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# KENYA AND THE RULE OF LAW: THE PERSPECTIVE OF TWO VOLUNTEERS

*Kim Matthews and William H. Coogan*

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## KENYA AND THE RULE OF LAW: THE PERSPECTIVE OF TWO VOLUNTEERS

*Kim Matthews and William H. Coogan\**

### I. INTRODUCTION

Reaction to Kenya's 2007 national elections was explosive. Riots claimed at least 1000 lives, and upwards of 300,000 people were displaced from their homes.<sup>1</sup> The public lacked faith in both the ballot counting and in the impartiality of dispute resolution by the judiciary. On both counts, public cynicism was justified.

No democracy can flourish without the rule of law. In the absence of faith in the rule of law to replace police state oppression, government stability is evanescent. Rule of law is a habit; it grows only through steady erosion of past practices and constant reminders to officials that the times have changed. Public faith in the rule of law cannot be demanded—it must be earned. Kenya emerged from dictatorial control in 2002. The process of gaining public faith in the rule of law is a long one, and Kenya is in the middle of it.

### II. THE ASSIGNMENT

We are a married couple who were in Kenya from September 2006 through February 2007. At the time of the trip one of us, Kim Matthews, had been a lawyer for nearly thirty years. She practiced in the area of family law and civil rights, while serving as a community leader of civil rights groups and their political campaigns. William Coogan had been a full time political scientist at the University of Southern Maine. Also a lawyer, he occupied leadership positions in Maine civil rights organizations. The International Senior Lawyers Project (ISLP) asked us to go to Kenya to enhance the capacity of a law firm that concentrates on human rights matters, and to help the firm to develop the organizational operations of a think tank devoted to constitutional research and the rule of law.

The law firm, Kamau Kuria and Kiraitu, consisted of one full-time and one part-time senior lawyer, two junior lawyers, a group of three to five pupils with rotating membership,<sup>2</sup> and a support staff of eight. Gibson Kamau Kuria was the full-time senior lawyer. In his thirty-five year career he had represented scores of human rights clients. When his work put him at odds with the dictatorship of Daniel arap Moi, he

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1. Jeffrey Gettleman, *Death Toll in Kenya Exceeds 1,000, but Talks Reach Crucial Phase*, N.Y. TIMES, Feb. 6, 2008, at A8.

2. In Kenya, aspiring lawyers major in law as undergraduates, then serve a one year apprenticeship as "pupils" before becoming eligible to take the bar exam.

was accused of a capital crime grounded on trumped up charges, detained for nine months, and subsequently exiled for two years. Now sixty years old, he continues to work grueling hours on human rights cases and civic education initiatives. He sees everyone who comes to his office—with or without an appointment.

With a view to institutionalizing his work, Kamau Kuria asked ISLP for two volunteers, and we readily obliged. Our work would include training the younger lawyers in the firm in strategy, case selection, legal research, brief writing, and trial tactics. In addition, we would work with an affiliated organization, the International Centre for Constitutional Research and Governance (ICCRG), a body created as an educational resource on matters of constitutionalism, democracy, and the rule of law for those in the legal, political, and public realms. We were to play a small role in helping to foster the rule of law in Kenya, and met with both success and failures in that task. The true import of these successes and failures can only be understood, however, in the context of the legal and political landscape in which we were operating.

### III. THE SETTING: A BRIEF HISTORY OF THE LEGAL AND POLITICAL LANDSCAPE

Between 1885 and 2002, Kenya endured more than three quarters of a century of British colonialism,<sup>3</sup> followed by forty years of indigenous misrule.<sup>4</sup> During that time, there was enormous damage to governmental institutions and to the nation's political culture. Britain's governance did not exhibit the same degree of relatively relaxed and benign oversight that it manifested in its governance in other parts of the world.<sup>5</sup> Colonization was late in Kenya, and the installment of British military and administrative power was relatively efficient and quick. By appropriating the land in Kenya, the British turned Africans—the overwhelming majority of the population—into economic, social, and emotional paupers. By using the judiciary as an enforcement arm of administrative power, the “mother country” formed habits of corruption and subservience to the executive. Through often one-sided judicial proceedings in colonial courts,<sup>6</sup> a massive extension of capital punishment for Mau Mau offenders,<sup>7</sup> exploiting tribal rivalries,<sup>8</sup> and incorporating torture<sup>9</sup> and collective punishment<sup>10</sup> as tactics for dealing with the nationalist Mau Mau uprising of the mid-twentieth century, Britain legitimized lawless brutality as the norm for dealing with the opposition.

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3. See DAVID ANDERSON, *HISTORIES OF THE HANGED: THE DIRTY WAR IN KENYA AND THE END OF EMPIRE* 387 (2005); CAROLINE ELKINS, *IMPERIAL RECKONING: THE UNTOLD STORY OF BRITAIN'S GULAG IN KENYA* 5 (2005).

4. See MARTIN MEREDITH, *THE FATE OF AFRICA: FROM THE HOPES OF FREEDOM TO THE HEART OF DESPAIR: A HISTORY OF 50 YEARS OF INDEPENDENCE* 79-87, 264-68, 383-85 (2005).

5. For example, in the British American colonies self-government, or its approximation, was necessitated by the vast distances and primitive state of communication. LARRY BERMAN & BRUCE ALLEN MURPHY, *APPROACHING DEMOCRACY* 29-30 (4th ed. 2003); CHRISTINE BARBOUR & GERALD C. WRIGHT, *KEEPING THE REPUBLIC: POWER AND CITIZENSHIP IN AMERICAN POLITICS* 44-45 (2d brief ed. 2006).

6. See ELKINS, *supra* note 3, at 132.

7. ANDERSON, *supra* note 3, at 291.

8. See MEREDITH, *supra* note 4, at 151-61.

9. ELKINS, *supra* note 3, at 207.

10. ANDERSON, *supra* note 3, at 293.

When the British left in 1963, they transferred the forms of democracy—parliaments, courts, and administrative apparatus—to African Kenyans. They also transferred a demoralized judiciary, a violent, oppressive, and corrupt police force, and a contemptuous and venal bureaucracy.<sup>11</sup> Local elites inherited these institutions, along with national poverty. Because most of the elites could make a living only by clinging to their public salaries and the attendant opportunities for graft, their major focus became the retention of power. Thus, because the government inherited the authoritarian tools for retaining power, Kenyans endured years of post-colonial governmental predation, as those in power behaved like their British forbears: they robbed, killed, and ruthlessly defended their positions.<sup>12</sup>

Kenya's nationalist leader and first prime minister, Jomo Kenyatta, presided over an authoritarian modification of the inherited government institutions.<sup>13</sup> By manipulating a pliant Parliament and using a constitution that could be amended by that Parliament alone,<sup>14</sup> he merged the offices of prime minister and governor general, thereby converting Kenya into a presidential state. Next he pushed to eliminate *majimbo*, a form of federalism, and created a centralized system.<sup>15</sup> Eventually, he eliminated the upper house of Parliament.<sup>16</sup> Additional constitutional amendments gave him the right to name twelve members of Parliament<sup>17</sup> and to declare a state of emergency without Parliamentary approval.<sup>18</sup> As his suspicions about his opponents grew, he used his consolidated powers to suppress the rights of free association, assembly, and speech, and imprisoned several of his political rivals.<sup>19</sup> In addition to leaving Kenya an authoritarian government, Kenyatta used various forms of bribery and intimidation to convert public lands to his own use and that of his political allies.<sup>20</sup>

Kenyatta died in 1978 and was succeeded by Vice President Daniel arap Moi. Moi took a corrupt, authoritarian government and burnished it into a kleptocratic dictatorship. In response to calls for increased political freedom, he bullied Parliament into amending the constitution to institute one-partyism in Kenya.<sup>21</sup> When calls for

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11. See generally Makau Matua, *Republic of Kenya Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission*, 10 BUFF. HUM. RTS. L. REV. 15, 26 (2004) (“[T]he post-colonial was autocratic at its inception because it inherited wholesale the laws, culture, and practices of the colonial state.”).

12. See MEREDITH, *supra* note 4, at 162-78.

13. See generally Y.P. GHAI & J.P.W.B. MCAUSLAN, *PUBLIC LAW AND POLITICAL CHANGE IN KENYA: A STUDY OF THE LEGAL FRAMEWORK OF GOVERNMENT FROM COLONIAL TIMES TO THE PRESENT* (1970) (providing a cogent history of constitutional and institutional change in the Kenyatta period); see also Matua, *supra* note 11, at 26.

14. CONSTITUTION, § 47 (1998) (Kenya) (Alteration of the Constitution).

15. See COLIN LEYS, *UNDERDEVELOPMENT IN KENYA: THE POLITICAL ECONOMY OF NEO-COLONIALISM* 213 (1975).

16. Kenya High Commission in Canada, *Kenya's Brief Political History*, [http://www.kenyahighcommission.ca/political\\_history.htm](http://www.kenyahighcommission.ca/political_history.htm) (last visited Mar. 27, 2008).

17. CONSTITUTION, § 33 (1998) (Kenya).

18. *Id.* § 85.

19. MEREDITH, *supra* note 4, at 267.

20. KENYA NATIONAL COMMISSION ON HUMAN RIGHTS, *UNJUST ENRICHMENT: THE MAKING OF LAND GRABBING MILLIONAIRES 7-8* (2006), available at <http://www.knchr.org/dmdocuments/unjustenrichment.pdf>.

21. Matua, *supra* note 11, at 26-27.

multi-partyism resurfaced, he fomented ethnic clashes in the Rift Valley and Western Kenya that led to over 1500 deaths and the displacement of more than 300,000 people—all to demonstrate that multi-partyism was not feasible.<sup>22</sup> Neither the judiciary nor the civil service enjoyed independent tenure under the Moi government. For example, when opponents scheduled pro-democracy rallies, his appointees denied licenses for the demonstrations.<sup>23</sup> If the assemblies went ahead without administrative consent, the police—often in concert with Youth-KANU, the thug division of the ruling party—would intervene with unrestrained violence.<sup>24</sup> Moi used the Preservation of Public Security Act<sup>25</sup> to detain opponents without trial<sup>26</sup> and instructed the Attorney General to initiate charges of robbery with violence, a capital offense, against human rights activists. Those charged would be locked up and tortured,<sup>27</sup> then released when the Attorney General filed a *nolle prosequi* motion.<sup>28</sup>

From underpaid public officials who supplemented their salaries with bribes (“to make the pen move”), to police officers, whose offenses ranged from accepting a few shillings for overlooking a traffic violation to engaging in murder-for-hire, corruption became a way of life in Kenya. Many individuals and organizations have captured the favor of officials—often through bribery—and have bought land from the state at fire sale prices. The previous administration simply transferred ownership of Nairobi’s signature skyscraper, the Kenyatta International Conference Centre, built with public funds, to KANU, Moi’s political party.<sup>29</sup> In August, 2006, the Nairobi City Council sliced off a portion of City Park and gave it to a private developer.<sup>30</sup> The example set at the very top was breathtaking in its audacity. Officials close to Moi looted the National Social Security Fund not once, but twice.<sup>31</sup> A mix of public and private officials defrauded the treasury of the equivalent of \$600 million, in what became known as the Goldenberg Scandal.<sup>32</sup> When the first defendants were scheduled for court appearances, the Attorney General filed another *nolle prosequi*.<sup>33</sup>

International support for the Moi dictatorship declined with the end of the Cold War.<sup>34</sup> Faced with increasingly intense and widespread domestic opposition, Moi decided to retire, and his chosen successor, Uhuru Kenyatta, lost handily in the 2002

22. HUMAN RIGHTS WATCH, *DIVIDE AND RULE: STATE-SPONSORED ETHNIC VIOLENCE IN KENYA I* (1993), available at <http://hrw.org/reports/1993/kenya1193.pdf>.

23. MEREDITH, *supra* note 4, at 401.

24. Makau Matua, *Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya*, 23 HUM. RTS. Q. 96, 98 (2001).

25. The Preservation of Public Security Act, (1998) Cap. 57 (Kenya).

26. Matua, *supra* note 24, at 99-100.

27. MEREDITH, *supra* note 4, at 383-385, 400-04.

28. See CONSTITUTION, § 26(3)(C) (Kenya) (permitting the Attorney General to “discontinue at any stage before judgment is delivered”).

29. Kamau Kuria and Kiraitu represented the post-Moi government in its successful effort to recover the building.

30. *Developer Back at City Park*, DAILY NATION, Feb. 9, 2007, at 7.

31. MICHAEL JOHNSTON, SYNDROMES OF CORRUPTION: WEALTH, POWER, AND DEMOCRACY 172-73 (2005); see also JOHN MUKUM MBAKU, CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS 316-19 (2007).

32. JOHNSTON, *supra* note 31, at 172; MEREDITH, *supra* note 4, at 385.

33. Matua, *supra* note 24, at 117.

34. MEREDITH, *supra* note 4, at 401-03.

national election.<sup>35</sup> The Rainbow Coalition, with Mwai Kibaki as its presidential candidate, swept into power, promising not only an end to the dictatorship, but also the enactment of a new constitution, election reform, and measures against corruption, economic decline, and tribalism.<sup>36</sup> Though the Kibaki Administration can be credited with major achievements, including economic revitalization, increased tax revenues, and a free primary education program, its proposed constitution was defeated, and there have yet to be any convictions in the corruption cases.<sup>37</sup>

Democratic institutions remain wobbly in Kenya. The 2007 national elections were marked by widespread ballot fraud, and the incumbent president was declared the winner by his own handpicked Electoral Commission of Kenya.<sup>38</sup> The opposition party accused officials in the incumbent administration of political assassinations.<sup>39</sup> Both sides promoted clashes between party affiliated gangs and the police forces. The post-election agreement to share power by naming the losing presidential candidate to the newly created office of Prime Minister<sup>40</sup> is unlikely to end the accusations, and a return to the detention practices of the Moi years may be on the horizon.

Tribalism provides the lens through which much of the Kenyan population views political events.<sup>41</sup> For example, during the 2005 constitutional referendum campaign, opponents of the new constitution demonized the Kikuyus, the largest community in Kenya, in order to promote a “No” vote, and as the 2007 elections approached, politicians whipped up ethnic resentment for their own purposes.<sup>42</sup> In November 2006, thousands fled their homes in Nairobi’s Mathare slum as gang members killed one another and politicians swept into the area to make appearances and allegations against the government.<sup>43</sup> In early 2007, land disputes in the Mt. Elgon area led to over forty deaths, with militia leaders accusing cabinet ministers of “fanning the ethnic animosity in the district.”<sup>44</sup> The late 2007 presidential election was followed by some of the worst ethnic violence in Kenya’s history.<sup>45</sup>

Kenya’s history of misrule has had a profoundly negative impact on cultural aspects that have been identified as prerequisites for democracy: trust in others, trust in the government, and confidence that citizens acting collectively can influence public policy.<sup>46</sup> In Kenya, there is a minimal sense of public ownership of governmental

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35. JOHNSTON, *supra* note 31, at 171-72.

36. MBAKU, *supra* note 31, at 316-18.

37. *Id.* at 317.

38. See Jeffrey Gettleman, *Disputed Vote Plunges Kenya Into Bloodshed*, N.Y. TIMES, Dec. 31, 2007, at A1.

39. Jeffrey Gettleman, *Second Lawmaker is Killed as Kenya’s Riots Intensify*, N.Y. TIMES, Feb. 1, 2008, at A6.

40. *Kenya: Agreement on Power Sharing*, N.Y. TIMES, March 19, 2008, at A9.

41. See Jeffrey Gettleman, *Kenya’s Kikuyus Are Being Routed From Lands of Rival Tribes*, N.Y. TIMES, Jan. 7, 2008, at A1.

42. *Id.*

43. See Michael Mugwang’a, *Thousands Flee Their Homes as Slum Death Toll Goes Up*, DAILY NATION, Nov. 9, 2006, at 1.

44. *More Die in Dispute over Settlement*, DAILY NATION, Jan. 15, 2007, at 40.

45. Gettleman, *supra* note 1.

46. Political scientists have proffered data demonstrating the relationship between mass and elite values and the viability of democratic political institutions. See generally EDWARD C. BANFIELD, *THE MORAL BASIS OF A BACKWARD SOCIETY* (1958); ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION*

institutions, and little expectation that the state will provide services in an effective manner. Moi's corrupt and incompetent Attorney General remains in office. In October 2006, he declined to prosecute corruption cases initiated by the Kenyan Anti-Corruption Commission,<sup>47</sup> and two months later, the official Performance Appraisal of Government Ministries rated his office second from the bottom among thirty-four ministries.<sup>48</sup> Cynicism about politicians is rampant, and the public's attitude toward bureaucracy is one of avoidance when possible.

Lack of confidence in law enforcement, coupled with fear of police violence, remain high.<sup>49</sup> The newspapers report lynchings by citizens on a regular basis. In November 2006, a police death squad removed three suspected gangsters from their homes in Nairobi and shot them in full view of a large crowd.<sup>50</sup> Indeed, evidence points to a de facto policy of summarily executing suspected criminals.<sup>51</sup> The Kenya National Commission on Human Rights (KNCHR) accused the police of executing some 454 men as part of an intensified crackdown on the Mungiki sect and other wanted criminals.<sup>52</sup> Most of the victims had been killed by a single gunshot wound to the head.<sup>53</sup>

Politicians in Kenya profoundly mistrust one another. Much of the mistrust derives from the sense that politicians put personal gain above political progress. For example, a rapacious attitude toward the national treasury prevails among a large segment of parliamentarians, who draw tax free salaries and perquisites appropriate for wealthy nations in a region where the per capita annual income hovers around \$500.<sup>54</sup>

Political parties function as vehicles for personal advancement, rather than as organizations presenting competing policy visions to voters. The lack of party loyalty is evidenced by the fact that between the 2002 and 2007 national elections, more than 74% of parliamentarians defected from their political parties in a process of jockeying for personal advantage.<sup>55</sup>

(1971); RONALD INGLEHART, *MODERNIZATION AND POSTMODERNIZATION: CULTURAL, ECONOMIC, AND POLITICAL CHANGE IN 43 SOCIETIES* (1997); ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); OLIVER H. WOSHINSKY, *EXPLAINING POLITICS: CULTURE, INSTITUTIONS, AND POLITICAL BEHAVIOR* (2008).

47. See *Attorney General Faults Graft Probe*, EAST AFR. STANDARD, Oct. 19, 2006, at 1.

48. *Performance Appraisal: Agriculture is Best Ministry*, SATURDAY NATION, Dec. 9, 2006, at 5.

49. Joshua N. Auerbach, *Police Accountability in Kenya*, 3 AFR. HUM. RTS. L. J. 275, 277 (2003) ("A majority of Kenyans indicate that, at best, they lack confidence in the impartiality and effectiveness of the police, and that, at worst, they fear the police."); see also Stephen Muiruri, *Police Too Eager to Gun Down Suspects*, DAILY NATION, Jan. 22, 2007, at 3.

50. Michael Mugwang'a, *Three Executed, Insist City Residents*, SUNDAY NATION, Nov. 4, 2006, at 3; see also Victor Bwire, *Police Killing of Suspects is a Violation of Human Rights*, DAILY NATION, Jan. 18, 2007, at 12.

51. See, e.g., Muiruri, *supra* note 49.

52. Cyrus Ombati, *Police Accused of Executing Suspects*, EAST AFR. STANDARD, Nov. 6, 2007, at 1.

53. *Id.*

54. Marc Lacey, *Crisis Swirls in Kenya as Politicians Reward Themselves*, N.Y. TIMES, May 22, 2006, at A4. The base salary of parliamentarians is around \$81,000 per year, tax free. In addition there are allowances and perquisites that effectively double the amount. For example, parliamentarians get a car and a mileage allowance of \$4,719 for the first 350 kilometers they drive plus \$1.60 per kilometer after that. This is "particularly galling" to Kenyans whose per capita income in 2005 was around \$463. *Id.*

55. Owino Opondo, *New Bill to Tame Political Parties*, SUNDAY NATION, Dec. 3, 2006, at 7.

Moreover, authority for malicious interference with the election process is readily available to the executive.<sup>56</sup> One such avenue for manipulation by the executive is through the Registrar of Societies, who serves at the President's pleasure, and who has discretion over which organizations (including political parties) to recognize and which individuals within those organizations to recognize as office holders.<sup>57</sup> As an extreme example of executive interference in elections, the Registrar undercut the presidential campaign of a prominent opposition politician by delisting him as party leader in late 2006.<sup>58</sup> The executive has influence in other areas of the election process as well. In early 2007, the President packed the Electoral Commission of Kenya (ECK) with his own appointees.<sup>59</sup> The Commission schedules elections, registers voters, draws constituency boundaries, and certifies results.<sup>60</sup> In October 2007, the Commission set the date for the general election at December 27,<sup>61</sup> a time when most of Nairobi's three million citizens have departed for the countryside. After the election, early returns reported in 189 of 210 constituencies showed President Kibaki losing his bid for reelection by nearly one million votes.<sup>62</sup> At that point, the ECK stopped counting the votes.<sup>63</sup> In perhaps the most astonishing example of malicious executive interference, the ECK reconvened the next day and announced an incredible turnaround: Kibaki had won by 231,728.<sup>64</sup>

In addition to the egregious executive manipulation of elections, the honesty, competence, work ethic, and susceptibility of the judiciary to administrative influence also remain problematic.<sup>65</sup> In 2003, the Ministry of Justice dismissed twenty-three judges for corruption.<sup>66</sup> Those fired comprised nearly half the entire judiciary and included not only several judges of the highest court, but many magistrates and other court officers.<sup>67</sup> Although the dismissals were an effort to root out corruption at the judicial level, the deep entrenchment of executive corruption was again apparent when in December 2006, two judges who ruled against Administration interests were transferred from Meru to new posts 200 kilometers distant.

However, there have been other reform efforts in the judiciary, that although not entirely successful, do show progress in the right direction. For example, there has been an effort to streamline procedures of filing cases so that they are heard

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56. See CONSTITUTION, § 41 (1998) (Kenya) (granting the President power to appoint all members of the Electoral Commission of Kenya).

57. See The Societies Act (1998), Cap. 108 §§ 8-14; see also Opondo, *supra* note 55.

58. Lilian Muendo, *Karua Dares ODM-K to Storm Statehouse*, KENYA BROADCASTING CORP., Dec. 4, 2006, <http://www.kbc.co.ke/story.asp?id=39743>.

59. See Robert Shaw, *ECK Appointments are Not Made in Good Faith*, DAILY NATION, Jan. 18, 2007, at 11.

60. CONSTITUTION, §§ 42, 42A, 43 (1998) (Kenya) (delineating the responsibilities of the Electoral Commission).

61. See Warigia Bowman, *Moving forward in Kenya*, BOSTON SUNDAY GLOBE, Jan. 6, 2008, at D9.

62. *Id.*

63. *Id.*

64. *Id.*

65. See generally Matua, *supra* note 24.

66. Wahome Thuku, *Surgery in Judiciary That Never Was*, DAILY NATION, Dec. 28, 2006, at 5.

67. *Id.* at 5, 7. Accusations of corruption are not new for the judiciary of Kenya. See MEREDITH, *supra* note 4, at 385 (“‘Why hire a lawyer when you can buy a judge?’ ran a well-worn Kenyan saying.”).

expediently.<sup>68</sup> Furthermore, the new Constitutional Court (a division of the High Court, Kenya's court of general jurisdiction) has taken on controversial topics, and some of the decisions have gone against the government.<sup>69</sup> Although the implementation of the Constitutional Court is a positive change, most filings now include a constitutional component which must be decided by that court before other aspects of the case are tried, introducing a bottleneck into the case flow.<sup>70</sup>

There remain other impediments to speedy adjudication of cases that were apparent during our time in Kenya. Judges' work ethic is questionable; it is not unusual for them to fail to appear in court. The judges have no research assistance. There are no stenographers, no recording devices, and no computers in the courtrooms. Nevertheless, the judges feel obliged to maintain a complete record of proceedings before them in order to forestall reversals at a higher level, so they take down *all* testimony and arguments on points of law in longhand—an agonizingly slow process of dictation by lawyers and witnesses. Since mistrust among members of the legal community is a given, the courts require lawyers to submit photocopies of the entire opinion in every case cited in a brief.

The press is yet another facet of the problem. Despite the recent ranking by Reporters Without Borders that put Kenya at seventy-eighth among 168 countries in its World Press Freedom index (a respectable elevation from a rank of 118 in 2006),<sup>71</sup> the press remains vulnerable. In May 2005, the First Lady invaded the offices of the *Daily Nation* shortly after midnight to protest the coverage of a personal matter, and subsequently slapped a cameraman filming the encounter.<sup>72</sup> The Attorney General dismissed assault charges against her.<sup>73</sup> In early 2006, under the guise of a national security investigation, a squad of masked police officers raided the facilities of the Standard Group, owners of the Kenya Television Network (KTN) and the *East African Standard*, Nairobi's other major newspaper.<sup>74</sup> The officers disrupted the television signal, carried off computers, disabled the press, and burned thousands of newspapers.<sup>75</sup> The Minister of National Security justified the attack, commenting, "When you rattle a snake you must prepare yourself to be bitten."<sup>76</sup>

Likewise, freedom of speech and assembly do not enjoy solid constitutional protection. In the run up to the 2007 elections, officials denied licenses for some political

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68. Thuku, *supra* note 66, at 7.

69. *Id.*

70. Anecdotal evidence on this bottleneck includes one recent decision on child support that was handed down by the court of first impression four years after the case was filed, and prosecutions in the massive Goldenberg Scandal of the early 1990s that were finally "scheduled for scheduling" fourteen years after the offenses.

71. Compare Press Release, Reporters Without Borders, Worldwide Press Freedom Index 2007 (Oct. 16, 2007), available at [http://www.rsf.org/article/php3?id\\_article=24025](http://www.rsf.org/article/php3?id_article=24025), with Press Release, Reporters Without Borders, Worldwide Press Freedom Index 2006 (Oct. 23, 2006), available at [http://www.rsf.org/rubrique.php3?id\\_rubrique=639](http://www.rsf.org/rubrique.php3?id_rubrique=639).

72. Xan Rice, *Second Wife Slip Prompts Slap from First Lady*, THE GUARDIAN, Dec. 13, 2007, available at <http://www.guardian.co.uk/world/2007/dec/13/kenya.xanrice>.

73. *Id.*

74. Marc Lacey, *Kenyan Police Deliver Blows to the Press*, N.Y. TIMES, Mar. 3, 2006, at A8.

75. *Id.*

76. *Id.*

marches and rallies.<sup>77</sup> When the unlicensed events proceeded, they were broken up, in some cases by party-affiliated youth gangs, in others by the police wielding truncheons and firing tear gas or bullets—occasionally with fatal consequences.<sup>78</sup>

#### IV. THE TASKS

Against this difficult setting, we went to work. Matthews's tasks included training younger lawyers and supporting the human rights cases of the law firm's chief lawyer through legal research and brief writing. During her time at the firm, she faced a number of impediments—some expected, some not. Resources that American lawyers take for granted were often unavailable or unusable. Although the Kenyan legal profession aspires to incorporate international legal innovations into their briefs and decisions, the uneven availability of treatises and decisions by major courts of last resort has frustrated this goal.<sup>79</sup> Despite the availability of computers for word processing, access to the Internet remains troublesome. For example, shortly after we arrived in Kenya, our office severed its relation with its Internet Service Provider (ISP) and was reconnected after a nearly five month hiatus. Internet unavailability, resulting from lack of ISP reliability and speed, exorbitant expense, and overall inertia, forced us into Internet cafes.<sup>80</sup>

Despite these impediments, Matthews was able to train the staff to identify human rights issues, perform legal research, recruit and select clients, organize moot court events, and draft legislation. Reacting to an office whose shelves and walls were stacked ceiling high with documents that only a full time librarian could locate, she devised a system of case and office management that included maintenance of a card catalog, a filing system to identify previous work product relevant to current cases, a conflict identification system, and the organization of the pupil training program. She instructed the staff on how to research cases decided by courts in East Africa, the British Isles, South Africa, India, Canada, and the United States, along with the European Court on Human Rights, and she identified international charters whose provisions could be incorporated into Kenyan law when the latter was ambiguous.

In addition to her organizational and training efforts, Matthews helped prepare briefs in several constitutional cases. To compound the technical, practical, and more mundane obstacles that she faced within the law office, Matthews encountered a judiciary plagued by corruption, improper influence, and partiality.<sup>81</sup> One case

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77. Graham Kiwa, *Now No More Public and Political Rallies in Nairobi*, KENYA BROADCASTING CORP., Nov. 9, 2006, <http://www.kbc.co.ke/story.asp?id=39360>.

78. *Id.*; see also HUMAN RIGHTS WATCH, *BALLOTS TO BULLETS: ORGANIZED POLITICAL VIOLENCE AND KENYA'S CRISIS OF GOVERNANCE 5* (2008), <http://hrw.org/reports/2008/kenya0308/kenya0308web.pdf>.

79. The University of Nairobi's Law Library's holdings of United States Supreme Court decisions run only to 1989.

80. The firm's senior lawyer, a voracious consumer of legal information with a photographic memory, felt no need for access to the Internet and was somewhat of a technophobe. It proved difficult to persuade him that the younger lawyers required Internet access.

81. Though the Kibaki Administration promised "radical surgery" on the judiciary in Kenya as a means of combating corruption, there has been skepticism as to the efficacy of such efforts. Thuku, *supra* note 66.

involved a bishop of the Methodist Synod of Nkubu. He had been hired in 1974 but was suspended in 2003 amid allegations of mishandling of church funds.<sup>82</sup> The bishop convinced a magistrate to issue an order directing the church to pay him half of his monthly salary despite his suspension.<sup>83</sup> Amid allegations of bribery on the bishop's part, the congregation appealed the decision to the High Court. Matthews argued that the Kenyan Constitution gave a preferred position to the protection of individual liberties, including the right of free association.<sup>84</sup> Though this hierarchical conceptualization of constitutional rights proved absent from Kenyan jurisprudence, it certainly has enjoyed such status elsewhere, and Matthews's brief relied heavily on such international precedents.<sup>85</sup> The case proceeded slowly in the High Court—in part because the High Court judge stayed proceedings after declaring that she, too, had been approached with a bribe. In the aftermath of that accusation, the bishop asked the judge to recuse herself, further delaying the court proceedings. As of this writing, the congregation is still seeking to have the order set aside.<sup>86</sup>

Matthews also faced an executive branch that was at times brazen in its deprivation of individual rights. In one case, a Canadian mining company proposed an investment of more than \$160 million (U.S.) to extract titanium from a patch of land in Eastern Kenya owned by over 300 farm families.<sup>87</sup> The Kenyan government regarded the proposal as an economic windfall and was anxious to get the project moving. The government determined, *ultra vires*, to represent the farmers in their negotiations with the mining company. Eight farmers objected; our office represented them.<sup>88</sup> Matthews submitted a constitutional brief focusing largely on freedom to contract.

Although Kenyan cases generally move at glacial speed, the mining company case proved to be an exception. Immediately after our office secured an injunction prohibiting local officials and the Kenyan armed forces from intimidating farmers who refused to sign sales agreements at the price negotiated by the government, the judge scheduled a hearing on the company's claim that the farmers had, in fact, agreed to a price. He decided the case in the company's favor, on basis of documents, including three affidavits.<sup>89</sup> There was no trial, and the judge heard no testimony from live

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82. See Jibril Adan, *Judge Accuses Church of Defying Court Order*, EAST AFR. STANDARD, Oct. 5, 2007, available at <http://www.eastandard.net/archives/index.php?mnu=details&id=1143975485&catid=159>.

83. *Id.*

84. CONSTITUTION, § 80 (1998) (Kenya) (“[N]o person shall be hindered in the enjoyment of his freedom of assembly and association . . .”).

85. See, e.g., *Coetzee v. Government of the Republic of South Africa; Matiso & Others v. Commanding Officer, Port Elizabeth Prison & Others* 1995 (10) BCLR 1382 (CC) at 1403 (S. Afr.) (elevating the right of personal freedom, as protected by the South African Constitution, to the status of fundamental right); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (emphasizing the importance of the right to expressive association).

86. Adan, *supra* note 82.

87. See Nyakundi Nyamboga, *Twist in Battle for Land Compensation*, EAST AFR. STANDARD, June 5, 2007, available at <http://216.180.252.4/archives/index.php?mnu=details&id=1143969560&catid=4>.

88. Patrick Mayoyo & Gitonga Marete, *So Close, Yet So Far From Fortune*, DAILY NATION, May 5, 2007, available at <http://allafrica.com/stories/200705070534.html>.

89. *Nzioka v. Attorney General & 8 Others*, Petition No. 613/2006 (Dec. 19, 2006), available at <http://www.kenyalaw.org>.

witnesses. The proceedings from injunction to decision lasted three weeks. To add insult to injury, the company later moved successfully to require the farmers to pay its legal expenses.<sup>90</sup> One can only speculate whether the judge was influenced by the high priority the government placed on getting the mining project under way. Nevertheless, the lightning speed with which the case moved, the disregard of documents showing that the farmers rejected company offers, and the devastating decision on attorney's fees sent a message to those without substantial resources about the consequences of impeding government policy.

While Matthews's work brought her face to face with some of Kenya's more glaring problems in the judiciary, Coogan's work with the International Centre for Constitutional Research and Governance (ICCRG) presented obstacles and frustrations of a different sort. ICCRG is a nonpartisan, nonprofit organization founded in 2003 as an outgrowth of Gibson Kamau Kuria's human rights work. The organization's focus is on promoting democracy, constitutionalism, and the rule of law in Kenya and elsewhere in Sub-Saharan Africa. Its activities have included research, publicity, and the presentation of workshops. Volunteers affiliated with ICCRG have pursued antigerrymandering lawsuits. ICCRG maintains holdings that, with the 2007 acquisition of the professional library of Richard Pierre Claude, founding editor of *Human Rights Quarterly*, have become East Africa's primary repository of human rights literature.

Despite its ambitions and accomplishments, ICCRG was in dire straits when Coogan arrived in Nairobi. In 2003, aided by the Robert F. Kennedy Memorial Center for Human Rights, it had been awarded a three year grant from the National Endowment for Democracy (NED). But ICCRG failed to hire competent staff and neglected its obligation to file reports with NED. While ICCRG's board of directors consisted of five members, only three attended directors' meetings. Though they reveled in discussions of legal and political theory, none wanted to supervise staff. None had any fund raising experience and only one offered to learn how to do it. Eventually, its grant was cancelled, its reputation damaged, and its office shuttered. During his stay Coogan assisted the board in developing vision and mission statements, a strategic plan, and grant applications. Despite these efforts, administrative malaise proved too difficult to overcome. As of early 2008, ICCRG remains closed, and what could be a forceful voice on behalf of human rights in Kenya is silent.

## V. THE LONG VIEW

There are multiple obstacles to the promotion of human rights in Kenya. The legacy of mistrust delegitimizes election outcomes. Violence occurs regularly during political campaigns. Corruption is a fact of daily life.<sup>91</sup> The practice of dunning losing

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90. See Tom Mogusu, *A Fresh Obstacle Faces Tiomin Mining Project*, EAST AFR. STANDARD, Oct. 5, 2004, available at <http://www.eastandard.net/archives/cl/print/news.php?articleid=2226>.

91. Both Freedom House and Transparency International recently downgraded their evaluation of Kenya, largely because of the failure of the Kibaki Administration to pursue allegations of corruption against senior ministers. See Freedom House.org, Country Reports 2007, Kenya, <http://www.freedomhouse.org/template.cfm?page=22&year=2007&country=7205> (last visited Mar. 31, 2008); TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2006, 188-91 (2006), available at [http://www.transparency.org/content/download/4822/28521/file/Part%202\\_8\\_countries%20A\\_K.pdf](http://www.transparency.org/content/download/4822/28521/file/Part%202_8_countries%20A_K.pdf).

parties for attorney fees is a massive disincentive to the assertion of constitutional rights. Judges lack resources. Inertia keeps them from disposing of simple motions over the telephone. The courts fail to penalize parties for late filings. Though judicial review is constitutionally sanctioned,<sup>92</sup> its practice is not yet smooth. Judges enjoy constitutionally protected tenure during good behavior,<sup>93</sup> but the possibility of being removed by presidentially-appointed tribunals is real.<sup>94</sup> Furthermore, the universal human reluctance to learn new skills characterizes not only the judiciary, but law offices as well.

Using volunteers burdens the receiving agency and interrupts its routine. Since volunteers are temporary, there is no expectation that they will fully integrate into the workforce. A volunteer may submit a paper then wait for several days with little to do until the recipient has time to absorb it and react. The pace of the legal process in Kenya is slow, and volunteers stare nervously at the advancing calendar, concerned that the opportunity to make a positive impact is fleeting.

Kenya has made significant economic progress over the past five years, and increasing national wealth—so long as its distribution is relatively widespread—promotes democratic political development and a reduction in corruption. In addition, civil society is vibrant, with all that that implies for the growth of social capital and the diminution of mistrust. There has also been substantial growth in the number of lawyers in Kenya. Forty years ago there were barely more than 300 lawyers in Kenya, only twelve of whom were Africans.<sup>95</sup> Today, there are over 5,000 attorneys, and in the estimation of Gibson Kamau Kuria, the former president of the Law Society of Kenya, over 90% are African.<sup>96</sup> Though there is little tradition of *pro bono* service among members of the bar, to the extent that lawyers are becoming an increasing presence in public policy debates, there is a corresponding increase in the respect for law, as well as a decrease in the prevalence of patron-client political assumptions accompanying these debates. Although the Kenya Constitution provides for amendment by Parliamentary action alone,<sup>97</sup> the Court of Appeals has limited the scope of Parliament's exclusive authority to routine matters, concluding that on major constitutional issues, the public must give its assent in a referendum.<sup>98</sup>

Recognition for Kenya's legal and political progress has been forthcoming. Although consensus had built among international donors that investment in Kenya was futile because of the high level of corruption, those donors have now begun to reaccept applications from Kenyan institutions.<sup>99</sup> As a result of increasing governmental scrutiny by the press, Reporters Without Borders has upgraded its assessment of press freedom in Kenya<sup>100</sup> and the shock of the raids on Nairobi's leading media

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92. CONSTITUTION, § 67 (1998) (Kenya).

93. *Id.* § 62.

94. See Thuku, *supra* note 66.

95. GHAI & MCAUSLAN, *supra* note 13, at 383 n.4.

96. The Law Society of Kenya, Membership Overview, <http://www.lsk.or.ke/membership.php> (last visited Mar. 20, 2008).

97. CONSTITUTION, § 47 (1998) (Kenya).

98. *Njoya & 6 Others v. Attorney General & 3 Others*, (2004) 1 K.L.R. 261, 262.

99. Samuel Siringi, *World Bank to Give Sh5.8bn for Education*, DAILY NATION, Nov. 9, 2006, at 6.

100. See *supra* note 71 and accompanying text.

outlets<sup>101</sup> has receded into the past. Promoting the rule of law in an emerging democracy is hard, frustrating work, and volunteers step in and out of what is often a very long-term project. There are stops and starts, delays and failures. There are, however, also accomplishments, such as helping to block a compromised judge's attempt to foist a criminal bishop on an unwilling congregation. Working within a legal culture where lawyers make a practice of learning from other jurisdictions is thrilling for Americans unfamiliar with that sort of outlook. Sensing that one is playing a role in the promotion of democracy and the rule of law, no matter how attenuated, is one of the highlights of a legal career.

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101. *See supra* notes 74-76 and accompanying text.