HUMAN RIGHTS COMMITTEE

of

THE BAR OF ENGLAND AND WALES

VISIT TO KENYA

VISIT TO KENYA DECEMBER 1993

DELEGATION:

J J Rowe QC, Chairman of the General Council of the Bar

Ian Robbins	)	Bar Human
Patrick Anim-Adoo	)	Rights Committee

INDEX

Introduction:

1. In December of 1993 the general Council of the Bar sent a Delegation to Kenya comprising of J J Rowe QC, the then Chairman of the General Council of the Bar and Patrick Anim-Adoo and Ian Robbins both members of the Bar Human Rights committee. The visit was made against a background of great change in Kenyan history. In December of 1992 the country underwent its first multi-party elections. The incumbent president, President Moi was re-elected in the face of protests attacking the fairness of the election by a fragmented opposition. The elections had come about with the repeal of Section 2 A of the Kenyan Constitution (this had restricted Kenya to be a one political party state) due to growing international pressure most notably from the members of the Paris Club, a collection of countries who provide the bulk of the donor aid to Kenya. The country was also experiencing at the time great problems with tribal clashes in the Rift Valley area of Kenya which had started as early as October 1991. The Rift Valley area is subject to Emergency Security Regulations to ostensibly control the violence. However, three independent sources including a parliamentary committee who had investigated the matter have implicated the Kenyan Government in the clashes which have

left hundreds of thousands homeless and many dead. The Security Regulations are widely seen as a method of restricting the flow of information from the area rather than providing the security the area needs. The Delegation was generously received in Kenya and would like to thank the following; The Law Society of Kenya; the Attorney General of Kenya, Amos Wako; Judges of the Court of Appeal of Kenya; Paul Muite MP; Gibson Kmusa Kuria; Mirugi Karuki; Taib Ali Taib; the United Nations High Commissioner for Refugees; the Political Secretary to the American Embassy, Joe Cassidy; the British High Commissioner; the Kenyan Law Commissioner; and all the other lawyers and members of the Press who made our stay such an enjoyable one. The Delegation focused on three areas these being, independence of the judiciary; independence of the Bar and detention without trial. The following is a record of the observation and conclusions of the Delegation.

Independence of the Judiciary

1. To understand the problems relating to the independence of the Judiciary you must first look at the picture of the court system in Kenya. The Constitution creates, specifically, a High Court and Court of Appeal but the bulk of the judicial duties in Kenya are performed by the Magistrates Courts. At the base of the court system are the District Magistrates Courts who have a limited geographical jurisdiction and limited power of sentencing. The next level are the Resident Magistrates Courts who have an unlimited geographical jurisdiction and have unlimited sentencing powers, including the power to hear capital offences. The High Court acts as an Appellate Court to the Magistrates Court. The High Court is peculiar in that it is the sole court which may hear constitutional cases for which there is no avenue of appeal to the Court of Appeal. In all other matters heard in the High Court the Court of Appeal exercises an appellate jurisdiction. The Magistrates Courts can hear a variety of different matters which include criminal matters which are non-bailable and carry a mandatory death sentence: (for instance the offence of robbery with violence.) The Delegation heard that despite the appointment of Amos Wako as Attorney General, who has an international reputation for human rights work himself outside of Kenya, there is however very little faith in

the office of Attorney General and his will to protect the abuse of the legal process by the executive and maintain the independence of the judiciary.

Recent examples of cases that have led to this criticism of the office of the Attorney General have included the prosecution of opposition figure Koigi Wa Wamwere on a charge of robbery with violence (which international observers have described as "a farce") and the prosecution of the editor of The People newspaper in a matter of criminal contempt for an article criticising a decision of the Court of Appeal. These examples serve to illustrate to the legal community the inconsistency with which the Attorney General approaches matters of an ostensible political nature. They also serve to add weight to the widely expressed suggestion that the Attorney General's office is being undermined. In this respect the role of the Chief Justice is of primary importance and the appointment of the Ghanian Justice Fred following the retirement of Chief Justice Hancox (who was severely criticised even by his own Judges), created a hope that a new Chief Justice would guarantee the independence of the Judiciary. However sources suggest (see the US Embassy report on Human Rights in Kenya as early as 1992) that this has not been the case and some serious problems still exist; for example; cases are still transferred to favoured areas to be put in the hands of a trusted Judge. In theory, judges to the High Court are recommended by the Judicial Services Commission. It is

alleged quite often that the government will assume this role and the Attorney General and the Chief Justice will play a very limited part in this process. In practice the appointment of the judges to the High Court effectively falls into the hands of the President who also appoints members of the Judicial Service Commission.

The view expressed to the Delegation by members of the legal community is that the present Chief Justice is just too weak to oppose the Executive. The behaviour of some pro government judges remains indefensible: an example was given to the Delegation of one matter where Mr Justice Dugdale was dealing with a constitutional reference to challenge the Government. The Attorney General in this matter filed a reply to the Plaintiff's case and the matter was listed for a mention in front of the judge to fix the matter for hearing. On attendance of the advocate the Judge produced a written Judgment dismissing the case and branded it politically motivated, without giving the advocate an opportunity to address him. The Delegation also heard of more crude interferences with the Judiciary; for example, it was acknowledged during a meeting between the Delegation and members of the Kenyan Court of Appeal that instances do exist of members of the Judiciary being telephoned by members of the Government to attempt to influence the outcome of a particular case. However, the Court of Appeal Judges reflected that this really depended on whether a

certain judge was amenable to being telephoned. The Delegation was also cited the case of Mr Justice Mbalugo who had ruled against the Government in relation to a case involving an attempt by the Attorney General to amend the law relating to the registration of political parties at the time of the presidential elections in December 1992. The Delegation heard allegations from sources that this Judge had been transferred from Nairobi to Mombasa and then finally to Kisii in a short space of time following his decision in this case. The transfer to Kisii represented a significant demotion. Since the Delegation's return it has been recorded that a Magistrate has suffered a similar fate having dismissed charges in a case where he found the Defendants had been cruelly tortured by the Police. On further investigation of the first matter members of the Judiciary told the Delegation that they felt it was unwise to comment on this matter in any detail, suffice it to say that the matter of a transfer of a judge is for the Judicial Services Commission, but it was possible to be moved in such circumstances, if, to borrow the words of a member of the Judiciary "the State is gunning for you". The Delegation also noted that the Court of Appeal felt that the difficulties that they faced had to be seen also in a cultural context, and that certain members of the Government did not understand the separation of powers between the Executive Branch and the Judicial Branch and these members of the Executive felt that it was not wrong to intervene in judicial matters. Members of the Judiciary told the

Delegation that they were in a very difficult situation and that there was a need to assert the independence of the Judiciary and underline the separation of powers between the Judicial and Executive branch.

2. From the meetings that the Delegation undertook it became very clear that one of the greatest problems that the Judiciary faced in Kenya was the politicisation of the legal process. Over many years (due to a lack of a pluralist system in Kenya which would allow political differences to be put into the hands of the Kenyan population) many political battles have been fought out in the Court. This continues to be the case as the one party nature of Kenyan politics is asserted by President Moi under a constitution not tailored to meet the demands of a pluralist society. The consequences of this is that the Executive have found it necessary to intervene in the administration of justice and a system has developed where a judge is perceived as falling into a category of pro or anti establishment. This is the perception of the legal profession and this has consequentially attacked the independence of the Bar in Kenya; for example, a lawyer will be labelled as being pro or anti establishment through the type of case he accepts. It is fair to say that the Delegation received views from the legal profession that more notably in Nairobi, local judges were showing a greater resilience since the elections in December of 1992 and were producing decisions which were seen as upholding justice and being fair to

the parties involved. This was seen as an increase in strength for the Judiciary. Problems, however, still exist and a number of local judges who remain under state contracts were considered as being vulnerable to State pressure due to the terms of their employment and reliance on the state for promotion.

3. The Delegation also heard from a range of legal practitioners that an important question remained to be addressed as to how to enhance conditions for the Judiciary to guarantee their independence; the terms of employment for judges need to be improved; physical conditions of work; more pay; a recording system in the courts; a system of law reports; a registry and a proper court administrative system which would prevent basic problems such as the loss of files relating to a particular matter. it appears that these problems were amplified at the Magistrates Court level which many lawyers believe is awash with problems. The Delegation encountered allegations of bribery of magistrates in certain matters. The President of the Kenyan Law Society, Dr Mutunga stated that; "There exists a real problem with recruitment of magistrates and the poor quality candidates are filling the posts with a lack of proper training". He further expressed concern that in these circumstances magistrates were hearing and had jurisdiction to hear important cases which included capital offences.

4. The problems identified in relation to the independence of the Judiciary at the Delegation's meeting with judges and lawyers in Nairobi were again identified and expanded upon in other areas of Oekna. At a meeting with the Law Society of Kenya in Nakuru, the Delegation recorded an incident involving a member of the Law Society of Kenya who told of Police interference with the administration of Justice in the Magistrates Courts in Nakuru. The incident involved armed police storming the Court Chambers and removing a file relating to a case to prevent the Magistrate from dealing with the matter and considering an application for bail where it was feared by the Police that the suspect may obtain bail. There was also a substantial complaint that the Senior Magistrate in Nakuru, Principal Magistrate Tuiyot, was not impartial, would undertake all politically sensitive cases and would not rule against the State in such cases. A current example is the case of Koigi wa Wamwere which lawyers dealing with this matter believe has been placed before the Principal Magistrate Tuiyot on the basis that he will find for the State, despite the lack of evidence to support the charge brought; the charge is robbery with violence which is a capital offence.

5. Further complaints that the Delegation encountered were that magistrates in the areas in the Rift Valley were not prepared to make rulings in relation to violations of basic rights, including the right not to be

tortured, being perpetrated allegedly by branches of the Police. It was also put forward to the Delegation that the Magistrate system was so dependent on the Executive in relation to their terms and conditions of pay and promotion (a Chief Magistrate expects to be appointed a High Court Judge) that it was easy to exert pressure on this branch of the Judiciary. The Attorney General acknowledge that there was a problem of training in relation to magistrates who may not question prosecutors or Police if a defendant is produced to the Court with injuries.

6. It was also made known to the Delegation by members of the legal profession in Nakuru that there was a substantial belief that certain judges were being kept away from politically sensitive case; an example was given of a case in 1990 involving a woman who was involved in a religious gathering and was then later charged with holding a meeting without a licence. It was argued by her Counsel that the charge should be dismissed or if not then she should be granted bail. The Magistrate dealing with this matter realised that the charge brought by the prosecution was not properly constituted. The Magistrate adjourned the case until the next day for State Council to attend and explain why this charge had been brought. When the lawyer attended the next day a different Magistrate was sitting and allowed the State Council to introduce a new charge. This new charge was not properly constituted, however there ensued an argument in relation

to bail which was rejected. A hearing date was later set then adjourned and new dates set but these were also adjourned. This process went on for a considerable period of time. After this period the charge was withdrawn. It is felt that this was another case of abuse of the Judicial process to remand someone in custody until a publicly contentious issue had died down. The prisoner in question remained in custody for 6 months.

It was also noted by the Delegation whilst they were in Nakuru that complaints arose that the Police would bring defendants from out of the district to be tried in front of a certain magistrate who was known to be pro Government, and that this Magistrates would not question the fact that the defendants were from another district. It was further brought to the Delegation's attention that certain magistrates would also ignore requests for legal counsel if parties were brought before the Court at irregular hours. This was a common complaint, and the likely outcome of such a case would be that the person would be remanded in custody at the request of the Police without allowing the client any legal representation.

The concern in relation to complaints such as these again is the question of who is controlling the administration of Justice in courts such as the Magistrates Court cited in these examples. The impartiality of

a Judge cannot be overstated as an essential ingredient for the due administration of Justice. All the examples given were drawn from the experience of the lawyers who we had met, and illustrated an attack on the independence of the Judiciary and of the Courts. The Delegation were concerned that in some areas such as Nakuru some judges were perceived by nearly all the members if the legal profession who operate in that area as being openly pro Government and would not question irregular practices of producing defendants at late hours or from outside the commission area of the Court to be tried with an inferred guarantee of a conviction. Such practices completed undermine the integrity of the Court and need to be addressed urgently. The Delegation also noted and would emphasise a great concern that the Police appeared to take part in the active interference with the independent of the judges in the Court. Again this is a dangerous situation as it creates an illusion that the Police are above the law. In any democratic society the Police must be seen to be accountable to the courts and the examples that the Delegation received suggested that certain members of the Judiciary were not fulfilling this role of enforcing Police accountability. Further examples received highlighted the repeated problem in relation to Police accountability focusing on the unwillingness of judges, especially in the Magistrates Courts, to question police in relation to injuries sustained by defendants brought before the Court where there was

a high probability that they were caused by torture whilst the defendants had been in the custody of the Police.

7. Although the Delegation did encounter some feelings of optimism in relation to the potency of the Judiciary in the face of Executive interference, it was also given recent examples of the apparent impotency of the Judiciary when faced with a politically contentious case and the consequent need to rely upon international pressure to achieve any form of result. An example of this was given in relation to the case widely known as the "Fotoform" case which involved the magazines Society, The Economic Review and Finance and the publishers of the three magazines, Fotoform. In this case the Police confiscated printing presses to prevent the publication of all three of these magazines. Action was taken by the publishers and the editors of all the magazines in the form of an application for a declaration of illegal entry into the premises and that the dismantling of the machines was a contravention of the rights of the owners to possess such property. The case was dismissed but later that year the charges were withdrawn after a blaze of international publicity in relation to the cases and the impending meeting of international aid donors.

8. When the Delegation travelled to Mombasa (the second city of Kenya on the .....) there was once again a reflection of the view

that the Judiciary had over the last 10 years found that its integrity had been severely undermined. The view expressed in relation to the Judicial process in Mombasa was that in the High Court the situation was improving. However, the impression created was that the judges were watching the political situation and that there were unspoken rules in relation to the extent a particular judge would be prepared to rule against the Government in a politically contentious case. One lawyer told the Delegation that he felt there was still bias in the courts when starting proceedings which involved an unpopular client, in the Government's eyes, or an opposition politician. He felt that judges were unable and unwilling to take a risk of ruling against the Government even if it meant the ruling in favour of the Government was founded on no legal basis. An example was given in relation to the leader of the Islamic Party of Kenya who was transported from Mombasa to a Court in another town, Voi to appear in front of a Judge known to be sympathetic to the Government. Another example was given by a lawyer representing a politician charged with threats of death; the particular lawyer appeared in front of the Chief Magistrate who adjourned the case until the afternoon, even though there was one hour of court time left until lunch time. The application was for bail. The lawyer returned at 2 o'clock to continue his submissions in the case. However, at 2 p.m. the Magistrate refused to let the lawyer continue his submission, and ruled that he believed that the Defendant was not of

sound mind and should be remanded in custody for a psychiatric assessment. This matter had never been raised before and the lawyer was dumbfounded by the Court's decision which was of its own motion. An appeal was immediately mounted to a High Court Judge and an application was made for bail. The Judge refused to give bail but quashed the psychiatric order, saying that he could "only go so far as this" and referred the matter back to the Magistrates Court for a further application for bail. The lawyer clearly believed that the reference to "he could only go as far as this" was in reference to a ruling against the Executive in a case which involved an opposition politician.

The Delegation was also given example of another lawyer who was conducting a case for an opposition politician, where in Open Court the Judge said to the lawyer that he had done all that he could do for one day in handling a politically sensitive case and would the lawyer take the case to another Judge. Again the Delegation encountered the opinion that the problem with the independence of the Judicial Branch is that the Judiciary needs guarantees to strengthen their position. On paper a Judge has security of tenure, (this was once withdrawn by the Government but later restored) but his salary or housing and all his Court administrative costs are paid by the Government. It is in this way that Judges are put under pressure. The problem is amplified in relation to magistrates who

have no security of tenure and their promotion depends purely on the will of the Government.

9. When the Delegation approached the Attorney General in relation to these matters, the Attorney General acknowledged that part of the problem in relation to the Judiciary is the lack of training for magistrates. A magistrate may not have knowledge of procedure but may still sit in Court. He indicated that he is discussing these matters with the British Government for release of monetary aid to give training attachments to the courts in England to provide training of Kenyan Magistrates. The Attorney General conceded that before the elections in 1992 there may have been a problem with magistrates being wary about making decisions in certain political cases. He felt now, however, that the Judiciary had strengthened and, with greater training and resources, would meet a majority of the criticisms raised. This view was not shared by the practitioners we met.

Summary of Observations

10. From the representations that the Delegation received from judges and lawyers and other parties during the investigation mounted by the Delegation into this aspect of judicial independence the Delegation came

across constant references to the failings in the Magistrates Courts system in Kenya where a large amount of work is undertaken. The expressed feeling was that the Magistrate system was more open to corruption and Executive pressure due predominately to the fact that the terms of employment and promotion were dictated by the Executive. The Delegation was disturbed to hear from the Attorney General of the extent of lack of training in the Magistrates Branch, taking into consideration that Magistrates Courts do hear capital cases. The Delegation was also concerned about the manipulation of the Magistrates Court system and the moving of the defendants out of a district to appear in front of a judge in a different district where the judge was known to be sympathetic to the Government. Whilst the Delegation accept that the improvement of terms and conditions and resources for the Judiciary would strengthen their position, it also feels that the Government have to take active steps to ensure and independent Judiciary for Kenya. In many cases in a young democracy such as Kenya, the first multi-party elections only taking place in December 1992, the Courts have a vital role to play in providing to the people of Kenya a forum to air grievances against the Executive and to allow the people to avail itself of this forum which can monitor the use of power by the Executive.

Independence of the Bar

1. Unlike the United Kingdom, the body which represents the profession is the Law Society of Kenya, which in recent years has come under attack from the Government culminating in 1991 with injunction proceedings being brought to prevent the Law Society commenting on political issues. These proceedings are well documented in other reports and were not investigated at length by the Delegation. However, it is clear that for an independent Judiciary to exist it is essential that there exists and independent Bar. The Delegation were asked by the Kenyan Press on whether it thought that the Law Society of Kenya was too political: It has become clear throughout the time the Delegation were in Kenya that the legal process gas become unavoidably politicised and that lawyers have acted as a crucible for change. They are also the vessel through which ordinary Kenyans have the opportunity to invoke the judicial process to protect their elementary rights. This may mean representing those of the same or different political persuasion which they will do without reference to their own views. It has also become clear to the Delegation however, that those who represent clients who are unpopular or of a politically high profile are seen as being the same as that client, and in some cases to be actively spouting the same views by the representation of the client in a matter. This is a dangerous and fallacious preconception which attacks the

independence of the Bar and hinders the process of Justice. The Delegation heard a wide range of views on this subject and examples of cases in 1990 and 1991 when lawyers meeting with opposition politicians in their capacity of legal advisers had consultations in their offices broken up by the Police. One lawyer gave details of his detention after one such meeting; "I believe it was because I had acted for these clients who were unpopular and it stated in my detention order that I was detained for association with these clients".

2. Since the elections in December 1992 a view is being expressed that such excesses had decreased, improvements in the situation have evolved and previously targeted lawyers feel freer in their practice. This was a view expressed in Nairobi predominantly. One lawyer described the change as substantial but, however, always dependent upon the political climate. The impression was that in the immediate post election period there was a perception of an improvement whilst the eyes of the world were on Kenya. Again it is important that there is the maintenance of such tolerance and it appears the problem remains of being labelled by the type of practice (i.e. political or non-political) that is undertaken. It seems that as the Judiciary has fallen into opposing camps of pro and anti Government the division of the Bar is seen as such and that lawyers are labelled and harassed as a consequence of this labelling. In the Provinces the perception is different to that of Nairobi

which suggests the attention has been diverted from the high profile lawyers who still claim international attention. A lawyer from Thika gave this view; "I knew the danger of going beyond a certain point. The pressure can mean that you have to go into the background until the heat is off; you get the feeling of not just fighting the law but other forces".

In other towns lawyers were wary of discussing in public the problem of interference. However, one lawyer gave an example of a case in September 1993 involving a politically undesirable client. He alleged that he was threatened by the Police and had to remove himself from the record as being the lawyer representing this client. This is a totally unacceptable interference with free operation of legal representation. It was suggested that the Attorney General should publicly denounce this type of interference and set up a consultation forum to record such instances and investigate persons, whether a Police Officer or a Government official, implicated to prevent the undermining of the profession and its operation.

Further examples that were given to the Delegation since 1992 of the attacks on the integrity of the Bar included a lawyer who, due to the nature of his practice, was charged with unlawful demonstration. The

lawyers who know of this case testified to the Delegation that the charge was fabricated, as the lawyer in question was not in the area at the time.

Another example was given of a lawyer's offices being stormed by the Police, the offices searched and then the lawyer being taken and held in custody, interrogated but not charged. A day later a charge of being in possession of seditious material was proffered and the lawyer was remanded in custody. After some 6 months in custody the Attorney General entered an intention not to proceed with the charge. This appeared to be an example of not only an attack on the independence of the Bar but also of preventative custody to keep a person out of the public eye for a period of time.

The Delegation also received sworn affidavit evidence of a similar case in December 1993 in Mombasa of a lawyer who had dealt with a high profile political case involving the Islamic Party of Kenya. On returning to his offices after intervening on a client's behalf to prevent an unlawful search, he discovered his offices being searched by Police Officers. He was then charged with being in possession of seditious material but released on bail. This was yet another incident suffered by this lawyer whose father's shop was set fire to as a result of his representation of a client. He also attested to Police threats of repeated

arrests to pressure him to stop representing such clients. The Delegation finds such action reprehensible, but it would also appear to be in direct contravention of Section 6 of the Judicature Act of Kenya which provides for the protection of officers of the Court. The Delegation also received testimony from lawyers who had received telephone calls from politicians of the ruling party, KANU, advising that they should not represent a particular person. Other incidents include threats in relation to representation of unpopular clients then arriving to a Court full of armed Police (this complaint was heard on many occasions). The Delegation also recorded incidents of clients being taken to Court out of hours to avoid being able to obtain legal representation. The Delegation was given the example of the Reverend Timothy Njoya being taken to Court at 6.30 p.m. and his lawyers were only alerted after he was seen by another lawyer entering the Court. Other examples of pressure being put on lawyers included tax matters being reviewed at irregular times, lawyers being asked to resign from Boards upon which they sit, bank loans being called in early, and large tax bills being issued at irregular times to put financial pressure on certain lawyers. The Delegation also received information in the case of Koigi Wa Wamwere who was arrested in conference with his lawyer by 20 armed Police Officers. It appears that Wamwere was being interviewed regarding a pending case and this further arrest was for a new charge which was only made

apparent when he appeared in Court a week later. The Police were asked to specify the charge at the time of the arrest but declined to do so.

The Delegation were particularly struck by the numerous examples of the attacks on the independence and integrity of the Bar, given the size of the relatively small community in Nakuru. This seemed to indicate that whilst in Nairobi harassment has reduced, in the Provinces (where there was also experience in the early 1990s of Police being posted to the doors of lawyers' offices asking clients their business at the office and the refusal of trade licences) there is still an attack on the Bar and its practice. A very disturbing example was given of a lawyer in Nakuru district in 1991 who fled the area after harassment on the basis of tribal origin. The Delegation also heard wide complaint in Nakuru of harassment of Mirugi Karuki who is the Chairman of the Law Society of Kenya, Nakuru Branch, and a lawyer who is held in great esteem by his legal colleagues. The concern in relation to this is that if such attacks are still being made on such senior lawyers younger lawyers are then fearful of taking high profile cases; this was in fact a view directly expressed to the Delegation.

3. The variety and diversity of the forces of such complaints leads the Delegation to believe that whilst progress has been made since the election there appears to be a great deal of pressure from lawyers not to present politically undesirable clients. The Delegation also met with Gibson Kamua Kuria who had previously been detained without trial for his representation of opposition figures. He repeated both the feeling that lawyers are labelled by their work to the extent that they are seen as a danger to the State, and the problems of defendants being taken to Court with the knowledge of the Police at irregular hours. As late as 1992 he experienced problems of Police posted at the entrance to his office. In line with other Nairobi lawyers he identified a slight improvement up to and after the elections, but was pessimistic about the future.

4. The catalogue of harassment which was recorded by the Delegation reflected a worrying attack on the Bar and its independence. Legal Representation is an elemental right and there is an urgent need to recognise the division between the lawyer and the client he represents. It is dangerous to confuse the two and the Government, including the Attorney General, should take steps to protect the profession. The maintenance of an independent Bar is essential to the maintenance of an independent Judiciary. Suspicions which exists between the Bar and the

Judiciary at the present in Kenya are unhealthy and prevent the working of the administration of Justice. As previously noted it is important that justice is seen to be done, not only to the clients who appear before the Court, but also to the lawyers who daily perform their duties to the courts and to their clients.

It must be incumbent upon the Judiciary to ensure that the administration of justice in Kenya is an open system of justice. The Delegation were greatly disturbed to observe in Nakuru an incident which tended to suggest that this was yet to be achieved. The Delegation went to observe the plea and bail application in relation to three priests charged with illegal assembly who had on a Sunday afternoon convened a service in their church. The case had been listed to go before a Magistrate at 2 o'clock; in the afternoon when the lawyer appeared and the Court was full of supporters of the priest, the State Counsel informed the Defence lawyer outside the Court that the Defendants would not be brought from Police custody to appear in Court that day. He indicated that further investigations were ongoing. This explanation was not put before the Judge. In fact the Judge did not even appear in Court.

More recently after the Delegation returned it was learnt that in the trial of Koigi Wa Wamwere the Judge hearing the matter had refused permission to independent observers of the Kenyan Human Rights Commission, the Law Society of Kenya and international organisations, to take notes in Court. The trial proceeds in open Court and the Delegation has just learnt that this ruling has not been reviewed and is pleased to note observers may now take notes in this case.

Detention without trial

1. Detention law is framed in the Preservation of Public Security Act (PPSA) and Sections 83 and 85 of the Constitution. Similar provisions exist in many countries which allow persons to be held without trial when war or disaster threaten national security. The main criticisms of the Detention Without Trial Provisions in Kenya is that in the past it has been used specifically to silence political figures who are in opposition to the incumbent Government. Preventative Detention is alleged to have been used in Kenya as part of standard law, ignoring the exceptional nature of its proper use. Historically the PPSA has its roots in Colonial Law; however, the provisions for detention were retained by President Moi when he became president in 1978. Despite pledges in the KANU Manifesto provisions remain and the president retains the power at any time by order published in the Kenya Gazette to bring into operation generally or in any part of Kenya provisions of the PPSA. The Act gives the President total discretion to bring into effect this law and to put the machinery of detention into operation. Detention of a person is prepared by Order of the Minister in charge of Internal Security and the Government is under an obligation to Gazette political prisoners held without charge. Detention without trial was a familiar weapon employed by the Government throughout the 1980s. Its use has become almost obsolete now, however, and when the Delegation was in Kenya there

was no record of any gazetted prisoners being held without charge. Unfortunately the Delegation received constant and substantiated allegations of the use of criminal charges for political reasons allowing the Government to detain without a record being available for scrutiny. This is achieved by the denial of bail and postponement of trial dates. The use of this method is prevalent throughout the country at present and causes great concern. This problem was initially identified in the early 1990s and highlighted in several Human Rights Report, including the report of the Robert F Kennedy Memorial Centre for Human Rights in their publication "Justice Enjoined", a study of the state of the Judiciary in Kenya. The detention takes the form of a charge of a non-bailable offence which requires the consent of the Attorney General to proceed with the prosecution. In this way a defendant is kept in custody for as long as the Attorney General's consent is not obtained. For example, in the case of Koigi Wa Wamwere, although Wamwere was arrested in November of 1993, it was not until April of 1994 that this case came to trial after receiving the Attorney General's consent shortly before the matter was set down for hearing.

2. The insidious development of the use of criminal charges to silence political opponents in place of detention without trial was recognised and reported to the Delegation by many lawyers and judges

met by the Delegation in Nairobi. The delegation heard from a prominent opposition member of parliament, the lawyer Paul Muite, who commented that the detention without trial provisions were not formally used any more but that other methods were employed. A specific example given was that of a person being charged with a capital charge on which bail is not available and which required the Attorney General's consent for prosecution. This presents a "faite accompli" in relation to habeus corpus applications. The Attorney General's consent will not be forthcoming until the person who is held is thought no longer to be a concern to the Government. The Attorney General will then enter an intention not to prosecute and the suspect will be released. This represents abuse of the Attorney General's power and the legal process when a conviction is clearly not likely on a serious capital charge and there is needed some kind of filter to prevent this happening. New procedures are also needed to speed up the question of the Attorney General's consent to a particular charge. When the Attorney General was addressed upon this matter he did not accept that it was a particular problem.

3. The Court still appeared to be relatively impotent to act in such cases. The Court of Appeal has acknowledged the problem of prisoners detained improperly and have indicated in the ratio of judgments that

magistrates who are in the front line of these cases should make appropriate enquiries into the matters which come before them. However, there is a feeling amongst the higher echelons of the Judiciary that even if they are willing to take these steps, they will only be effective if followed in the lower Courts. It appears to the judges met by the Delegation that these decisions are not being followed in the lower Courts. Some judges expressed a view that in relation to offences requiring the Attorney General's consent, if the Attorney General's consent is not obtained in a reasonable time, the prisoners should be released, otherwise the prisoner can be held for an endless period. Although this was not acknowledged by the Attorney General as being a problem it is clear that members of the Judiciary felt that this was a problem which needed to be addressed.

4. In some cases persons will be detained without a charge being brought at all. The Delegation was aware of a case reported in the papers whilst the Delegation were in Kenya of a musician, Sammy Miraya, arrested in the security zone area of Burnt Forest, and held for a period totally incommunicado. The Delegation met with his lawyer who had had meetings with his family who had no idea where he was being held. It appears this is an example of the Police acting without any regard to legal procedure and a later report in the national

newspaper which recorded the musician disowning all the music he had recorded in relation to the security area suggested pressure had been put upon the Defendant to make such a statement. It was later reported that in fact the musician claimed that he had been told what to say by the Police at the Press Conference convened when he was released. It is a matter for pure speculation as to how long this person would have been held in custody if he had not agreed to attend the Press Conference and disown the music that he had recorded.

5. No cases were brought to the Delegation's attention of lawyers being detained without trial, whether under the PPSA or by other means during the period that the Delegation was in Kenya. This has been a problem in the past and is well documented in other reports. However, the Delegation notes that criminal charges were pending against a senior member of the Law Society, a lawyer based in Nakuru, Mirugi Kariuki in relation to his association and representation of Koigi Wa Wamwere. The Delegation did receive evidence in relation to lawyers detained in the past without trial and were told by a Nairobi based lawyer that when he was detained under the PPSA provisions in 1990 for 3 weeks his opinion was that he was being detained because he was acting for an unpopular client. In fact his detention order had stated this as the reason. This was a reflection of the State's refusal to draw a necessary

line in a liberal democracy between the right of legal representation and an independent legal profession and the political activities of certain individuals. This lawyer did indicate, however, that since 1992 the harassment of the legal profession in this manner seemed to have abated. In his words; "The pressure of these things happening or being followed have improved and subsequently I can say I do feel freer".

6. However, in the Rift Valley area the Delegation received further evidence of the use of charging of non-bailable offences to detain a party without trial. The Delegation was given a particular example involving a lawyer who was charged with possession of seditious material and held in custody for some 6 months, bail being refused. At the end of this period the Attorney General entered an intention not to proceed with the prosecution and the individual was released. A further example was given of 8 unnamed Police Officers in November 1993 held in custody after which a similar pattern of intention not to prosecute being entered by the Attorney General emerged. All the lawyers that we met and a majority of the judges identified this as a common problem. Similar experiences were recorded by the Delegation from details given by lawyers met in the coastal town of Mombasa and in particular an example of the client arrested for treason, a non-bailable offence, which led the lawyer to the conclusion that the reason this charge was formed

was purely to keep the particular politician out of circulation until the elections had been completed. He came to this conclusion on the basis that the papers he was supplied with did not disclose an offence, and subsequently when the matter did come to trial after a period of some time the charge was dismissed.

7. When this matter was raised with the Attorney General he conceded that this type of detention could be a problem, (he did not concede it is a problem), and spoke of some time delays inadvertently arising but did not see this as an abuse of process. It is apparent that this is an issue which the Attorney General needed to look at closely as it has been independently identified by lawyers and the Judiciary throughout Kenya and creates an impression that the Attorney General lacks the will to take action to review such problems which clearly exist. The Delegation feels that this lack of action creates a suspicion of the Attorney General and his role in relation to the Executive. It also creates a lack of confidence in his office from the legal profession contributing to the lack of trust in the legal process and a lack of openness in the administration of justice. Provisions need to be put into place to prevent suspects being held in custody for long periods of time on non-bailable offences where the evidence suggests that it is impossible to sustain a prosecution.

8. The Delegation was encouraged by the Attorney General's commitment to remove the PPSA and associated legislation from the Statute Books and replace it with provisions in line with the International Human Rights Declarations. However, the Delegation noted that no timescale was given to this process, and it is a promise given by the Attorney General in recording in the past by other bodies reporting on the state of human rights in Kenya including as long ago as 1989 to 1990. (Robert Kennedy Centre - "Justice Enjoined").

9. The Delegation would like to thank the Attorney General for the time spent addressing the queries that the Delegation had. The Delegation would like to note that the Attorney General was keen to set up a system of Court reporting, a system of precedent and a registry, all to improve the administration of justice in Kenya. It was also interesting to note that the Attorney General stated that if lawyers do receive telephone calls from politicians, these telephone calls should be ignored as they would come from what he described as naive and illiterate politicians. Again this is an illustration of the need for steps to be taken to protect the judicial process from interference of the Executive. The Attorney General also indicated to the Delegation that proposals had been put forward to restructure the judicial system and a commission had been set up to investigate its operation. Again,

unfortunately, no timescale was given for the report of such a commission. The Attorney General also agreed that provisions should be put into place for a right of appeal on constitutional matters. The Delegation took the view that whilst the Attorney General was willing to consider the problems brought to his attention there was few examples of where these had produced change and that due to this lack of action the legal profession appeared to have very little faith in the office of Attorney General.

Conclusion

After receiving a broad spectrum of opinion from members of the government, judiciary, press and legal profession, the Delegation concluded that urgent steps were needed to address the problems highlighted in the areas discussed.

The Delegation believes, despite the meeting with the Attorney General and the assurances and explanations given, that the problem goes beyond lack of resources. The Delegation believes it was presented with accurate and creditable evidence from other sources, and that there needs to be a fundamental reappraisal of the relationship between the executive and the judiciary. A public declaration of intent to tackle this problem in tandem with the Law Society, and a real timetable for reform would

represent a significant step along a difficult path to restoring public and professional faith in the judiciary.

Constitutional reform to provide a framework for democracy and guarantees of rights is essential. It is clear that serious breaches of fundamental human rights are occurring in Kenya, and urgent action needs to be taken to prevent the worsening of a grave situation.

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