

LEGAL PRACTICE MANAGEMENT: ATP 106

LECTURE 6

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STANDARDS, POLICIES AND PROCEDURES

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STANDARDS

Definitions:

"...general written limit, definition or rule approved and monitored by the authority as a minimum bench mark available."

Kimani M., (2019); Legal Practice Management; Nairobi, Kenya, LawAfrica Publishing (K) Ltd. at page 23

"standardization mark' means a mark which has been specified by the Council under section 10"

Section 2, Standardization Act

"working standards' means standards provided for under section 16."

Section 2, Weights and Measures Act

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"A written limit or rule that is approved and monitored by an agency as the minimum benchmark acceptable, or technical specification contained in a document that lay down the levels of quality, performance, safety or dimensions of a product."

OR

"Stability, general recognition and conformity to establish practice. A type, model or combination of elements accepted as correct or perfect"

The Law Dictionary

• There seem to be a lacuna in the law when it comes to the definition of a standard.

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Classification of Standards

• Standards can be: -

- National
- International
- Personal

• Standards can also be: -

- Public
- Private

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Standards in Kenya: A General Outlook

The preamble to the Standards Act states,

"An Act of Parliament to promote the standardization of the specification of commodities, and to provide for the standardization of commodities and codes of practice; to establish a Kenya Bureau of Standards, to define its functions and provide for its management and control; and for matters incidental to, and connected with the foregoing."

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- Standards are utilized comprehensively
- Organizations have to comply with standards that are required by law e.g. manufacturers (KEBS)
- The *grundnorm* is the Kenyan Constitution and every other law / standard has to adhere to the dictates of the Constitution e.g.
 - Article 43 which provides for economic and social rights and
 - Chapter 6 which is devoted to setting standards that govern public servants.

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Judicial Enforcement

- The Judiciary has a crucial role to play in ensuring compliance with standards.
- They do this by enforcing judgements that penalize those who fail to comply with standards.
- Examples:
 - *R v. KEBS & 2 others ex parte Peter Mbwiri Ikamati* [2014] eKLR
 - *John Kinyua Munyaka & 11 others v. County Government of Kiambu & 3 others* [2014] eKLR.
 - *Kennedy Osoro Nyoka v Republic* [2020] eKLR.

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Prescription

- Parliament ensures that legislation has been put in place to guide standards
- Parliament's mandate is enshrined in article 94 of the Constitution, 2010.
- Standards are developed by technical committees which comprises of representatives of the various stakeholders.

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Standards can be broken down to six categories i.e.:-

- Glossaries or definition of terminology
- Dimensional standards
- Performance standards
- Standard method of test
- Codes of practice
- Measurement standards

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- Examples of organizations that develop standards in Kenya include:
 - The Kenya Bureau of Standards;
 - The National Environment Management Authority (NEMA);
 - Council of Legal Education;
 - Federation of Kenyan Employers;
 - NGO Coordination Board;
 - Central Organization of Trade Unions;
 - Law Society of Kenya;
 - Commission for University Education;
 - Institute of Public Accountants Kenya etc.

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POLICIES

Definitions:

"The general principles by which a government is guided in its management of public affairs, or the legislature in its measures."
Black's Law Dictionary

"Policy is a law, regulation, procedure, administrative action, incentive, or voluntary practice of governments and other institutions."
The Centres for Disease Control's office of the Associate Director for Policy and Strategy

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"... the approaches that an organization adopts to dealing with key aspects...and provide continuing guidelines on how these approaches should be applied. Policies define the philosophies and values of the organization... and from these are derived the principles upon which managers are expected to act when dealing with matters".
Armstrong, M. with Taylor, S.; (2017); Armstrong's Handbook of Human Resource Management Practice; Kogan Page, 14th Edition, at page 62

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"A documented general approach taken within the practice to the issue in question..... A policy is therefore the comprehensive and contemporary programme that aims at measuring an organization's ability to provide efficient administrative support within the organization."
Kimani M.; (2019); Legal Practice Management; Nairobi, Kenya, LawAfrica Publishing (K) Ltd. at pages 23 and 24

- A policy therefore provides some sort of governing structure within an organization or even a government.

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Objectives of a Policy

- The main objective is to regulate and guide operations. Policies also: -
 - provide guidance towards an organization's mission;
 - provide guidance on implementation of strategies;
 - provide controlling mechanisms of the organization's behaviour;
 - provide controlling mechanisms on employee conduct;
 - defines roles;
 - defines rules;
 - explains consequences of actions and behaviours.

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Formulation Process

- A problem is identified;
- An agenda is set;
- Research is conducted;
- Policy paper is drafted;
- Policy paper is presented to management;
- Policy is adopted by management;
- The policy is communicated to those it will affect;
- Sensitization on the policy is conducted;
- Policy is implemented;
- Monitoring, evaluation, reporting and learning from the outcome of implementation of the policy.

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- For a policy to mutate into law, it can take the below steps: -
 - Stakeholders are consulted;
 - Experts are engaged to research;
 - The developed paper is adopted either by government or opposition side;
 - The paper is popularized;
 - A bill is introduced to parliament this has to be accompanied by a memorandum of objects and reasons;
 - First reading;
 - Second reading;
 - Third reading;
 - Presidential assent;
 - Commencement.

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Composition

- The policy name;
- Effective date of the policy and date for any revisions;
- Purpose of the policy;
- Main policy statement;
- Definition of any key terms and concepts used in the policy;
- Scope of permissible exceptions and authoritative figure who can make these exceptions;
- Committee's (if need be) for ensuring compliance of the policy;
- Authoritative figure / office responsible for implementation and monitoring.

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Policy Implementation challenges

- Constraints can be experienced from: -
 - parent organization;
 - regulatory bodies;
 - government policies;
 - legislation.

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- Implementation problems can be initiated by: -
 - corruption;
 - lack of continuity especially for government policies;
 - inadequate human resources;
 - inadequate material resources;
 - lack of legal framework to support implementation mechanisms;
 - poor participation by stakeholders thus poor uptake of the policy;
 - lack of learning from policy activities due to poor feedback mechanisms;
 - lack of public awareness;
 - ignoring input of target population thus poor uptake etc.

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PROCEDURES

Definitions:

"The methods by which legal rights are enforced; the specific machinery for carrying on a lawsuit, including process, the pleadings, rules of evidence, and rules of Civil Procedure or Criminal Procedure."

The Legal Dictionary

"....a set of actions that is the official or accepted way of doing something."

The Cambridge dictionary

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"....methods for accomplishing or implementing a policy"

McConnell, J.H.; (2004); *Developing Essential Human Resource Policies and Procedures*; VI, as cited in Kimani M., (2019); *Legal Practice Management*, Nairobi, Kenya; LawAfrica Publishing (K) Ltd. at page 24

• It is imperative to have procedures in place as they ensure the successful implementation of policies.

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Attributes of Good Procedures

Good procedures are: -

- Articulate;
- Simple;
- Accurate;
- Consistent with: -
 - organizational objectives and policies;
 - public policy;
 - statutes.

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Formulation Process

- Identify the organization's need for a procedure;
- Obtain support and approval from senior management to draft procedures;
- Define the scope;
- Collect and document information available;
- Prepare a draft procedure;
- Obtain comments on draft procedure;
- Obtain authorization to use procedure;
- Distribute procedure;
- Sensitize the persons affected by the procedure on the procedure;
- Review periodically to ensure viability.

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LEGAL FRAMEWORK ON STANDARDS, POLICIES AND PROCEDURES

Constitution of Kenya, 2010

- Article 2 of the Constitution of Kenya, 2010 embodies the supremacy of the constitution.
- The validity of the Constitution is supreme and unchallenged.
- All other laws must conform to the Constitution.
- The Constitution is the supreme guiding architecture of standards, policies and procedures.
 - See: Articles 43, 191, 232(1) and 244.

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The Standards Act, Chapter 496, Laws of Kenya.

- Section 9(2) is a declaration of Kenyan standards
- The Verification of Conformity to Kenyan Standards of Imports Order, 2018; provides for the standards to be applied to imports with Kenyan standards.

Legal Education Act

- Regulation 11 of the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations sets standards regulating the obligations of legal education providers.

- See:
 - *Eunice Cecilia Mwikali Maema v. Council of Legal Education & 2 others* [2013] eKLR
 - *Susan Mungai v. Council of Legal Education Petition No. 152 / 2011*
 - *Moi University v Council of Legal Education & another* [2016] eKLR
 - *Jannah Tusasirwe & 10 others v Council of Legal Education & 3 others* [2017] eKLR

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Employment Act, 2007

- As per the Employment Act, equal work ought to attract equal pay that is without discrimination with regard to age, gender, nationality etc. An employer who contravenes this is guilty of an offence.
- See: sections 6, 15, 25, 26, 27, 28, 29, 30 and 45.

Labour Institutions Act, 2007

- See:
 - Section 43; creates the wages council
 - Section 47; prescribes the contents of wages order as well as other conditions of work.

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HIV /AIDS Prevention and Control Act, Act 14 of 2006

- See:
 - Section 31 prohibits discrimination in the workplace based on HIV / AIDS status.
 - *BNN v Christopher Mutua Musyoki* [2019] eKLR
 - *SNN v Asha Gulem* [2019] eKLR
 - *VMK v Catholic University of Eastern Africa* [2013] eKLR

The Water Act; No 43 of 2016

- Section 3 of the Water Act sets the purpose of the Act as provision for the regulation, management and development of water resources and water and sewerage services in line with the Constitution.
- See: Article 43 of the Constitution

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The Basic Education Act; No 14 of 2013

- Section 95(1(a)) allows the Cabinet Secretary to make regulations that ensure consistent quality education is being provided. It provides for free basic education i.e. compulsory primary education.
- See: Article 43 of the Constitution

The Consumer Protection Act No. 46 of 2012

- Spells out consumers' rights and obligations vis-a-vis product and service liability.
- Makes provisions for the promotion and enforcement of consumer rights
- Empowers consumers to seek redress for infringement of their rights as consumers.
- Provides for compensation.
- See: Article 46 of the Constitution

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The Energy Act; 2019

- Section 9 establishes the Energy and Petroleum Regulatory Authority whereas section 10 provides for the functions of the Authority.

Ethics & Anti-Corruption Commission Act; Chapter 65A, Laws of Kenya

- Section 3 establishes an Ethics and Anti-Corruption Commission whose mandate is to ensure compliance of Article 253 of the Constitution
- The Commission is also supposed to ensure citizens are able to access its services in accordance with Article 6(3) of the Constitution.

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Human Resources Management Professionals Act; 2012

- Section 3 establishes the Institute of Human Resource Management;
- Section 6 provides for the functions of the institute.

Conclusion

- Legal provisions are crucial in the creation of standards, policies and procedures.
- As the law is dynamic, these standards, policies and procedures have to be continuously reviewed not only to keep up with the changing laws but also to keep up with the challenges posed by globalization and changing social & economic needs.

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STANDARDS, POLICIES AND PROCEDURES IN THE LEGAL PROFESSION

Accounts management

- Advocates provide legal advice and services to their clients and as such are paid for their professional services.
- The fees that advocates charge on the services offered are regulated by the provisions of the Advocates Act and the Advocates Remuneration Order.
- The advocate is separately instructed and separately rewarded by fees for each piece of work done for the client.

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- Section 36(2) of the Advocates Act prohibits the charging of fees at a rate less than that prescribed by the Advocates Remuneration Order.
- Section 45 of the Advocate's Act; an advocate may exercise three options in charging fees;
 - by using the Advocates Remuneration Order
 - by entering into an agreement with the client as to cost.
 - By charging ex gratia.
- Management of client's money is strictly legislated by: -
 - Advocates Accounts Rules
 - Advocates Deposit Rules
 - Advocates Accounts (Certificate) Rules
 - Advocates Remuneration Order

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Standard

- There should be at least 2 accounts, one for the advocate's personal money and another for client's money. Every advocate should ensure proper books of accounts are kept with respect to all accounts that the advocate holds.

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Policy

- A policy should be available that provides for transparency and accountability.
- The advocate has to provide an accountant's certificate when applying for an annual licence; which certificate is provided after an audit of the accounts has been conducted.

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Procedure

- Section 36(1) of the Advocates Act makes it an offence to undercut (This is also envisaged under rule 3 of the Advocates (Practise) Rules).
- Section 46 of the Advocates Act invalidates some arrangements; the breach of which may subject the advocate to disciplinary proceedings

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- If found guilty of professional misconduct, an advocate may be subject to the penalties prescribed under section 60 (4) of the Advocates Act which include: -
 - Admonishment
 - Suspension from practice
 - Having the name struck off the roll
 - Payment of compensation or reimbursement to the aggrieved person
 - A combination of the above as the disciplinary committee deems fit.

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