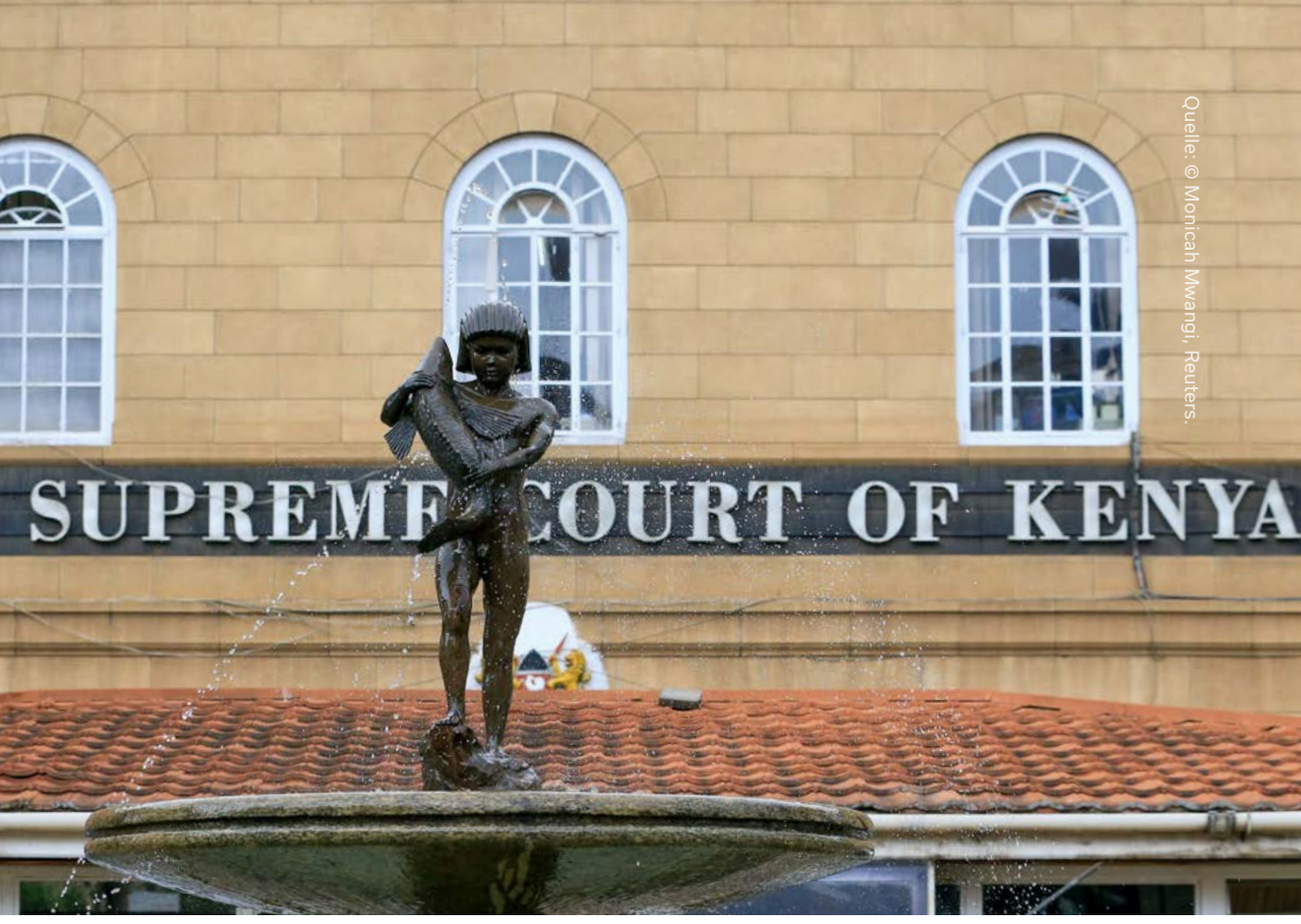

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Kenya's Supreme Court Writes a Further Chapter in the History of the Rule of Law in Africa

The failure of President Kenyatta's Building Bridges Initiative

Stefanie Rothenberger

Kenya's Supreme Court has halted a project through which the head of state had sought to amend key elements of the country's Constitution. The fact that the Supreme Court judges did not go as far as the lower courts in certain aspects of their ruling has disappointed some. Nonetheless, the glass is not half empty but at least half full when it comes to judicial independence in the East African country.

The impression might arise that one had wandered into a sheltered oasis: a garden full of nooks and crannies, a shady terrace with potted palm trees, occasional bursts of song from a tropical bird somewhere. And beyond, the vibrant city, loud and hectic, never tiring, full of life; it is always an accomplishment to navigate the chaos of its traffic without ending up being late.

It is just before Easter, and I am in an Italian restaurant in the centre of Nairobi, sitting across from Willy Mutunga, a thoughtful man with a wealth of experience, calm, friendly eyes, and an alert gaze. You can tell at once that Willy Mutunga has seen a great deal in his lifetime – a dedicated campaigner for democracy and justice who was a political dissident in the years of President Moi's dictatorship and who was imprisoned back then, only to become, many years later, the first chief justice and president of the Supreme Court of Kenya under Kenya's new Constitution of 2010. He is a central figure in Kenya's rule-of-law scene, a close friend to the Konrad-Adenauer-Stiftung's Rule of Law Programme and an invaluable contact for me. Our conversation quickly turns to a topic which has been a recurring subject in my work for months, and which has dominated political debate in the country for almost three years.

A High-Profile Judgment

Just a week earlier, the Supreme Court of Kenya delivered its long-awaited judgment and drew a line under President Kenyatta's controversial Building Bridges Initiative (BBI), one of the signature political projects of his second term in office. It was touted as a reform project to overcome ethnic divisions, but it involved serious interference with the Kenyan Constitution.

When the Kenyan High Court ruled around a year ago, in May 2021, that the Building Bridges Initiative was unconstitutional and thus declared it "null and void", the country held its breath for a moment. The first instance ruling by the five-judge bench of the division responsible for constitutional petitions at the High Court in Nairobi came as a surprise, particularly in how unequivocal it was – a spectacular and unprecedented legal ruling against the government.

The Building Bridges Initiative had already been the subject of lively debate, and from that point on it intensified. Almost no other judicial proceedings in Kenya's recent past have attracted so much attention and offered so much fuel for discussion across the length and breadth of society as the BBI case. After the Court of Appeal upheld the judgment in principle in August 2021, the government appealed to the Supreme Court at the end of last year.

The verdict of the court of last resort was awaited with great anticipation for months, and on 31 March 2022, the day finally came: the Supreme Court delivered its judgment, four whole months before the general elections in August. The people of Kenya were able to follow the reading of the verdict in a six-hour live broadcast on Kenyan television stations; the media interest was enormous.

The Supreme Court halted the Building Bridges Initiative, but did not declare it "null and void", which is why opinions currently differ on the decision. Irrespective of the current analysis and discussion of the final judgment, the Supreme Court has undoubtedly delivered one of its most significant rulings against the Kenyan government since the annulment of the presidential election in 2017, and thus provided further impressive evidence of judicial independence in Kenya and the region. It was the annulment of the 2017 presidential election that became the starting point for the Building Bridges Initiative, and it is necessary to look back at those events to grasp the significance of what is happening now.

The Starting Point: A Contentious Presidential Election

After the presidential election was annulled by the Supreme Court in August 2017 due to glaring irregularities, a fresh election was held later that year, in which the original victor, President Uhuru Kenyatta, the incumbent since 2013 and son of the country's founder and first president, Jomo Kenyatta, was able to secure a clear confirmation of the original result. However, this was due in no small part to the fact that his main political opponent, Raila Odinga, who had petitioned the Supreme Court, boycotted the re-run and so refused to recognise the election result. Instead, in January 2018, he staged an elaborate ceremony in the centre of the capital city at which he had himself sworn in as the "People's President".

The political stalemate brought back disquieting memories of the bloodshed in the aftermath of the 2007 presidential election; the outbreaks of violence between various ethnic groups behind the opposing political camps cost more than 1,000 Kenyans their lives and have become a kind of national trauma. To avoid the possibility of a repeat of these events, the "handshake" between the political arch-rivals Kenyatta and Odinga took place in March 2018, and this led to the Building Bridges Initiative, touted as a project to promote national unity. Yet, rather than building bridges, BBI seems to have since divided the country.

The BBI report published in October 2020, which was compiled by a task force set up by President Kenyatta for this purpose, contains a broad set of proposals to strengthen social cohesion, for example through enhanced political awareness and civic education work – undoubtedly a welcome approach in a country which includes more than forty ethnic groups and where ethnicity plays such an important role. However, the report also includes a whole raft of proposals – more than seventy – for comprehensive and in some cases far-reaching amendments to the Constitution.

From the outset, there was fierce criticism – particularly of the introduction of the post of a prime minister, to be appointed by the president. It should be mentioned in this context that President Kenyatta cannot run for a third term, and consequently is unable to contest this year's election. It was soon speculated that the newly created post of prime minister was intended for the outgoing president, particularly in light of the fact that his former political opponent and co-founder of the Building Bridges Initiative, Raila Odinga, is now the presidential candidate he is publicly supporting. The posts of two deputy prime ministers were also supposed to be enshrined in the Constitution, as well as the post of a deputy minister for each cabinet minister; an additional 70 constituencies were to be created, which would have significantly increased the size of the 349-member National Assembly, with its highly remunerated seats. The creation of so many new posts in an already highly indebted state raised questions in the public mind. There were suggestions that the aim was to reward political cronies.

Criticism was also voiced of the creation of a judiciary ombudsman, to be appointed by the president, who would receive complaints directed against representatives of the judiciary, on the basis of which the ombudsman would have been able to launch investigations. Not without reason, this led to fears that the ombudsman could become a gateway for massive interference in the independence of the judiciary. The widely criticised reform proposals were turned into a bill to amend the Kenyan Constitution,

which was tabled in Parliament in November 2020. In formal terms, this process was supposed to be a Popular Initiative, a key point to which we will return later.

An Attack on the Constitution's DNA?

Willy Mutunga moves his glass aside and furrows his brow. Many Kenyans, he counters, would probably consider my opinion on the ruling too optimistic, and take a much more critical view. For many people, the Supreme Court's judgment fell short of expectations and was effectively a wasted opportunity. His comment does not come as a surprise to me, as debate has been raging for days about why the Supreme Court deviated from the lower courts' rulings in key respects. A closer look at the judgments reveals a fair amount about Kenya's judicial culture and the fundamental challenges facing justice systems in the region.

Firstly, it should be said that the courts at all levels gave full and careful consideration to their decisions. The legal arguments set out are generally plausible and logical. In light of this, the allegation that the judgments were politically motivated, which was voiced from the outset, does not seem justified. The new president of the Supreme Court, Martha Koome, who has been in office since mid-2021 and is the first female chief justice in Kenya's history, took her task very seriously. Each of the seven judges of the Supreme Court had to write their own judgment. This increases the level of transparency. Whether the same can be said of the level of legal certainty is another matter. The entire judgment ultimately runs to around 1,000 pages.

The main criticism of the ruling is that the Supreme Court supposedly tried to avoid taking a clear position and rejected a key point: the applicability of what is known as the "basic structure doctrine". This is based on the theory that a constitution has an inviolable essence, an idea advanced by the French legal scholar Maurice Hauriou and the German constitutional lawyer Carl Schmitt at the time of the Weimar Republic (1918 to 1933). According to this doctrine, amendments which interfere with the core features of the constitution are unconstitutional. Such far-reaching changes instead require the approval of the constituent power, i.e. the people or a constituent assembly, which would border on the adoption of a new constitution.

The applicability of the basic structure doctrine was one of the most important arguments put forward by the petitioners – a total of five individuals who challenged the constitutionality of the BBI law before the High Court in the framework of public interest litigation. The petition is broadly comparable to Germany's *abstrakte Normenkontrolle* ("abstract judicial review of statutes")[1], although it would not have been possible in this form in Germany as it was initiated by members of the public. Until recently, this type of petition was neither possible in Kenya due to the lack of an affected party, Willy Mutunga tells me; it was only created by the new Constitution of 2010 – a sign that the drafters of the Constitution wanted to give greater weight to the public's concerns and rights.

Both the High Court and the Court of Appeal confirmed the view that the basic structure doctrine applies in Kenya, citing, among other things, a 1973 judgment of the Supreme Court of India which marked the first time that the doctrine's applicability was recognised by a supreme court. The High Court argued that, while the Kenyan Constitution of 2010 does not contain any explicit eternity clauses along the lines of, for example, Article 79, paragraph 3 of the Basic Law for the Federal Republic of Germany, the basic structure doctrine nonetheless results in the implicit unamendability of those provisions which make up the Constitution's distinctive DNA. The planned reforms were deemed in some cases to constitute this kind of serious interference in the basic structures of the Constitution, for example the principle of the separation of powers. In the High Court's view, such fundamental constitutional reform would have required the authorisation of the constituent power, in this case in the form of a constituent assembly and a subsequent

referendum, on the basis of broad public participation.

Willy Mutunga has experienced first-hand what it means when the political elite undermine a constitution until it is unrecognisable, until it has all but disintegrated. He talks about how Kenya's Independence Constitution of 1963 was robbed of its rule-of-law structures by countless reforms, until by the early 1980s the country had in practice become an autocratic, one-party state; this is known in Kenya as a culture of "hyper-amendment". Other countries in the region, such as Uganda and Tanzania, have had similar experiences. From the early 1990s, after the reintroduction of multi-party democracy, Mutunga was himself involved in the processes to draw up a new constitution, which were initiated primarily by a strong citizens' movement opposed to the Moi regime. It was not until some years later, in 2010, that the Constitution was adopted. Willy Mutunga explains that the High Court interpreted the Constitution correctly in its historical context. The Kenyan people, he tells me, adopted an exemplary constitution due to the painful experiences of the preceding decades, a constitution which guarantees a stable democratic system and the protection of human rights. Accordingly, the High Court interpreted the Constitution in its historical context and found that the Kenyan people had intended to adopt a constitution whose core was protected and could not be amended.

The Supreme Court Stresses Different Points

I lean back and let my gaze wander across the restaurant's small garden for a moment. If there is one thing I have come to understand in my first eighteen months in Kenya, it is that the Kenyan people are incredibly proud of their Constitution, which was born from a courageous, decades-long struggle for democracy, the rule of law and civic participation, a constitution which, together with South Africa's, is among the most progressive in the whole of Sub-Saharan Africa.

The Kenyan Constitution is unique primarily because of the process by which it was produced, which included broad public participation, something which was taken extremely seriously. The Constitution of Kenya Review Commission set up in 2000 organised countless public consultations across the entire country, and in its final report, whose conclusions fed into the Constitution adopted by referendum in 2010, the Commission discussed in detail the wishes and fears expressed by the public regarding every single topic. As a result of this remarkably inclusive process, the Kenyan people identify strongly with the Constitution, and its roots go deep. The BBI proceedings were about defending precisely these achievements of a constitution based on the will of the people, Willy Mutunga tells me.

I ask him whether, in his view, the basic structure doctrine is more of a foreign and thus "un-African" legal concept. He immediately says that this is not the case, and spontaneously comes up with a wonderful translation into Kiswahili: *nguzo*, the pillar. He laughs when I pass him my notebook and ask him to write the word down for me.

By contrast with the lower courts, the Supreme Court declared that the basic structure doctrine is not applicable, and thus based its interpretation strictly on the wording of the Constitution. The Supreme Court relies mainly on the argument that the provisions for amendment contained in the Constitution offer adequate protection against abusive interference in the Constitution's foundations. The possible pathways for amending the Constitution set out in these provisions are a parliamentary law or a Popular Initiative, with a referendum being required in either case if the planned amendments touch on certain fundamental constitutional principles, which are explicitly listed and include, for example, the sovereignty of the people, the Bill of Rights, or the independence of the judiciary. The Supreme Court argues that introducing an external, foreign legal concept on top of these provisions would be to go over the heads of the people as the constituent power. Kenya's Supreme Court rejects a parallel with the aforementioned judgment of the Supreme Court of India in the Kesavananda case, as the Indian Constitution does

not contain any explicit, narrow limits on constitutional amendments comparable to those which exist in the Kenyan Constitution.

The ruling carefully analyses many foreign judgments and legal opinions, and includes references to German legal scholars such as Dieter Grimm, Ernst-Wolfgang Böckenförde and Dieter Conrad. Its argumentation is balanced and legally plausible. The Supreme Court does not go on to discuss the question of whether there are substantive problems with the bill to amend the Constitution; instead, it limits itself to ruling that the basic structure doctrine is not applicable, given the lack of any legal gap in the Kenyan Constitution.

Ultimately, the Supreme Court draws the line elsewhere and much earlier in the process. It finds that there was a significant procedural error in how the entire BBI process was conducted. The crux of the matter is that the process, which took the form of a Popular Initiative, was – according to the Supreme Court – initiated by the President himself. The starting point for BBI was in fact the reports produced by a task force established by the President and a steering committee, which formed the basis for the bill to amend the Constitution. In accordance with the Constitution's requirements, the necessary one million signatures were gathered and the approval of a majority of the 47 county assemblies was obtained. The bill was subsequently tabled in Parliament and passed. The necessary referendum was supposed to follow in mid-2021, but was halted by the court proceedings.

A Popular Initiative launched by the President seems particularly absurd given that the president has the constitutional role of giving final assent to the law after the referendum is held, which means he would be taking on an unacceptable dual role. The Supreme Court ruled that the BBI process is therefore unconstitutional. However, it did not go as far as the lower courts, which stated in this context that legal proceedings could be taken against the President. It rejects this finding on the grounds of the president's immunity, which is guaranteed by the Constitution.

The Supreme Court also declared that the creation of 70 new constituencies is unconstitutional, although again largely on procedural grounds. It states that because the proposal was only added to the amendment bill at a later stage, the necessary public participation did not take place. The lower courts were more explicit on this point and additionally underlined that the delimitation of constituencies is a matter reserved for the Independent Electoral and Boundaries Commission, which is anchored in the Constitution, and that this cannot be changed via constitutional reform.

Finally, it should also be mentioned that the lower courts criticised public participation as being inadequate throughout the process; for example, the BBI reports were only published online and were not available in Kiswahili. The Supreme Court takes the opposite view and, at the very least, does not regard the initiative's unconstitutionality as being rooted in a lack of public participation.

All in all, the Supreme Court's judgment does in fact differ – in some respects considerably – from the rulings of the lower courts. Nonetheless, the outcome of the proceedings should be seen as a success. While it is true that BBI could indeed be revived, as it failed primarily due to procedural issues, the Supreme Court put a clear stop to the current initiative and thus put the executive in its place. The pressure the Supreme Court had to withstand from all sides can only be imagined. Some experts have described the judgment as pragmatic and politically astute.

The Kenyan Judiciary Withstands Political Pressure

How heated the debate was in the run-up to the ruling is shown by a passage which the Supreme Court included immediately before the operative part of the judgment. In it, the Court expresses its displeasure about the conduct of several participants in the proceedings who had commented on the process publicly on social media, in some cases in disparaging terms. There has probably been pressure from the government's side as well. The relationship

between the judiciary and the executive in Kenya is not an easy one. In the aftermath of the High Court's initial ruling, the President refused to approve the promotion of some of the judges involved in the proceedings. Martha Koome's predecessor, David Maraga, under whom the Supreme Court annulled the election in 2017, was subsequently subjected to an extremely rude tone from the executive. The Kenyan judiciary has since been regarded as underfunded.

Nonetheless, the judiciary in Kenya is resolutely and in some cases courageously asserting its position, as the various BBI judgments have surely proven once again. Some courts in the region are doing the same as the Kenyan courts: take, for example, the annulment of the 2019 presidential election by the Supreme Court of Malawi, or the 2021 decision by the High Court of Zimbabwe declaring that the President's arbitrary extension of the tenure of the incumbent Chief Justice was unconstitutional. It can only be hoped that this becomes a consistent trend in future, despite all of the challenges which justice systems in Sub-Saharan Africa often face.

The restaurant has emptied; we are the last remaining guests. After all of this information, facts and background, what I want to ask is: what is Willy Mutunga's final view of the judgment, what does it mean for the future, and am I right in my own assessment? For a moment we are silent. He looks pensive, as though he has to arrange several complex thoughts. We should ultimately see the judgment for what it is, he says finally and with emphasis: evidence of judicial independence and loyalty to the Constitution, delivered in difficult circumstances, and at the same time a major victory for the people of this country. We should celebrate the judgment and not be over-critical, as we Kenyans often are, he tells me. I have to smile; it seems that Kenyans and Germans have some things in common.

He talks of a process that is taking place one small step at a time, which requires patience and a sense of proportion, and in which the judiciary is increasingly gaining in stature. The judgment will resonate across the region, he tells me, and could be a source of inspiration and encouragement for courts in other countries. In any event, the scale of what has happened cannot be properly grasped as yet. All of the criticism notwithstanding, the judgment will send an important signal that the government will have to consider its actions more carefully in future. Undoubtedly, he says, the people's trust in the judiciary has been strengthened. However, he adds, the road ahead is still a long one, and it will be a rocky one at times, but undoubtedly also a hopeful one.

On my way back to the Konrad-Adenauer-Stiftung, I chat with the taxi driver, a bright man who is interested in politics. I ask him what he makes of the outcome of the court proceedings, what it means for him personally. At first he dodges the question. It depends, he says, what political camp you belong to. He sees that his answer is not what I was looking for. He hesitates a moment, then laughs. It was a good outcome for us in the end, for the people, he tells me. Anything else would have been a big disappointment.

Construction workers in yellow safety vests are moving back and forth between giant metal struts in the middle of the road. The new Chinese-built expressway to the airport, meant to prevent gridlock in the city, is almost complete. The toll to use it will be expensive, unaffordable for the average Kenyan. On the red ground at the edge of the road, there are small kiosks with long queues forming in front of them; every few minutes, people pour out of brightly coloured minibuses and join the tumult; a young boy is standing forlornly at the roadside with bunches of flowers wrapped in newspaper.

Inexorably, my thoughts return to our discussion, to the victory for the people, to the long road ahead. If public participation in the broader sense has taken place anywhere, then it is probably here, in the streets, and wherever else people come together. And if this initiative has achieved anything positive, then it is the fact that it sparked a critical political discussion

at all levels, and that empowered citizens have come to realise that there are certain things which they are no longer willing to relinquish. A process which may be irreversible, and which represents a new dawn for Kenya, and possibly for the region as a whole.

– translated from German –

A shorter version of this article first appeared under the title "Gute Nachrichten aus Afrika: Kenias Justiz behauptet sich" on 11 May 2022 in the "Einspruch Exklusiv" section of the Frankfurter Allgemeine Zeitung newspaper.

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1 Review of the constitutionality of a statute by the Federal Constitutional Court, independent of a specific legal dispute, which cannot be filed by individuals but only by the Federal Government, the Government of a Land or by one quarter of the members of the German Parliament, the Bundestag.