groups, plays a crucial role.

At the same time the Workshop, emphasized the co-operation between employers and workers organisations and the places of work in the community (private or public) as important partners in any rehabilitation programmes, especially in aspects dealing with training and employment.

LEGAL PROTECTION OF YOUTH AND CHILDREN WITH REFERENCE TO THE CHILDREN AND YOUNG PERSONS ACT, THE GUARDIANSHIP OF INFANTS ACT AND THE ADOPTION ACT BY V.W. MUCAI KATTAMBO

In Kenya, the law relating to children and youth is spread out in various statutes. The Law Reform Commission has identified sixty five statutes all of which deal with children and youth directly/or indirectly. A chart indicating those statutes, their date of commencement and relevant sections is attached to this paper. The general import of most of the provisions is to recognise the vulnerability of children and youth hence they are protective in nature. Important safeguards are to be found in our criminal, employment and marriage laws.

(a) The Children and Young Persons Act (Cap. 141)

This Act provides an institutional framework for the protection and discipline of children, juveniles and young persons. A special Children's Department within the Ministry of Home Affairs derives its authority from it to provide protective services to needy children. These services include invoking the jurisdiction of the juvenile court to facilitate government support for children born and brought up in conditions of poverty, destitution and abuse.

Section 24 of the Act confers authority on any police officer, administration police officer, administrative officer, inspector of children, children's officer, approved officer, chief or sub-chief appointed under the Chief's Authority Act, who has reasonable grounds for believing that a child or juvenile is in need of protection or discipline, to apprehend him without warrant and without delay bring him before a court. The Act defines a child as a person under the age of fourteen years and a juvenile as a person who is of the age of fourteen years or more and is under the age of sixteen years. It is mandatory for an inspector of children or Children's Officer to bring before a court any child or juvenile in need of protection or discipline unless proceedings are about to be commenced by another person.

A child or juvenile who is in need of protection and discipline is one who has no parent or guardian, or has been deserted by his parent or guardian, is destitute or a vagrant; who cannot be controlled by a parent or guardian; whose parent or guardian does not, or is unable or unfit to, exercise proper care and guardianship; who is falling into bad associations or is exposed to moral or physical danger; who is kept in any premises which, in the opinion of a medical officer, are overcrowded, insanitary or dangerous; who is prevented from receiving compulsory education, or is a habitual truant; who frequents any public bar or gambling house, or who is found buying or receiving or in possession of any drug which is deemed to be dangerous or habit forming; who is found begging or receiving alms or inducing the giving of alms whether or not there is any pretence of singing, playing or performing; or who has been abused sexually or physically or if he is a member of the same household as a child or juvenile who has been exposed to such abuse, or a person who has been convicted of offences involving such abuse.

The Act gives the court wide powers to deal with children and juveniles in need of protection. It may order that the child or juveniles be returned to its parent; commit him to the care of a fit person or local authority or an approved society. It may also place the child under the supervision of an approved officer, an inspector of children, a children's officer or some other person appointed for the purpose by the court but only for a period not exceeding three years.

The court has powers to vary, or review its order from time to time or revoke it altogether. It may also order that a juvenile remain in the custody of an appointed local authority, an approved society or fit person until the age of eighteen years or a lesser age. The Children's Department has wide supervisory powers over children's institutions and children's officers are expected to visit them to ensure that children who are received or placed in them get proper care and attention.

The parent or guardians of the child or juvenile have a right to be heard in all applications involving the child or juvenile. A guardian includes anyone who in the opinion of the court has charge or control of the child or juvenile.

The Children and Young Persons (Boarding-Out) Regulations provide for fostering of children committed to local authorities approved societies or fit persons. Fostering involves temporary care of a child or juvenile in a residential home and is different from adoption. It serves as an important measure against institutionalisation by ensuring that the child or juvenile is provided with the warmth of a family for a period of time by suitable foster parents who are screened thoroughly to ensure their fitness. The Rules, for example, state that a foster child cannot be placed in the custody of a person who has been convicted of an offence which renders him unfit to be a foster parent. The person must among other things, have a good reputation and must be able to provide suitable sleeping and living conditions for the foster child.

(b) The Guardianship of Infants Act (Cap. 144)

Personal matters are governed by different laws which have been recognised by the Constitution and are accorded equal importance. Four systems of family law namely Customary Law; Moslem Law; Hindu Law and English Law govern marriage. Children are governed by their personal law as well as other laws that apply to all communities such as the Law of Succession Act (Cap. 160) and the Guardianship of Infants Act.

Marriage confers on the child the right to be maintained by the father and to inherit his property. A child born out of wedlock has no right to be maintained by his father or to inherit his property in accordance with the Law of Succession Act unless he either recognised him expressly or assumed responsibility for his support.

Custody and maintenance of children is governed mainly by the Children and Young Person's Act, Matrimonial Causes Act (Cap. 253) the Subordinate Courts (Separation and Maintenance) Act (Cap. 153), the Guardianship of Infants Act and the Adoption Act (Cap. 143).

The Guardianship of Infants Act deals with guardianship and custody of infants. An infant is defined as a person under eighteen years of age but does not include a person who is or has been married. It was enacted in the same year as the United Nations Declaration on the Rights of the Child (1959) and it embodies an important principle of the Declaration which requires that when making laws for purposes of affording children special protection and opportunities to develop physically mentally and morally to ensure that the best interests of the child shall be of paramount consideration.

Section 17 of the Act provides that in any proceedings before a court for custody or upbringing of an infant the court shall have the welfare of the infant as the first and paramount consideration. In the absence of exceptional circumstances, Kenya courts favour custody of children of tender years to be with the mother. In all matters pertaining to the rights and duties over children the court treats men and women equally.

The Adoption Act (Cap. 143)

Adoption involves total and permanent separation of children from their natural parents and other relations and the creation of a legal relationship between the children and adopting parents. The adopted child assumes the rights of a natural child including the right to proper care and maintenance and inheritance of property from its adoptive parents. It is different from fostering which involves temporary care of a child over a period of time.

The concepts of adoption and fostering are not new to the African Communities. The traditional African society recognised them. Homeless children were unheard of as the community took responsibility to care for the needy and less fortunate persons. This was especially facilitated by the extended family system. This scenario has changed due to social and economic conditions and the emergence of the nuclear family. There are now many homeless children without the protection which the traditional society gave.

Many homes/institutions have been set up to fill the gap created by the changed circumstances. However, it is unlikely that they can cope with the increasing number of homeless children. It is for this reason that the legislation on adoption assumes an important role in ensuring that legal arrangements are made for the care and protection of such children.

The Adoption Act provides a mechanism through which homeless infants can be provided with a permanent home in which they are enabled to find warmth and an identity and to enjoy rights similar to those of natural children of the adopting parent. It is therefore preferable to institutionalisation. The Act makes provision with regard to the making of adoption orders, their registration, effect, adoption societies and miscellaneous matters.

The court is empowered to make an adoption order in respect of an infant where the applicant is at least twenty five years of age and is at least twenty one years older than the infant; or has attained the age of twenty-one years and is a relative of the infant or is the father or mother of the infant.

An adoption order must not be made in favour of a sole applicant who is a male; a spouse or spouses of a polygamous marriages; an applicant who is a different race from the infant; and a non-resident applicant unless the court is satisfied that there are special circumstances which justify exceptional measures.

The Act also requires that before an order is made consent must be obtained from certain persons. The court may however dispense with the consent in certain cases for example in the case of a guardian or parent of the infant that has been abandoned, neglected, persistently failed to maintain or persistently ill-treated the infant, or that he has failed the normal duty and care of parenthood in respect of the infant.

Consent may be granted either conditionally or unconditionally and in any case it may be withdrawn at any time before the making of the order.

The court must be guided by a number of matters before making the order. For example it must ensure that the applicant is able to maintain, educate the infant and has not received or agreed to receive payment or other reward for the adoption; that where the applicant is not a relative of the infant that reasonable steps have been taken to inform the relatives of the infant of the proposed adoption and that no relative is able to accept responsibility over the infant or expressed willingness to do so.

In making the adoption order the court must treat the interests of the child as paramount; subject thereto, it must consider firstly the interests of the parents and relatives of the infant and secondly those of the applicants. It is empowered to impose conditions and terms that it considers fit and to make interim orders to test the suitability of the applicant. Once the adoption order is made, the infant assumes the position of a child born to the adoptor in lawful wedlock. All the rights, duties; obligations and liabilities of his parents or guardians in relation to his future custody maintenance and education, including all rights to appoint a guardian and to consent or give notice of dissent to marriage are extinguished and vested in the adoptor as though the infant were born to the adoptor in lawful marriage. Moreover, the adoptor can not marry the adopted infant.

For the purposes of the Workman's Compensation Act (Cap. 236) the adopted infant is deemed to be a member of the family of a deceased workman and the adoptor is deemed to be a parent of a deceased workman whom he has been authorised to adopt.

The adopted infant has also the right to inherit movable or immovable property of an adoptive parent who dies intestate in the same way that a natural child born within lawful wedlock would. Disposal of property by instrument inter vivos or by will is subject to provisions that ensure favourable treatment of the adopted infant.

The main thrust of the three statutes discussed above is to ensure that among other things, there is adequate protection for the child; decisions are made in the best interests of the child; and the guardian or parent-adoptive or otherwise is able to maintain and educate a child.

**LAWS RELATING TO CHILDREN JUVENILES AND YOUNG PER-
SONS
ALPHABETICAL LIST OF STATUTES/AND GUIDE TO TABLE OF
STATUTES**

ACT	CHAPTER	DATE OF COMMENCEMENT	RELEVANT SECTIONS
1. Adoption	143	16.6.1959	the whole Act (Sections 1-37)
2. African Christian Marriage & Divorce	151	17.12.1931	8,13
3. Age of Majority	33	5.4.1974	2, 5
4. Asian Officers' Family Pensions	194	1.5.1942	2, 7, 13
5. Asian Widows & Orphans	193	22.10.1927	2, 4, 12, 15, 20, 23, 24, 25, 31, 34
6. Betting, Lotteries and Gaming	131	Part 11-1-11 66 Remainder 1-1-67	28, 43, 50, 52, 54
7. Births and Deaths Registration	149	9-6-28	2, 7, 8, 10, 11, 12, 13, 14
8. Bills of Exchange	27	14-5-27	22
9. Borstal Institutions	92	2-9-63	The whole Act (Section 1-52)
10. Chief's Authority	128	24-3-37	15
11. Children and Young Persons	141	31-12-63	The whole Act (Section 1-79)
12. Civil Procedure	21	31-1-24	Rule 1, 2, 3, 4, 12
13. Constitution			34, 43, 70, 75, 78, 82, 87, 88, 89, 90, 93, 97, 98
14. Co-operative Societies	490	31-12-66	14
15. Contract	23	1-1-61	2

<i>Act</i>	<i>Chapter</i>	<i>Date of Commencement</i>	<i>Relevant Sections</i>
16. Criminal Procedure	75	1-8-30	185, 186
17. Domicil	37	5-6-70	3, 4, 5, 6, 9, 10
18. Education	211	4-4-68	
19. Employment	226	3-5-76	2, 7, 24, 25, 26, 27 28, 29, 31, 32, 33, 34, 35 37, 38, 48, 52, 56
20. Evidence	80	10-12-63	118, 124
21. Fatal Accidents	32	8-2-46	2
22. Film and Stage Plays	222	1-10-63	2, 17
23. Firearms	114	1-1-54	32
24. Geneva Conventions	198	22-11-68	
25. Guardianship of Infants	144	5-5-59	The whole Act
26. Hindu Marriage and Divorce	157	19-7-60	3, 4, 11
27. Immigration	172	1-12-67	2, 3, 4
28. Interpretation and General Provisions	2	16-5-60	3
29. Industrial Training	237	1-8-67	2, 8
30. Judicature	8	1-8-67	3
31. Kadhis' Court Act	11	1-8-67	5
32. Kenya Boy Scouts	219	23-8-35	The whole Act
33. Kenya Girl Guides	220	23-8-35	The whole Act
34. Kenya Citizenship	170	12-12-63	2, 3, 4, 5, 18
35. Legitimacy	145	10-6-30	The whole Act (Section 1-11)

<i>Act</i>	<i>Chapter</i>	<i>Date of Commencement</i>	<i>Relevant Section</i>
36. Limitation of Actions	22	1-12-67	2, 42
37. Liquor Licensing	121	5-11-57	14, 30
38. Marriage	150	29-11-02	11, 19, 21, 22, 35
39. Magistrates Courts	10	1-8-67	2, 9
40. Maintenance Orders Enforcement	154	6-9-21	
41. Matrimonial Clauses	152	1-1-41	2, 26, 27, 28, 30, 32
42. Merchant Shipping	389	1-12-67	53, 86, 89, 96, 97
43. Mohamedan Marriage and Divorce Registration	155	8-6-06	9,
44. National Hospital Insurance	255	12-7-66	5, 10
45. National Social Security Fund	258	23-10-65 LN 308/65 Section 10-13-LN 47/672,	19, 21
46. National Youth Service	208	1-9-64	
47. Oaths and Statutory Declarations	15	Part VI 18-10-57	13, 14
48. Partnership	29	1-7-34	13, 14
49. Parliamentary Pensions	196	1-7-84	3, 14
50. Penal Code	63	1-8-30	14, 25, 27, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 157, 158, 159, 160, 161, 164, 166, 167, 174, 210, 211, 214, 216, 217, 227, 239, 255, 257, 262,
51. Pensions	189	1-2-63	15, 17

<i>Act</i>	<i>Chapter</i>	<i>Date of Commencement</i>	<i>Relevant Sections</i>
52. Public Health	242	6-9-21	2, 46, 47, 103, 104, 105, 106, 107, 108, 109, 112
53. Prisons	90	1-2-63	66, 67
54. Probation of Offenders	64	20-12-43	4
55. Registered Land	300	16-9-63	113, 114, 115
56. Registration of Persons	107	16-5-49	2, 9
57. Sale of Goods	31	1-10-31	4
58. Succession	160	1-7-81	3, 4, 5, 26, 29, 32, 33, 41, 42
59. Subordinate Courts (Separation and Maintenance)	153	1-2-29	3, 4, 10, 12, 13, 15
60. Traffic	403	1-1-54	33
61. Traditional Liquor	122	1-7-71	27
62. Trustee Act	167	16-11-29	46, 47, 54
63. Trusts of Land	290	22-12-41	10, 13
64. Widows and Children's Pensions	195	1-1-66	11, 3, 12
65. Workmen's Compensation	236	1-10-49	11, 3, 12

September, 1988

V. W. MUCAI KATTAMBO (Mr.)
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 Kenya Law Reform Commission.

**CONSULTATION PLANNING SEMINAR ON CHILD CARE SERVICES
HELD AT THE KIA CONFERENCE CENTRE, 13TH TO 16TH JUNE,
1989**

The major issues for discussion were:

- i. The administration procedure of the child-care institutions and the facilities that they provide
- ii. The children's services required.
- iii. Methods that may be used to bring the institutions closer to the community.

Representatives from various Child-Care Institutions presented papers on the roles of their institutions in providing child-care.

Starehe Boys admits mainly orphans and children from poor families. Some of these children are sponsored by the Save the Children Fund. The centre also runs a hostel where their school-leavers stay while searching for alternative independent accommodation.

St. Nicholas Development Centre takes in parking boys and girls, orphans and other needy children. In selecting the needy children, the Centre is assisted by the Local Chiefs, Church Ministers and Social Workers.

The S.O.S. Children's Villages admits orphans and abandoned children. They provide substitute families for the children. The Village rely on donations and gifts to keep them running. They also provide education for the children.

The Kenya Institute of Special Education conducts training courses for teachers who deal with children who have special educational needs. The Institute takes in children who are mentally retarded, have hearing or visual impairments, or physical, emotional or behavioural problems.

Approved Schools admit young offenders, orphans and children beyond parental control. They offer vocational and academic training as well as discipline or behavioural problems.

The Prisons Department provides separate accommodation for expectant and nursing mothers. There are medical personnel for pre-natal and post-natal care. Children ages 3-4 attend nursery schools within the prison. Those over four years of age are handed over to a Welfare Officer to place with a relative or in an institution.

World Vision International Focuses on the neediest children and their families. These fall under the category of the handicapped, those who are malnourished, have the poorest shelter, lack basic food requirements, and those who lack educational facilities.

The Salvation Army helps orphans and handicapped children (among other needy people.) It runs a Centre for street boys in which they are taught carpentry, masonry and agriculture in order to rehabilitate them and equip them with skills that will enable them to be self-reliant.

Christian Children's Fund is a non-profit organisation that serves the needs of children all over the world. It works through a sponsorship programme based on a sponsor/child relationship. Its objective is to assist needy children together with their families by meeting their basic needs and improving their standards of living through community-based projects, institutions and schools. It sponsors children until they complete their formal or vocational training.

Adoption cases are handled by the *Child Welfare Society*. The Society locates unwanted and abandoned children and places them with families.

Kanu/Maendeleo Ya Wanawake Organization has as one of its objectives the provision of child-care services through various programmes such as Maternal Child Health/Family Planning, and Mother and Child Nutrition Programmes. The Organization does not provide institutional care.

UNICEF Children's Services Department Baringo takes in destitute children, orphans, the handicapped, juvenile delinquents, illegitimate children, abandoned and abused children. Its main objective is to investigate the plight of children in difficult circumstances with a view to offering specific rehabilitative measures within their own environments, and involving natural or foster parents, or guardians.

The Young Muslim Association is a charitable organization that offers welfare, education and religious activities for needy children. It also runs a dispensary for the children's medical needs.

Thomas Bernado House caters for abandoned, neglected, battered and orphaned children. Abandoned children are given foster parents who may eventually adopt them if they so wish. The home receives voluntary medical services.

There are several community-based child-care services.

The Kisumu Municipality representative pointed out that the Children and Young Persons Act (Cap. 141) does not spell out the Council's role in the co-ordination and inspection of children's homes.

The Nairobi City Commission runs Child Welfare Clinics, Primary and Special Schools and Day-Care Centres, among other things.

Machakos Children's Home is funded by the Christian Children's Fund which provides school fees, text books, medical fees and uniforms. The Children are discharged on reaching the age of 18 in order to create room for others.

The following were the general recommendations made:

1. **Community-based Programmes**

It was recommended that Child-Care Institutions be started at the community level-with the involvement of Parents, Teachers Associations, women's groups and churches as facilitators.

2. **The Legal Aspects**

It was recommended that:

- i. provision be made in the law for co-ordination between the

Government and Non-Governmental Organizations in matters relating to children;

- ii. the law provides for a period of 3 to 6 months within which every attempt is made to place a destitute or abandoned child in a family. Only after such attempts fail should the child be placed in an institution;
- iii. there be provision for thorough investigation of the people behind a proposed new Child-Care Institution before it is registered;
- iv. female offenders who have children be given non-custodial sentences as far as possible.

3. **District Committees**

It was recommended that District Development Committees be involved as much as possible in the setting-up and running of all Child-Care Institutions.

4. **Awareness**

It was recommended that:

- i. teachers and heads of school be involved in creating awareness of the plight of needy children in their care;
- ii. children's officers be posted at police stations where they can properly work with police officers on children's cases;
- iii. the media be used to create awareness countrywide.

5. **Inter-Agency Co-ordination**

It was recommended that inter-agency co-ordination be initiated through newsletters and barazas.

**REPORT ON THE INTER-REGIONAL WORKING MEETING ON
SOUTH-WEST ASIAN HEROIN TRAFFIC TRANSITING AFRICA,
NAIROBI 20th-22nd JUNE, 1989**

The meeting was sponsored and organised by Interpol General Secretariat. In collaboration with the Government of Kenya. It drew its participants from Asia, Western Europe, Africa and North Africa. There were 25 participating countries.

The aim of the meeting was to identify the nature and extent of the illicit heroin traffic from South-West Asia transitting Africa to Europe and North America and also to devise effective measures of curbing the illicit traffic. A report from the General Secretariat ICPO Interpol based on the information received from member countries indicated that Africa had indeed become a trafficking route for illicit drugs from South-West Asia.

In his inagural speech the honourabl, the Attorney-General said that the Government was concerned about the menacing evil of drug trafficking. The concern stems from the painful knowledge of the injurious effects of drug abuse and trafficking. He informed the meeting that the major drug of abuse in Kenya is Cannabis (locally called "bhang") which grows in Kenya and is mostly abused by the youth between 12 to 25 years.

He said that due to the development of modern and efficient methods of Communication Kenya has attracted drug traffickers who use it as a transit point. He went on to inform the meeting that the law relating to drugs is contained in the Pharmacy and Poisons Act (Cap. 244) and the Dangerous Drugs Acts (Cap. 245). He said that these Acts do not address themselves to the drug trafficking of today and the penalties provided are too lenient. Therefore Kenyan legislation is being updated with a view to introducing stringent measures to curb drug abuse and trafficking. He said that such measures will include:

- the power to trace and confiscate proceeds from drug trafficking.
- the introducing of a minimum sentence for trafficking in narcotics.
- the provision of a deeming clause in the law so that possession of minimum quantities of substances such as heroin would automatically render the possessor guilty of trafficking unless the contrary is proved by the accused.

The Attorney-General concluded his speech by saying that the only meaningful hope of controlling the trafficking menace lies in collective and co-ordinated efforts by the international community. These efforts should be directed not only to control through legal sanctions but also through Education, Training and Research.

Delegates from the participating countries then presented situational papers on their countries depicting latest trends in trafficking. The reports contained, inter alia, information on:

- (a) Quantities of drugs seized

- (b) Traffickers and trafficking organisations, countries, organisers and financiers.
- (c) Trafficking routes and
- (d) Modus operandi.

At the close of the meeting the delegates made various recommendations.

The meeting was closed by Mr. Noah Arap Too, the Director of Criminal Intelligence. In his closing remarks he stressed the need to implement the recommendations made, for only by so doing could the meeting be of benefit to the participating countries. He said that if the recommendations were implemented they would go a long way in saving our youth from the dangers inherent in drug abuse. He assured the participants that Kenya would give all the co-operation needed in the effort to eradicate illicit drug traffic.

**VISIT BY MEMBERS OF KENYA LAW REFORM COMMISSION
TO MOMBASA FROM 21ST TO 23RD JUNE, 1989**

1. Meeting with the Public Health Officer

Members of the Commission led by the Chairman visited Mr. Ludindi the Public Health Officer for Mombasa, who had made representations to the Commission on their previous visit and had presented two memoranda which consisted of two documents namely:

- (a) Legal aspects of private medical institutions dated 8th December, 1975.
- (b) A chart showing in sequence the provisions of the Public Health Act (Cap. 242), together with an indication as to in whom the power or duty under the Act is vested for the purpose of enforcing and carrying out its provisions.

The first points made by Mr. Ludindi generally were that in the Act there is no definition of the word hospital, which he thought was a serious gap, and secondly there was no definition, and no creation of the office of, a Public Health Officer, by which the title of Health Inspectors and assistants in the Ministry are now known. Thirdly, he pointed out that the Government is specifically not bound by the definition of the term (Owner) in section 2 of the Act, leading, in his view, to the serious disadvantage that he as a public health enforcement officer, could not enforce sanctions in respect of any public hospitals which failed to meet required health standards as applied by his ministry.

The Chairman dealt with Mr. Ludindi's first memorandum. On the first three pages he set out with illustrations from the various statutory provisions that which in his opinion is the present unsatisfactory state of the law regarding Private Nursing, Maternity and other homes which are not maintained out of public funds. He argued that at the moment there are no regulatory powers in respect of such premises as opposed to licencing of individual medical practitioners under the Medical Practitioners and Dentists Act (Cap. 242) with the result that any method of control of proper standards in respect of such places is by indirect means, in as much as the health authorities can refuse to licence an applicant unless he takes appropriate steps to remedy defects which may be found in the premises in which he intended to practise and provide treatment.

Mr. Ludindi referred to the subsidiary legislation relevant to the Municipalities Ordinance, Cap. 136, of the 1948 revised edition of the Laws of Kenya and said that there has never been any by-laws regulating these private establishments in Mombasa, though there had been the Nairobi Municipality Nursing and Maternity Homes by-laws 1950, GN 21/1950 in respect of Nairobi. He was of the opinion nevertheless that those by-laws had become in-operative by reason of the Local Government Regulations 1963, L.N. 256 of 1965, which is now almost entirely incorporated in the Local Government Act Cap. 265.

This opinion is not in keeping with section 24 of the Interpretation Act (Cap. 2). Accordingly the Chairman was of the opinion that the Nairobi, 1950

by-laws were still in effect at least as far as the original-Nairobi Area was concerned, before it was geographically extended.

It was agreed that there existed a need for subsidiary legislation covering private medical institutions throughout the country and Mr. Ludindi's draft formed a useful basis for such legislation. The Chairman then proceeded to consider and analyse in detail the draft regulations and in particular suggested the deletion of certain of the definitions in line with the techniques of drafting.

On the issue of definition of the word "hospital" the Chairman forwarded a draft which included a suggested definition, which Mr. Ludindi was prepared to accept might be sufficient for the purpose of the draft Rules at page 12-26 of the first memorandum. As regards the third issue on the Government not being included in the definition of the word owner, the Chairman felt that, this was a policy issue and that it had to be assumed for the purposes of any discussion on legislation that the Government would fulfil its obligations in any other respect. Accordingly the Chairman was prepared to support the regulations as amended, because in the body of the draft there were very useful provisions which ought to be applicable to the whole country.

The Chairman said the Commission would try to establish action taken on the matter by the Ministry of Health since the memorandum was forwarded to the Ministry in 1977, then send final recommendations to the Chief Parliamentary Counsel for consideration in the review of subsidiary legislation under the Public Health Act.

2. Meeting with Members of the Law Society

(a) Rent Restriction Act

The first matter was in relation to S. 32 which Mr. Kasmani had raised during the Commission's previous visit. He had pointed out that if under that section a notice was given to the tenant then, in the absence of personal service, the Chairman of the Rent Tribunal was obliged to direct in what manner it could be served. This could hardly be done in advance of proceedings being filed before or referred to the Tribunal and therefore an amendment was necessary. The Chairman accordingly had redrafted S. 32 and read it out to those present.

The other matter was in connection with paragraph (g) (iii) of S. 14 of the Act which was the basis for the High Court decision in *Dodhia v. Jos Hansen*, 1979, K.L.R 118, that the benefit of the statutory protection should only extend to an individual domestic occupier. The Commission had accepted that was the position and required amendment. The proposed amendment is effected by amending the definition of "tenant" in S. 3 to add at the end thereof "but does not include a company incorporated under the Companies Act or any corporation." In addition it would be necessary to delete the references to the word company in paragraph (g) (iii) of S. 14. The meeting was prepared to accept these amendments.

The meeting also discussed the issue of the finality of an appeal from the Tribunal's decision to the High Court by virtue of subsection (4) of S.8 of

the Act. The Chairman told those present that the Commissioners were of the view that the High Court decision should be final. He traced the position as it was in England where an appeal to the Court of Appeal was only with leave of that Court. That if there was to be such a provision in Kenya, it should only be with leave of the Court of Appeal.

On examination of subsection (1) of section 72 of the Civil Procedure Act, it appeared that an appeal from any decree passed by the High Court on appeal was itself appealable without leave.

It was decided that if any second appeal was created, it would have to be an unrestricted right. The Chairman undertook to inform the Mombasa Law Society of the result of the Commissioners deliberations in this respect.

On the issue of repossession under paragraph (e) of S. 14 (1) it was said that application of this part was problematic where the property was owned by joint landlords because the same property could not reasonably be required for occupation by both of them and their families.

The Chairman proposed an amendment by way of insertion in the beginning of that paragraph as follows:

“In the event of there being more than one landlord, then by any one of them.”

It was also noted that under S. 16 the Tribunal is required to interpret any notice given under that section as liberally as possible, which could result in an indeterminate period of notice being given in such a case. It was felt that it would be best to provide for a certain period with liberty to the Tribunal to extend the period of notice if the tenant, upon whom the burden would lie, was able to show good sufficient cause.

(b) *Land Disputes Tribunal Bill*

The second subject raised by the Chairman was with respect to this Bill which the Commissioners had acted on. He pointed out that it had been found that the tribunal of elders generally worked unsatisfactorily, in particular because the two elders who were to be appointed by each of the parties always crystalized their decision in favour of the party appointing them. It was suggested that the elders should be appointed by a different method and the parties should have a restricted right of objection to those elders.

The Chairman then passed the proposed Clause 3 of the Bill which could enable a case to be filed in a separate registry instead of having to go through the Court as is the case at present. This proposal was made in view of the Court of Appeal decision in *Khayadi v. Aganda C.A. (Kenya) 133* in which it was stated by Gachuhi J.A. that the procedure was lengthy and caused delays.

(c) *Advocates Bill (Cap. 16)*

The Chairman stated that the Commissioners had held meetings on the subject and that some advocates had been involved in one of the meetings and had in general approved of the innovations made by the Bill. He

pointed out the main innovations of the proposed Bill and explained at length the reasons behind each innovation.

Concern was expressed that there is no limitation of time within which a complaint should be brought under the new proposed Part X the Chairman pointed out that it was difficult to say when instructions given were not adhered to and therefore impossible to lay down a hard and fast rule as to when a limitation period could be deemed to have commenced or expired. Nevertheless, in view of the members concern, he proposed a possible provision as follows:

“Provided that no complaint shall be entertained by the Commission unless it is filed within 12 months after the occurrence of the act or omission complained of or (in respect of which the complaint is made).”

On the supervision period under Clause 32 it was suggested that there should be correlative provision that employment should be guaranteed in order to achieve compliance with this requirement. The Chairman pointed out that the proposal on a minimum salary for a person who was a pupil or under supervision was in the course of being drafted.

The Chairman also referred to Clause 12 (a) which states that no person shall be admitted as an advocate unless he is a citizen of Kenya. Formerly this paragraph had in addition the following words:

‘or ordinarily resides in Kenya.’

The impression was that the new Bill had deleted these words and the people who were practising in Kenya and were not citizens were at risk as regards their practising certificates. The amendment (deleting the words) was made by the Miscellaneous Amendments Act of 1987. The Chairman explained the Commissioners’ views that this amendment did not mean that those who were non-citizens would be unable to obtain practising certificates in future. Nevertheless he had written to the Chief Parliamentary Counsel requesting that the transitional provisions of the Advocates Ordinance 1961 which had been omitted from the present Laws of Kenya, shall be reintroduced to preserve, the status quo as regards practising certificates, membership of the Disciplinary Committee, and of other bodies which are set up under the Advocates Act. He was still awaiting a reply. He stated that S. 23 (3) of the Interpretation and General Provisions Act regarding preservation of accrued rights was doubtful on this issue and the insertion of these provisions in the Advocates Act could remove any possible doubt.

Secondly the Chairman explained that he had managed to get the agreement of the Chief Parliamentary Counsel to the repeal of the Mazrui Land Trust Act, Cap. 289, and that he also proposed an amendment to the Wakf Commissioners Act, Cap. 109, by the addition of a new S. 160A. The Chairman had set out the proposal in a letter which he had copied to the Provincial Commissioner. The Provincial Commissioner expressed himself as being satisfied with both these matters and also supported the reintroduction of a minimum sentence for trafficking Offences which the

Chairman had previously proposed under the new Trafficking in Specified Goods Offences Bill.

In continuation of the question of drugs the Chairman explained that he had proposed that the penalty under S. 18 of Cap. 128 for disobedience to a Chief's order under S. 10 and 11 be increased to a maximum of KSh. 5,000 or 6 months imprisonment.

He also gave his response to a submission made to him by a Councillor from Kwale on the previous occasion that there were occasions when Chief's allowed activities which were contrary to the customs of the local people to be conducted. He had drafted a proviso to be inserted in the end of S. 10 and 11 of the Act, that a Chief or assistant should not issue any order or direction to persons resident in the area requiring them or permitting them to perform duties or ceremonies contrary to local customs or traditions unless an opportunity had been given to a person or representative of public interests to make representations regarding it. The Provincial Commissioner expressed approval to that amendment.

On the Law of Succession Act, the Chairman addressed the proposals made that there should be separate provisions for Muslims under part V of the Act so as to enable intestate Succession to devolve according to Muslim Law; the Provincial Commissioner supported this proposal.

The Provincial Commissioner then referred to troubles that the administration was experiencing with people grazing in the Matrimonil Parks presently, the only power under S. 17 of the Wildlife Conviction and Management Act is to impound the animals, which are returned to the owner as soon as he is notified and comes to claim them. He proposed that there should be a penalty for future and a power of conviction to enable a fine to be imposed.

Meeting in the Provincial Commissioners' Office

The meeting discussed the new Advocates Bill and the Provincial Commissioner heartily welcomed the proposed Complaints Commission and the new proposed offence under Clause 80 entitled Betrayal of Trust.

Meeting with the Chief Kadhi

The Chief Kadhi did not appear to be in agreement with the proposed amendment to the Wakf Commissioners' Act but after the Chairman explained to him that no prejudice could be caused to the administration of Wakf trusts by the new amendments since they were merely procedural, he appeared to be satisfied. Having read the proposed amendment sent by the Chief Parliamentary Counsel the Chairman proposed two further amendments to the Act, which would be inserted at or after section 25 as follows:

- 25
- (1) Notwithstanding any of the provisions of this Part all testamentary dispositions made to a person of Muslim faith shall conform in all respects to the law of the Holy Quran.
 - (2) Testamentary gifts or dispositions of real or personal property shall be void if and in so far as they offend or are contrary to

the provisions of the Islamic Law of Succession and testamentary disposition.

The Chief Kardhi appeared satisfied with these proposals and desired the Commission to support his view regarding testate succession. The Chairman promised to do his best to keep the Chief Kardhi informed as to developments in future.

**ENVIRONMENTAL SESSIONAL PAPER WORKSHOP AT SAFARI
BEACH HOTEL FROM 30TH JULY TO 2ND AUGUST, 1989**

Since I became Chairman of this Commission, we have tried to indicate that there are numerous enactments which impinge on the environment, but no comprehensive environmental statute. I have written to the Director of the National Environment Secretariat saying that this is something which we really ought to do, as soon as possible, particularly in view of the Presidential concern expressed at the London Conference in March about the danger to the international scene as regards the environment and I think we have to remember that all the conferences, workshops, seminars that we have been attending, the Sessional, working and other papers that have been produced should all be directed to the end product, which is a comprehensive law protecting the environment, not just fragmented bits and pieces of legislation but a comprehensive statute which can be regulated and controlled by a proper body set up for the purpose.

There was an attempt to promote some legislation by the Secretariat in 1984, but it did not, for one reason and another, really get very far off the ground. I think very probably because people were concerned that the bodies sought to be set up in that Act or that Bill would conflict with existing ministries and bodies.

So Mr. Chairman, Distinguished Participants, Ladies and Gentlemen, it is once again my great honour and privilege to be invited to attend a workshop promoted by the Ministry of Environment and Natural Resources and in particular its arm the National Environment Secretariat, relating to the environment. This is a subject which you all know has been in the forefront in recent months, not the least because of the keynote address by his Excellency the President at the International Conference on Chloroflorocarbons and the Ozone layer in London in March 1989. The address was in fact in keeping with his Excellency's well known concern for our natural surroundings, emphasizing as he does his well known concern for our natural surroundings for which we are unusually fortunate in Kenya; having an exceptional country, with exceptional surroundings and an exceptional climate of exceptional benefit to all its inhabitants. It is very important to preserve the natural heritage of Kenya and not to let it be eclipsed or damaged by the immense pace of growth and development which has taken place and which is continuing to take place, so that any legislation must balance the requirement of development with the minimum interference absolutely necessary with the natural surroundings. That is one of the difficulties, this balancing act which has to be achieved in promoting any meaningful legislation on the subject. Not only do we have to preserve it for the rest of the lives of those in the country or on this earth at the moment but also for generations to come in the future. Perhaps, to oversimplify, one has to reconcile the competing interests of present and future generations.

Returning for a moment to the international conference, His Excellency expressed mounting international concern to the damage, for the damage taking place in the natural forces of climate and nature, particularly to the

ozone layer, of which we have heard a lot in recent months. He said that if timely action is not taken the consequences will be very serious. The Presidential address was widely acclaimed not least by the British Prime Minister.

I have here something which may be familiar to most of you. It is the UNEP publication on the ozone layer. It is, I believe, available at the UNEP library. They give an overview and show for instance layers of the earth's stratosphere which have varying degrees there shown of the Ozone. It is very easy to perceive from this publication that the danger can arise, if the ozone layer is damaged, in two ways. One is because it acts as a filter of the sun's rays preventing the ultra-violet rays from having their full impact on both mankind and plant life. If that insulating layer is reduced then considerable damage can occur to both. The second is that by damaging it or reducing the coverage of the ozone layer then the result would be that the earth itself would become warmer. According to the statistics, the raising in the earth's temperature over the last ten millenia has only been between 1%. So if there was a significant warming of the earth's atmosphere in this way then catastrophic results would occur by flooding in various areas; for example Bangladesh which is already very seriously damaged by floods, and there are illustrations in this second book, which is the Greenhouse gases, showing the level which the sea would encroach if there was a significant warming of the earth's atmosphere.

Ladies and Gentlemen, in Kenya there have been movements both official and non-official, that is to say outside the government, and they have been gathering momentum to prevent damage to our surroundings and preserve the environment. During 1988 many official statements occurred, not the least from the Hon. Minister Mr. Nyagah, stressing the importance of protection measures, meaningful protection measures.

I had occasion to compare our situation with that of Britain and I wrote to the Law Commission there and discovered that they had numerous enactments but nothing really comprehensive to protect the environment. They compiled a list of the Acts and I have it here. Also in Kenya we have something like sixty-six (66) Acts or more which in one way or another, as Mr. Mugo said fragmented provisions, touch on the environment.

So really we do need a comprehensive piece of legislation which will cover all of the environment. This enormous subject of the environment I do hope that the result of all these conferences and workshops we have been attending in the last year or so will result in legislation before long. As I said, Britain did manage to legislate in particular fields. I have for example "The Control of Pollution Act 1974" which sets out a wide range of duties for local and water authorities to control water and air pollution by toxic material, waste and even noise is covered. The earlier London Clean Air Acts, one of which we have taken as a model for embryo legislation here, in 1956 and 1968, were probably the first measures which were aimed directly at controlling the emission of harmful material into air space.

Mr. Chairman, the Kenya Law Reform Commission obtained from our Counterparts in London, the United Kingdom Law Commission, a list of no less than 182 statutes which in one way or another affect the environment.

The Secretary to that Commission frankly stated that though the legislation was in much the same state as ours, in that there had been as at that time, that's in March 1988, no comprehensive efforts made to consolidate any or all of those fragmented provisions into a single environmental statute. The immensity of the subject is Ladies and Gentlemen rather daunting. One of the problems, I think, in legislating for the environment is it is not something which the ordinary person regards as tangible as opposed to legislation, which the Commission is also involved in for example drug trafficking legislation or even Children and Young Persons or the Advocates Bill, all of which we have had a hand in. And in some cases quite an important hand in promoting, in the last year or so.

One phrase struck me during the morning's proceedings from Mr. Chairman Sir, which highlights the difficulties of legislating generally in any matters forming part of the environment and here he mentioned the Tana River which as we all know is an extremely long river, starting up in the Aberdares. During the length of its course different environmental problems occur at different levels and different parts of the river. Quite obviously, quite high up in the Aberdares one would have plenty of vegetation, foliage afforestation and so on. Further down we get much greater human settlement, competition between the need to provide for that by way of food and the need to preserve the environment and perhaps further down a degree of desertification and perhaps even at the middle level too much cultivation.

The problems of desertification were gone into at some depth by us and it transpired that the total land area in Kenya which is 570,000 sq. kms. 484,000 sq. kms are experiencing some form of desertification. That is 84% of the total land area. And of that about 110,000 sq. kms is severely affected that is approximately 19.3% of the total land area. That is one end of the spectrum. One may compare the level of afforestation in Kenya which is, I think the speaker said this morning, between 2%, and 3%, at the other end of the spectrum.

We have been considering the Kenyan Acts and Miss Munyao of the Commission has produced quite a comprehensive table, showing the effect of statutes on the environment. That was produced at the Nyeri Conference at which most or at least some of you were present. The workshop on Policies and Principles to Enhance Sound Environmental Management that was in Nyeri from 12th to 15th March, 1989. We also participated in the Seminar held just over a year ago at the Serena Beach Hotel in Mombasa and both of us produced papers at that seminar, which have been appended to the Commissions 6th annual report. We took part in a further seminar on Desertification Control in Nyeri between 6th and 9th October, 1989 and a comprehensive paper was prepared.

Mr. Chairman, Ladies and Gentlemen, Kenya is a party to several international conventions on the environment, but not, as I understand it, the Vienna Convention on the Protection of the Ozone Layer held in 1985. His Excellency urged wider Participation by states in both the Vienna Convention and the Montreal Protocol which followed it.

However, quite apart from promoting the Drug Trafficking Legislation the Advocates Bill, various aspects of Children and Young Persons Act, all of which are regarded as of very great importance on the environment and this has been sent to you, Sir, and has also been submitted to the Attorney-General's Chambers where no doubt it will attract a measure of Surgery from the Chief Parliamentary Counsel. But nevertheless it is a start and is something concrete to get it done because as I say all these conferences and workshops do need to have never to lose sight of the fact the aim, the end product must be to produce meaningful, effective and enforceable legislation. That is really the sum total of what we have been involved in even the last 18 months or so.

Legislation must not only be internal and regulate people and their activities, industrial activities, chemical activities and soon, within its border, it must also be international. That is where the World Commission on Environment and Development (W.C.E.D.), which was held at the Hague in June 1986, comes in. There are a number of articles which were set out in the paper that I presented to the 1988 July Seminar which I think epitomize all the principles to which legislation should have regard internationally. Of course anything certainly towards the edge of the area which the country occupies will have transboundary effects. So obviously there must be a degree of collaboration between the various states involved.

Ladies and Gentlemen, I suggest to you, we have at least made a start by producing something that can be worked upon even if it needs modification and adjustment particularly by those experts in the drafting field. I would like to thank you, Sir, for inviting me to come and for inviting the other members of the Commission here and to wish the workshop every success in its objectives.

