Proposed amendment via the Statute Law (Miscellaneous Amendments) Bill, 2005
Standing Committee on legislation and Law Reform of the Law Society of Kenya

Position Paper

On 6th April 2005, the Hon the Attorney General Amos Wako published a Bill that seeks to make amendments *inter alia* to certain sections of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya.

Beginning with section 262, all sections that mention assessors are proposed to be deleted.

The Standing Committee on Legislation and Law Reform of the Law Society of Kenya has now developed two opposing arguments on whether or not the proposed amendments should be passed. In light of these opposing arguments, it is proposed to have an afternoon lecture hosted by the LSK for the public, at which authorities in this area can present papers and invite participation from the attending public.

a) The following view opposing the proposed amendment has been expressed by Boniface Njiru, Advocate and Defence attorney at the International Criminal Court:

> The proposal by the Hon Attorney General to abolish the system of trial with the aid of assessors in capital cases should not be supported. I think there should be wider consultation and even a debate ought to be arranged one evening with members of the Law society.
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> Trials with aid of assessors just like the jury trials in common law jurisdictions serve an important aspect of criminal trials in that the community from which the accused comes participates in criminal justice. An accused is tried by his own peers and hears his society condemning or exonerating him. Kenyan trials have been criticised for being alien to the people. From the priestly robes of judges and lawyers to the complex procedures and legal issues arising in trials the courtroom is intimidating, confusing and even hostile to accused.
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> Lay juries and assessors help to ameliorate some of the effects of the trial by involving lay people in the verdict. The trial judge has to address himself to the assessors and in doing so has not only to use terms comprehensible to a lay person but has to consider also how his judgment affects the community that is represented before him.
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> The AG has only taken into account a speedy, efficient and cost effective trial. I suggest that in a democratic society involving the community in decision making is also an aspect that should be taken into consideration. Democracy may be slow and expensive but its value lies (especially as regards the justice system) in the removal of a feeling of injustice in that the community has participated in the verdict. I notice that other departments

involved with justice are moving towards community participation and it would be a backward step for the judiciary to abolish the system of involving lay people in trials

b) The following arguments, supporting the proposed amendment, have been made by Greg Karungo, Advocate.

Historically, assessors were tribal chiefs or village elders who sat beside colonial judges to assist them in determining issues, particularly with respect to cultural matters. Presently, the appointment of assessors in High Court matters is preserved under sections 269 – 271 and sections 297 to 299 of the Criminal Procedure Code, CAP 75.

The theory behind the use of assessors in the trial system is to protect the interests of the accused by reducing the risk of personal bias affecting the decision of the judge. In addition, the expertise of the assessors will assist the judge to make an informed decision. Note that the opinion of the assessor is based on the facts of the case, and the assessors must be excused when the judge is deliberating on matters of law.

Assessors in the Kenyan system are thus simply laymen advisors to the judicial officer presiding over the matter. Their opinions must be recorded by the judge and these opinions are not of a binding nature, merely persuasive (section 322 (2) Criminal Procedure Code). Thus the opinion of an assessor may not be used as a ground for appeal. It has been argued that the assessors thus do not play an integral role in the litigation process and the system should be removed "to ensure speedy, more efficient, and cost effective and fair trial".

Bearing in mind the historical reasoning behind the employment of assessors, the system does indeed seem redundant. The High Court Judges are Kenyan citizens who are familiar with the majority of tribal traditions and do not require assessors to assist them. In any case, should the judge require any such assistance, the judge may call upon a district officer or chief as an expert witness. Removal of this requirement for assessors would thus save on costs of summoning and remunerating assessors.

Furthermore, the presence of assessors does not necessarily prevent bias on the part of the judge, who may overrule the assessors' opinion. For this reason also, assessors do not represent trial by jury, and the accused cannot be said to have been judged by his peers.

In China and the Philippines, which also follow the assessor system, assessors play a more active role in the trial system, and they have the right to help investigate, participate in trial and issue suggestions with regard to cases tried. In Zimbabwe, assessors were legally qualified magistrates, and sat not as mere advisors but as an integral part of the process. In contrast, the role of assessors in the Kenyan legal system is perfunctory and is a relic of Kenya's colonial history that should be done away with.