THE FALLEN ANGEL: A REPORT ON THE PERFORMANCE OF AMOS WAKO IN PROMOTING HUMAN RIGHTS AND DEMOCRACY AS KENYA'S ATTORNEY GENERAL

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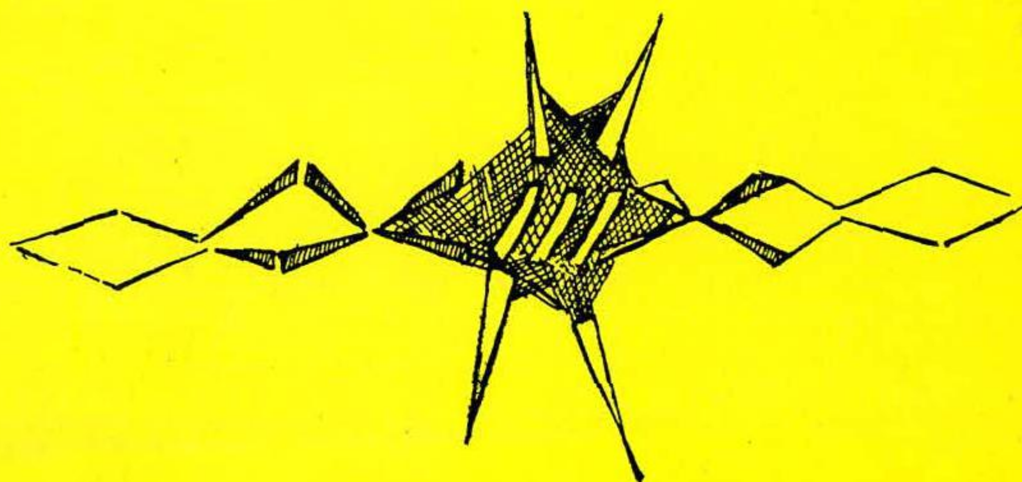

A KENYA HUMAN RIGHTS COMMISSION REPORT
NAIROBI, KENYA

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PREFACE

After concerted local and international pressure, the ruling Kenya African National Union (KANU) party finally caved in to demands for pluralism in the country in December 1991. Section 2A of the Kenya Constitution, enacted in 1982 and which outlawed the formation of other parties, was repealed. To many Kenyans, this development meant that Kenya was finally on the road to democracy after years of harsh dictatorial rule that led to serious human rights violations and economic mismanagement.

But the existence of multiple parties in a society does not necessarily mean that the citizens enjoy democracy. The hallmark of democracy is the diversification of power to various centres, both inside and outside government. Thus, institutions like the Executive, Legislature and the Judiciary should each enjoy powers that also act as checks and balances on each other.

Most importantly, power must be spread to the people who should have the ability not only to influence public policy, but also to oust those in leadership positions who do not serve their causes. This power is generally exercised through non-governmental bodies, such as the press and civic organizations.

"An independent, non-profit organization committed to the protection of, and advocacy for, fundamental human rights in Kenya."

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In this quest for democracy, the law has special importance as it is the medium through which these fundamental rights find expression. The alternative to the rule of law is anarchy.

In Kenya, the Constitution is ostensibly the supreme law of the land and its Bill of Rights guarantees the rights of individuals to freely pursue the goal of democracy and self-empowerment. Where countries are still in the process of building democratic structures, the Constitution should be used to continuously expand political space. The role of those empowered to protect and promote the Constitution is consequently critical.

There is arguably no other office as pivotal in expanding political space and democracy as that of the Attorney General. In recognition of this fact, the Constitution has deliberately given the holder of the office some security of tenure. Unlike most other public officers in Kenya, the Attorney General can not be fired via an announcement over the state owned radio.

Section 109 of the Constitution provides the mechanism for ousting the Attorney General. It states that he can be removed from office "only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour." The Attorney General can only be removed on the recommendation of a five-person tribunal to the president on the grounds mentioned. The tribunal is appointed by the president and must be composed of persons who are or have been judges of the High Court or the Court of Appeal, or who have the qualifications to be judges in those courts.

Section 26 of the Constitution provides for the office of the Attorney General. It states that the office "shall be an office in the public service," and the Attorney General "shall be the principal legal adviser" to the government.

The Attorney General also doubles as the Director of Public Prosecution, and he has powers to institute or discontinue criminal proceedings against any person. He is mandated to "require the Commissioner of Police to investigate any matter which...relates to any offence...and the Commissioner shall comply...and report to the Attorney General upon the investigation."

Sub-section 8 of Section 26 states that the Attorney General "shall not be subject to the direction or control of any other person or authority" in the performance of his duties. He is not only supposed to be totally impartial in his duties, but also to be seen as unbiased.

In Kenya, as in Britain, the Attorney General serves as a member of the Cabinet and as an ex-officio member of Parliament. In this latter role, he answers questions on the legality of government decisions and actions.

These twin roles as a member of the government of the day, and as the custodian of the public legal interest as Director of

Public Prosecutions, have generated much controversy. How well can someone who is part of the political establishment perform his duties as custodian of the public interest if that interest conflicts with the government's? This issue is more poignant in countries--such as Kenya--with records of gross violations of human rights and which are in the process of concerted efforts to move towards democracy. In autocratic societies, democracy directly contradicts the interests of the people in power.

The Kenya Human Rights Commission contends that where the public is locked in battle with the government on the need to promote democracy and expand the space for the respect of human rights, the primary role of the Attorney General is to ensure that the government moves in sync with the public and does not restrict the ability of Kenyans to move towards democracy. Consequently, the Attorney General must not be seen to be favouring the state over the public. As the government's chief legal adviser his job is to ensure that any contemplated move by the government does not compromise democracy and human rights.

This report analyzes the role and performance of Attorney General Amos Wako in Kenya's struggle for human rights and democracy. It questions whether the actions and philosophy of Amos Wako actually promote human rights and democracy. The report is based on the notion that the constitutional independence of the Attorney General from interference from any quarter in the performance of his duties is paramount. It also takes into account the high expectations that accompanied Wako's appointment in May 1991 given his record in international human rights advocacy.

BACKGROUND

Kenya attained independence in December 1963 after almost seventy years of British colonial rule. The Independence Constitution, negotiated in Lancaster House, London, provided for the office of the Attorney General fashioned on the British model.

Charles Njonjo, a close family friend of Jomo Kenyatta, the then Prime Minister, was appointed Kenya's first Attorney General. He served until 1980 when he went into active politics as a Member of Parliament and Minister in the Cabinet. Njonjo was forced into retirement from public life in 1983 after a carefully orchestrated campaign to clip his wings.

Initially, Njonjo's role as Attorney General was predominantly non-political as Director of Public Prosecution. KANU, which won the independence elections, appointed Tom Mboya--its secretary-general--as the Minister of Constitutional Affairs. This decision was a sign that the government intended to make constitutional changes that were political in nature.

The first constitutional amendments confirmed the government's desire to politically manipulate the constitution. The amendments consolidated the position of the Executive above all

other organs of state, and merged the duties of the Prime Minister and the Governor-General into the Presidency. Soon thereafter, amendments were made that concentrated security powers in the hands of the Executive. These amendments were made with a view to achieving dominance over any opposition existing or about to exist in the country.

The silence from the Attorney General during these amendments, imply that he was not perturbed by their implications to human rights and democracy in Kenya. In fact, this silence set a precedence where the political interests of a faction were more important than the common good.

Tom Mboya was later moved to the Ministry of Economic Planning, and Charles Njonjo became the sole legal tactician in the government. His power and influence grew dramatically, and by the time he left in 1980, he had built a circle of power from people in the civil service and the business community, particularly British expatriates and Asians.

Several historical events aptly depict Njonjo's perception of his role as Attorney General. First was the 1975 murder of J.M. Kariuki, a popular parliamentarian who was emerging as a credible challenger to Kenyatta.

The circumstances of Kariuki's death seriously implicated the government in both the murder and the subsequent attempts to cover it up. Njonjo defended the government zealously, with no indication that he was interested in establishing the true facts of the murder. The police, who were then under his portfolio, exhibited uncanny incompetence in the investigations, and angry parliamentarians were forced to appoint a Select Committee to probe the murder.

The Committee encountered hostility from police officers and other civil servants close to Njonjo in the course of their investigations. Their report indicted senior officials in the government and police force of complicity in the murder and subsequent attempts at a cover-up. The report was approved by parliament despite vehement opposition led by Njonjo. Three ministers who voted for the adoption of the report were fired from their positions by President Kenyatta.

The report's key recommendation that follow-up investigations and prosecutions be conducted was not implemented, and to this day this murder has never been solved. The responsibility for both instituting investigations and prosecuting the offenders lay with Njonjo.

The second event occurred in 1976 at a time when the health of the aging President Kenyatta was in question. A group of influential politicians began a campaign to amend the constitutional provisions relating to the succession of the president. The Constitution provided (as it still does) that in the event of a vacancy in the presidency, the vice-president would automatically assume the office for a period not exceeding

ninety days. Thereafter, a presidential election would be held.

KANU was then the only political party in Kenya, and according to its customs and traditions, the acting president inevitably would be elected president unopposed. In addition, the benefits of incumbency--even for a brief period--would be added advantage to any presidential candidate in the event that he was opposed.

Many observers saw the move as aimed at disabling vice president Daniel arap Moi from succeeding Kenyatta. Njonjo came out forcefully against the proposed amendment, threatening the people behind the move with treason charges. In his view, they were contemplating, imagining and encompassing the death of President Kenyatta.

The political nuances of the "change the constitution group" (as they came to be known) aside, Njonjo's interpretation of the law was clearly biased and incorrect. It was aimed at protecting the person who he thought best served his interests. The issue ended when Kenyatta ordered the end of the debate, and Moi indeed was elected president unopposed when Kenyatta died in 1978.

The third event was the coffee smuggling crisis that gripped the country between 1976 and 1978. Coffee was then fetching extremely high prices internationally, and many Kenyans rushed to trouble-torn Uganda to purchase coffee illegally and export it as Kenyan coffee.

As the smuggling progressed without any intervention from the government, trucks legally transporting coffee from Uganda and other parts of Kenya to the Mombasa port became prey to frequent hijacks. Many of these trucks were hijacked by people in police vehicles, and when the police "recovered" the trucks, there was never any sign of the coffee.

Despite public remonstrations against this illegality, few people were arrested and charged in court. Many observers opined that the smuggling was sanctioned from high political levels, hence the inaction. Two members of parliament were later sentenced to five years imprisonment for their role in the coffee smuggling. Two years later, they were taken to Njonjo's house and released.

By the time Njonjo left the office of the Attorney General, his influence in Kenya's political scene was unchallenged. The ascension of Daniel Moi to the presidency in 1978 only increased Njonjo's stature and clout, as Moi felt indebted to him. All pretences of independence and non-partisanship had vanished, and Njonjo was a political player protecting the government's perceived interests rather than the custodian of the public interest.

James Karugu, who had been the Deputy Public Prosecutor for many years under Njonjo, took over when the latter joined active politics. He brought a professionalism to the job that directly conflicted with Njonjo's and the government's interests. He studiously avoided being brought into political controversies and

quickly attained a positive reputation that no other Attorney General has ever achieved. His resigned quietly in June 1981, after barely eighteen months in office.

Karugu's successor, Joseph Kamere, was appointed from the Bar. His most important qualification for the job was his close relationship to Njonjo. His lack-lustre and bumbling tenure as Attorney General, confirmed these credentials. Moreover, he became involved in questionable financial dealings that compromised his independence and effectiveness.[1] With the fall of Njonjo in 1982, it was no surprise that Kamere lost his job in 1983.

Justice Matthew Guy Muli became the Attorney General in January 1983 replacing Kamere. He had previously served on the High Court of Kenya. After Kamere's disastrous tenure, Muli's appointment was greeted with relief.

However, Muli's abrupt and combative style against anyone perceived as opposing either him or the president dashed these expectations. Muli's tenure saw numerous people tried on dubious political grounds relating to sedition or otherwise propagating independent political views. Indeed, it was during Muli's tenure that the state perfected the use of the courts as the primary weapon in dealing with divergent views.

By 1991, Muli had endeared himself with so few people that the pro-government Weekly Review put out a cover story entitled "Confused A-G." The story referred to him as a "thin-skinned person" who had "a poor grasp of the constitution and the law." It was during Muli's tenure that the Constitution was amended to remove security of tenure of High Court judges, the Attorney General and the Controller and Auditor General--actions which resulted in concerted criticism. (In moving the debate to make these constitutional provisions, Muli termed the provisions as "anachronistic and obnoxious.")

Muli's exercise of his discretionary powers to discontinue cases also came under fire. The Weekly Review stated that they "often appeared strange, given the regularity with which they [were] entered for wealthy individuals, particularly Asian businessmen charged with involvement in major cash rackets." He was further accused of assuming the "same stance as politicians" on valid legal and constitutional issues raised by his pet enemy the Law Society of Kenya.

Like Kamere, financial improprieties haunted Muli. In 1986, for example, the Auditor General revealed that Muli had authorised payment of half a million shillings to himself for appearing as

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[1]. For example, Kamere received a loan without providing security from the Bank of Baroda at a time the bank was under investigation for illegal foreign exchange repatriation and unfair labour practices. While in office, Kamere was also sued by a German national over a business deal turned sour.

amicus curiae (friend of the court) in the judicial inquiry investigating Charles Njonjo. He appeared only thrice in that inquiry, and paid himself "for merely doing what he [was] employed to do."

The zest with which Muli followed the positions of KANU "hawks" proved to be his undoing. In 1986, KANU decided to amend its voting procedures and dispensed with the secret ballot--in favour of queuing--in nominating its candidates for election seats. Muli took up the decision with zeal, and announced that he would introduce a bill to legalise queue voting, despite its obvious contradiction with the constitutional rights of voters.

His reaction to the agitation for the repeal of Section 2A of the *Constitution was similar. In May 1990, while supporting the* single party system, Muli remarked that those advocating for pluralism were contravening the law since there was no constitutional provision allowing for such debate. The error in that interpretation was obvious.

At the apex of the demands for pluralism, international attention was turned to Kenya's human rights record and its democratic practices. Muli's enthusiasm for going along with politicians, no matter the legal and political implications of the actions, only added fuel to the fire. Local and international criticism of the government was reaching politically unbearable levels, and the KANU regime had to project a different image if it was to survive a while longer.

KANU's attempts to show a positive face all failed (for example the Saitoti Review Committee that went around the country in 1990 listening to the views of Kenyans). Someone had to be sacrificed to buy time, and Muli was the perfect choice; those others also under fire--such as the president, Vice President Saitoti, and Nicholas Biwott--were then considered politically indispensable.

It was against this background that Amos Wako was appointed Attorney General in May 1991, after Muli was appointed a Judge in the Court of Appeal.

AMOS WAKO: THE IMAGE

Over the years, Amos Wako has successfully cultivated an international image as a human rights advocate. Indeed, he has accumulated an impressive resume especially in non-governmental organizations both locally and internationally.

Amos Wako was admitted as an advocate of the High Court of Kenya in 1970. He has a law degree from the University of Dar-es-Salaam, an economics degree and a Master of Laws degree from the University of London. In 1977, he was elected a Fellow of the International Academy of Trial Lawyers, and in 1979, the Chairman of the Law Society of Kenya for a two year term.

He is a past chairman of the Association of Professional

Societies of East Africa, the Board of the Public Law Institute, and the Kenya Voluntary Development Association. He has been a member of the Faculty Board of Law at the University of Nairobi, the Editorial Board of the Law Reports of Kenya, Egerton University Council, and the Council of Legal Education.

At the international level, Wako was the Secretary-General of the African Bar Association between 1978 and 1981, Secretary-General of the Inter-African Union of Lawyers, and was a member of the Committee of Experts who prepared the preliminary draft of the African Charter of Human and People's Rights.

He has also served as Africa's representative to the Board of Trustees of the United Nations Voluntary Fund, and in 1982 was the Special Rapporteur of the United Nations Commission on Human Rights on the question of summary and arbitrary executions. In 1984, he was elected a member of the United Nations Human Rights Committee, and became its vice-chairman in 1991. Until his appointment as the Attorney General, Amos Wako was on the Executive Committee of the International Commission of Jurists based in Geneva. (He is now on a leave of absence.)

Wako is also the Deputy Secretary General of the International Bar Association, and was Chairman of the IBA's 1990 Biennial Conference of 1990 which was supposed to have been held in Kenya, but was moved to New York after the Saba Saba massacre in Nairobi on July 7, 1990. He is on the Advisory Board of the World Organization Against Torture based in Geneva, and in April 1993, travelled to East Timor as a Special Envoy of the United Nations Secretary-General to investigate human rights violations.

The one remarkable trend about Amos Wako's human rights work has been its concentration exclusively outside Kenya. Given his stature and international recognition, one would have expected him to be at the forefront of the struggle to expand the space for human rights in Kenya. However, Wako preferred to keep an extremely low profile in matters affecting the fundamental rights of Kenyans.

In some instances before his appointment as Attorney General, Wako's actions mitigated against his international record as a human rights advocate. In the March 1991 Annual General Meeting of the Law Society of Kenya, Wako abstained from voting for a resolution calling on the government to abolish detention without trial. He argued that the major problem with this provision in the law was that it was inherited from the colonial regime.

Wako was also implicated as one of the initiators of a case against members of the Council of the Law Society that sought to restrain them from speaking out on public issues affecting the democratization of the country.[2] The case was ostensibly filed

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[2]. One of the plaintiffs, Ms. Nancy Baraza, later swore an affidavit averring that the suit was actually instigated by Amos Wako and other pro-government lawyers.

by four members of the Law Society concerned that the utterances of the chairman, Paul Muite, would lead to confrontations with the government.

AMOS WAKO: THE REALITY

Exercise of Discretionary Powers

Despite misgivings in some quarters,[3] Amos Wako's appointment as Attorney General was generally received with high expectations that the Moi regime was finally serious about improving its disastrous human rights record.

Wako's first public action enhanced these expectations. Using discretionary powers provided for under the Constitution, Wako discontinued politically motivated sedition cases against Gitobu Imanyara, editor of the Nairobi Law Monthly, Chris Kamuyu, a politician, and Joseph Watoro, a journalist.

But at about the same time, he refused a request from the Council of the Law Society to allow them to hire a Queen's Counsel from England to defend them during their case for contempt of court orders barring them from discussing "political" issues. Wako's argument was that such outside help was only necessary in "complicated civil cases like trade marks and patents." The Council's view was that there could be few issues as important as the rights of individuals and the supremacy of the Constitution especially since they saw "the hand of the Kenya government behind the orchestrated manoeuvre to send it to prison."

Wako's perception of his role came out clearly in his maiden speech in parliament in June 1991. In his speech, Wako asserted that "a characteristic of the rule of law is that no man, save for the President, is above the law." This was an obvious misrepresentation of Kenyan law, as the president derives his powers from the law. Some observers opined that he made this statement to allay the fears of some of the political powers who were a little disconcerted with his human rights record.

From September 1991, government opponents of pluralism began holding meetings in the Rift Valley urging the imposition of majimboism or regionalism in the country as an antidote to pluralism. Their version of majimboism consisted of threats against communities they regarded as "aliens" in the area, and a call to their supporters to arm themselves against proponents of multipartyism. In his capacity as the chief legal adviser of the government, Amos Wako should have publicly taken action against these people for inciting violence and disobedience of the law. Instead he maintained a loud silence.

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[3]. See for example, Gibson Kamau Kuria, "Wako's Appointment a Disaster for Kenya," Nairobi Law Monthly, July 1991, pg. 48.

In contradistinction, when advocates of pluralism attended a public rally in Nairobi in November 1991, they were promptly arrested and charged in court. Strangely, the Attorney General decided to use the colonial strategy of charging them in their original home districts, in an effort to inconvenience them and isolate them from their lawyers.

This same tactic of charging critics in far away places was again used in April 1992 against the editors and staff of the Society magazine who were arrested in Nairobi and charged with sedition in Mombasa--about 500 kilometres from Nairobi. Bail for the staff was granted while waiting for the Attorney General's consent to prosecute the case. This consent was never given, and for more than a year, the journalists had to fly to Mombasa every two weeks for the mention of the case. The expenses for this exercise can not be overemphasized, and in the first week of May 1993, the publishers announced the suspension of publication. On May 19, 1993, the Attorney General dropped the sedition charges.

More recently, the tactic was used in May 1993 in charging Njenga Mungai (the FORD-Asili member of parliament for Molo) with incitement to violence in Kericho, after being arrested in Nakuru. His alleged offence was supposed to have been committed in Nakuru, and the one of the reasons for sending the case to Kericho--a distance of about 100 miles from Nakuru--was to frustrate attempts to get lawyers to represent him.

The violence and insecurity in the Rift Valley, Western Province, Nyanza Province, North Eastern Province and parts of Eastern Province, that begun in late 1991 and continue to this day, also illustrate Amos Wako's biases as Attorney General. This violence and insecurity has led to about 1,000 deaths, the displacement of more than 50,000 people from their homes, and uncountable loss of property.[4]

Several government officials and politicians have been implicated in instigating or otherwise encouraging the violence. Yet no one from the government, or from the communities that have been perpetrating the terror, has been prosecuted in court. Virtually all the people prosecuted have come from the opposition or from the affected groups.

During Wako's tenure, police brutality has become notoriously common. In 1993 in Nairobi alone, the police have gone on rampage several times. In January, Nairobi was besieged by a coordinated assault by police officers who indiscriminately beat up people, destroyed property and looted from shops and bars. Then in April, the police beat up innocent Kenyans participating

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[4]. See for example reports by the Select Parliamentary Committee to Investigate the Ethnic Clashes, and the recent "Courting Disaster: A Report on the Continuing Violence and Destruction" produced by the Council of Elders of the National Election Monitoring Unit.

in a legal religious march for peace led by Christian and Moslem clergy. Several opposition members of parliament were beaten and later charged in court.

Through all this, Amos Wako has kept mum on the rampant lawlessness by the police, and no policeman has been charged with breaking the law in any of these instances. Perhaps it is for this reason that in May, the police in Nakuru destroyed over 600 kiosks in the dead of the night without any adverse consequences. Running battles between the police and the affected citizens ensued after the destruction of the kiosks.

While the Attorney General can not investigate offenses, he has the power to order the Commissioner of Police to initiate investigations and report to him. As far as the public is concerned, no such orders have emanated from Amos Wako's office.

Linked to this fact, since the re-introduction of pluralism in Kenya, the public has witnessed the initiation of police investigations and prosecutions of opposition politicians or critics (for example, Raila Odinga, Njenga Mungai, Njehu Gatabaki, Kenneth Matiba, and Haroun Lempaka) for all manner of "offenses" such as breaching the peace, incitement and sedition. Despite the high emotions and confusion, no member of KANU or the government has similarly been publicly targeted, despite some highly inflammatory public statements (for example by George Saitoti, Paul Chepkok and William Ntimama).

Another illustration of Wako's biased use of discretion is the recent arrest of the leader of the Islamic Party of Kenya (IPK) Sheikh Khalid Balala for issuing threats to kill. The charge arose after Sheikh Balala warned KANU stalwart Emmanuel Maitha to desist from attempts to divide Moslems on racial grounds. (Maitha had issued a threat to wage war against Moslems who support the IPK, claiming he had a trained bush army which would be used in the war.) No action has been taken against Maitha so far, and the Attorney General has maintained his normal silence.

Most disturbing about the Attorney General's exercise of discretionary powers is the obvious intervention of the president and KANU. On March 2, 1992, the Attorney General published a Constitutional Amendment Bill that provided for direct presidential elections and the appointment of a Prime Minister. Eight days later, KANU Parliamentary Group met and "directed the [Attorney General] to withdraw it completely."[5] The Bill was promptly withdrawn after this meeting.

On June 18, 1992, mothers of some political prisoners paid a visit to President Moi. Moi agreed to "do something" about the conditions of their sons so long as they abandoned their fast initiated to pressure the government to release political prisoners. On June 23, five of the prisoners were released from jail under the president's prerogative of mercy. The next day,

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[5]. See the <u>Standard</u> newspaper, Wednesday March 11, 1992.

Amos Wako exercised his discretion to discontinue criminal proceedings and dropped the charges against four of the eight people charged with treason.

On January 19, 1993, the president asked the Attorney General to review the case against the other four treason suspects who included Koigi Wamwere, a former parliamentarian. That same day the Attorney General dropped the charges against the four.

An Advocate of Human Rights?

The hallmark of Amos Wako's tenure as Attorney General is that the same violations of human rights that were common in the pre-multiparty era have continued, but with a different--and more dangerous--style. The tenures of Charles Njonjo, Joseph Kamere and Matthew Muli were marked by an obvious and unrepentant approach to issues of impartiality and human rights. Amos Wako's style is far more insidious and devious.

For instance, during the pre-multiparty days, newspapers and magazines that criticised the KANU regime were outrightly banned, and their publishers prohibited from publishing again. This fate fell on Voice of Africa (1981), Beyond, A Christian Monthly (1988), The Financial Review (1989), The Development Agenda (1989), and the Nairobi Law Monthly, (1990). (The Nairobi law Monthly however obtained a court order reversing this decision.) In 1989, the Daily Nation, the country's most popular newspaper, was barred from covering the proceedings in parliament for about three months.

Wako's tenure has witnessed an increase in the impounding of critical magazines as a way of silencing them. Impounding magazines achieves the same result as banning--which is denying Kenyans alternative news--without the massive outcry that the latter would attract. Moreover, impounding results in a tremendous financial cost to the publisher.

The list of magazines impounded since 1992 is as follows:

Finance Magazine

May 1992	--	59,000 copies
November 1992	--	50,000 copies
December 1992	--	60,000 copies
January 1993	--	15,000 copies
April 1993	--	30,000 copies

Total Cost: Ksh. 10,450,000

The People

February 14, 1993 (1st issue)	--	3,700
February 21, 1993 (2nd issue)	--	100
February 28, 1993 (3rd issue)	--	176

Total Cost: Ksh. 50,580

Society Magazine

January 1992 --	30,000 copies
June 1992 --	10,000 copies
February 1993 --	250 copies

Total Cost: Ksh. 2,012,500

Economic Review

February 22, 1883 -- 2,500 copies

Total Cost: Ksh. 100,000

In April 1993, the government decided to deal a death blow to these critical magazines. They de-mobilized the printing presses used by the magazines and confiscated vital and expensive parts. After the printer and the magazine sued for the return of the confiscated parts, the Attorney General belatedly filed sedition charges against the printer. The two cases continue.

This strategy has resulted in the suspension of publication of The Society without the international and domestic public outcry that would have accompanied an outright banning.

In consonance with this strategy to muzzle the press, in 1992, Amos Wako introduced amendments to the defamation law raising the amount of damages payable for libel. The amendment stipulated that "where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings, and where the libel is in respect of an offence punishable by imprisonment of ... not less than three years the amount assessed shall not be less than four hundred shillings." This law came into effect in October 1992, just before the multiparty elections in December.

The long incarceration of the treason suspects without a full hearing is yet another demonstration of this deviousness. The suspects were arrested in September 1990, and their two-year stay in custody was effectively a backhanded form of detention without trial. Detention without trial would have raised far more international attention than this case got. That the Attorney General did nothing about the case until directed to by the president speaks volumes about his commitment to human rights in Kenya.

Amos Wako's response to a parliamentary motion introduced by Paul Muite seeking to outlaw detention without trial is also instructive. In opposing the motion, Wako stated that all colonial legislation would be reviewed soon with the aim of repealing those laws considered inappropriate. He did not say whether he thought detention laws were "inappropriate," or when exactly the government would repeal these laws.. He also argued that the laws should be repealed as a group rather than in a

piece-meal fashion without declaring why he thought this was the better way of dealing with repressive laws.

In any event, and no matter the arguments by Amos Wako on how to handle repressive laws, the government still retains the ability to jail anyone without trial for any imaginary or real offence.

The most egregious of all of Amos Wako's actions as Attorney General was his attempt to covertly change election laws last year. The election law provides that political parties must conduct their internal nomination procedures in a period of "not less" than twenty-one days after parliament is dissolved. Wako's amendment--purportedly made under his powers to rectify clerical or typographical errors--would have changed this period to "not more" than twenty-one days, and consequently bring the election date much closer.

Using this change in election laws, on November 3, the Electoral Commission announced December 7 as the election date--giving the country barely one month to prepare and conduct the first multiparty elections since 1963.

The impact of the intended amendment must be seen within the context of the disorganization that marked the new opposition parties. They would have had little time to organize their party machinery to establish credible nomination procedures. Importantly, the surprise change--the Attorney General had quietly gazetted the purported amendment on October 29, without any fanfare despite the seriousness of the intended change--gave effect to Moi's earlier assertions that the election date was his "secret weapon" against the opposition parties.

In an historic decision, Justice Thomas Mbaluto ruled that the purported amendment was "null and void," and new dates for the elections had to be taken. The judge noted that Wako had "mischievously" slotted in the amendment in excess of his powers, and "for purposes other than those stated."

CONCLUSIONS

From the provisions in the law, and from Kenya's own political history since independence, the person holding the office of Attorney General is critical in either promoting democracy and human rights or in suppressing these noble ideals. And no Attorney General has ever assumed that office with a real or perceived reputation for devotion to the cause of democracy and human rights. Except Amos Wako.

Hence the expectations of substantial (and positive) reforms that accompanied his appointment. And hence the disappointment that his tenure has so far elicited from democratic-minded Kenyans.

But perhaps a handicap that has faced Amos Wako, and indeed every Attorney General in Kenya, is the dichotomy of the demands of the office. On one hand the Attorney General is expected to be part

of the government and its defender on legal issues. On the other hand, he is expected to be the custodian of the public interest, which that government often violates.

This situation is not uniquely Kenyan. In the United States, *this* contradiction has prompted the development of the institution of the Special Prosecutor (such as Archibald Cox, appointed to investigate the Watergate Scandal during the Nixon era) or Independent Counsel (such as Lawrence Walsh, appointed to investigate the Iran-Contra affair during Reagan's era).

Unfortunately, all the Attorney General's that have "served" this country (except for James Karugu) have interpreted their membership of the government as more important than safeguarding the public interest. Yet, because the Attorney General can not be sacked with impunity, there has been no real political reason to subordinate their latter role for the former.

Because of his incredible international human rights image, Amos Wako was supposed to be different from that mould. Indeed, the government used his appointment as a sign that it was now committed to fundamental change when confronted by its international critics. But he has proven to be a "fallen angel," whose taste of power has dulled his reputed sense for human rights.

One of the most dangerous implications of Amos Wako's biases as Attorney General, and his selective use of discretionary powers, is that the Kenyan public stands to lose confidence in the law as an instrument for resolving differences in society. It should be no surprise, therefore, if sections of the Kenyan public decide that will consequently resolve their political issues outside the legal--or peaceful--framework. Amos Wako's continued tenure could easily encourage religious and political fundamentalism in Kenya.

The passiveness and inactivity of Kenyans has allowed this situation to reach its current levels, and Kenyans must shoulder some of the blame in these circumstances. Public opinion, voiced loudly and often, always affects those in office no matter their perceived disregard for public opinion. As long as Kenyans continue to be uninvolved in the affairs of this country, we can expect more Amos Wakos in public office.

RECOMMENDATIONS

1. The twin roles of the Attorney General must be split to avoid the natural conflict of interest that now accompanies the job. An independent office of Director of Public Prosecutions, with security of tenure, must be created. The office must be granted special investigative officers to carry out investigations where government officials or other powerful personalities are implicated in any crime.

2. Amos Wako should realise the damage he has done and decently resign from the post of Attorney General.

3. Kenyans must adopt a more active and critical stance with regard to persons occupying public office. It is our perceived docility that has led to many of the dubious actions that have afflicted this nation.

4. The international community must disabuse itself of the notion that Amos Wako is a human rights advocate and remove him from any positions that perpetuate this image. It is an irony, for example, that the World Organization Against Torture would have on its Advisory Board a person who does not seem to understand the torturous--and urgent--nature of detention without trial.

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The Kenya Human Rights Commission is an independent and non-partisan advocacy group that monitors human rights in Kenya. It is based in the United States and Kenya. The Board is comprised of Makau Mutua--chairman (based in the U.S.), Willy Mutunga--vice chairman (Kenya), Peter Kareithi (U.S.), Njeri Kabeberi (Kenya), Alamin Mazrui (U.S.), and Rose Waruinge (Kenya). Maina Kiai (Kenya) is the executive director.

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Other reports available from the Kenya Human Rights Commission include: Haven of Repression: A Report on the University of Nairobi and Academic Freedom in Kenya; and Slow Torture: A Report on the Deprivation of Medical Care to the "Treason Four."

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