

AFRICAN VOICES ON THE
RULE OF LAW IN 2020





WELCOME ADDRESS BY PROGRAM DIRECTOR



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Ladies and gentlemen, dear friends of the Konrad Adenauer Foundation; my name is Dr. Stefanie Rothenberger and I'm the new director of the KAS Rule of Law Program for Anglophone Sub-Saharan Africa. I'm pleased to present you, towards the end of a difficult year, an outstanding selection of interviews, with high-ranking legal experts, our African Voices on the Rule of Law.

The corona crisis has affected each and every one of us, directly or indirectly. I had to wait in Germany for seven months, until I could travel to Nairobi and take up my new position. But it was our program's work in general, that got heavily impacted throughout this year. Many of our conferences and seminars had to be postponed or even cancelled, which however, did not hold us back from actively engaging with our partners and stakeholders; at least in a virtual manner. This very project can be seen as a proof of how stable, committed and lively our network is, despite the crisis. We are proud and grateful that we could bring together eminent African voices that will give an insightful and objective account of the state of the rule of law in Sub-Saharan Africa in 2020. Be it on the independence of the judiciary, on the fight against corruption, the fight against impunity, and the very often deplorable state of human rights, against the backdrop of the pandemic and beyond.

As gravely as the corona crisis has affected the rule of law and human rights in Sub-Saharan Africa, and in many other countries of the world, as much can it also be seen as an opportunity; by making apparent the problems that have been there for long and that no one had ever dealt with properly. Thus, consider this gallery and the excellent analysis given on some of the most pressing problems of the continent, as our present for you towards the end of this year. And please, allow me to extend a very special and warm thank you to all our friends and supporters who have been with us for so many years and who have helped us to build a stable, and lively network throughout the continent.

A network that is kept together by a joint mission, "the promotion of the rule of law, democracy and human rights". And also see this as an invitation to follow us to participate in our activities, and to join us in our efforts for the sake of better, healthier and more stable societies in Sub-Saharan Africa and worldwide. I wish you happy holidays, and a peaceful end of the year.

May 2021 be full of positive change for all of us.

DR. STEFANIE ROTHENBERGER
Director, KAS Rule of Law Program for Anglophone Sub-Saharan Africa.

CORRUPTION IN AFRICA IN 2020



The solution lies in the promotion of the political will to strengthen the rule of law, to respect the impartiality and independence of the judiciary, so that those who go into politics for the purpose of enriching themselves are cleansed from the system, and that we have public servants and politicians who are there to serve the people, not to make themselves unnecessarily and unduly rich.



I'm afraid that the pandemic has been seen by the kleptocrats of Africa and indeed the kleptocrats of the world as an opportunity to enrich themselves at the expense of the health of the poor and indeed at the expense of the economies of all of the countries in the world. It reflects very poorly on the ethics, the morality and the commitment to the rule of law of those who are involved in the procurement of goods and services on behalf of the public. If money that is intended to improve the lot of the poor is diverted into the pockets of the kleptocrats, it exacerbates poverty, inequality, misery, hunger and an absence of the rule of law. It makes a revolutionary change all the more possible, that would not have been the case, had public money been spent as it should be.

Rules and regulations have been formulated in a way that does not have regard to human rights in general. (And) the corruption that has gone hand in hand with this authoritarian approach to dealing with the virus is exacerbating the situation in Africa. You need to get into a situation where politicians are committed to the notion that corruption needs to be prevented, combated, investigated, prosecuted and punished, and that the proceeds of corruption need to be returned to the sources from which they were looted.

Anti-Corruption machinery needs to stand alone, it needs to be properly resourced and its personnel need to have security of tenure of office. Everybody wants peace, progress and prosperity (and) we are only going to get peace that is secure, prosperity that is shared and progress that is sustainable, if the rule of law is properly in place in Africa. The solution lies in the promotion of the political will to strengthen the rule of law, to respect the impartiality and independence of the judiciary, so that those who go into politics for the purpose of enriching themselves are cleansed from the system, and that we have public servants and politicians who are there to serve the people, not to make themselves unnecessarily and unduly rich.



WOMEN RIGHTS & GENDER BASED VIOLENCE IN AFRICA IN 2020

I know it's basic, but we should start from awareness raising at the family level, at the community level and even putting in place the informal structures for monitoring. But of course, the primary interventions should be to (even) prevent Gender Based Violence before they occur. But in any case, if they occur, we need to have the support systems in place.



The pandemic, like any other crisis, has severely affected the lives of women in many ways; socially, economically and even politically. It has intensified the already existing gender inequality that we have seen for many years. (And) in the context of the pandemic, women are largely represented in the informal sector. When the economy was hit hard, the informal sector was also affected in much bigger ways than you can imagine. Women are not better off in the formal sector as well, because women are again largely represented in the low-skilled, low-paying job categories.

We have seen that the pandemic has provided an enabling environment for abuses. So due to these, women have been really suffering from domestic violence, sexual violence, whether adult women or young women. They have been subjected to different forms of violence at home and within the community. We have seen the rise of child marriage, we have seen also the rise of female genital mutilation, teenage pregnancy, all affecting women's lives. What COVID-19 has clearly shown us is that our policies are not gender sensitive. It has shown us that we need strong accountability mechanisms, that means, including the judiciary and other law enforcement mechanisms that are ready to respond to a particular context.

I know it's basic, but we should start from awareness raising at the family level, at the community level and even putting in place the informal structures for monitoring. But of course, the primary interventions should be to (even) prevent Gender Based Violence before they occur. But in any case, if they occur, we need to have the support systems in place; from reporting, to shelter and counselling and medical support as well. We have seen good laws coming out. We have seen very interesting initiatives in terms of implementing the laws. We have seen governments also being held accountable and we can ride on that, to hope for the future.

MS. MESKEREM GESET
Human Rights Lawyer

ENVIRONMENTAL RIGHTS IN AFRICA IN 2020



My only hope is that the level at which States have put measures to protect themselves from COVID, from terrorist-related acts, should be emulated in curbing transnational crimes of illegal trade of wildlife. We need to shift from lifestyles which endanger the environment to those which promote a healthy and safe environment.



Science has shown us beyond doubt that continued unabated anthropogenic pollution and green gas emissions will further increase global warming, ocean acidification, as well as changing climate patterns; due to rising sea levels, stronger hurricanes, longer dry and shorter wet seasons. Greenhouse gas emissions and pollutions are increasing, largely driven by economic and population growth. COVID-19, which is one of the worst crises in our lifetime, has certainly presented humanity an opportunity for reflection. COVID-19 may be equated to a mild heart attack, which is a sign that one should change their lifestyle to a healthier one. Despite the fact that greenhouse gas emissions in Africa are low compared to the rest of the world, the consequences are felt by the most vulnerable groups in Africa. Farmers in Africa place their reliance on a predictable climate pattern. If the patterns are disrupted, the livelihoods of farmers are put into jeopardy.

The levels of the usage and disposal of PPEs during the pandemic is significantly high. Governments should take the lead and devise means of proper disposal of PPEs. The lack of enforcement is closely related to bad governance, rampant corruption and disregard for the rule of law - poor habits also do contribute to pollution and unsafe environment in Africa. Small individual acts of ensuring that our environment is clean will make a huge difference. Protection of the environment starts with you and me.

There has certainly been a massive decrease in transnational crimes. Unfortunately, this decrease is not guaranteed beyond COVID-19. It was an unintended consequence of shutting down borders and airspaces. My only hope is that the level at which States have put measures to protect themselves from COVID-19 and from terrorist-related acts, should be emulated in curbing transnational crimes of illegal trade of wildlife. We need to shift from lifestyles which endanger the environment to those which promote a healthy and safe environment.

If the rules are enforced strictly, we can begin to see a change in the behavior of human beings. With regards to the environment, my hope is that everyone, in their own capacity and collectively, should jealously safeguard the rule of law. The Rule of Law can be compared to an infrastructure project. This applies to the ways in which the laws are conceived and drafted, their comprehensibility, their practical effects as well as their adequacy to meet the purposes for which they are framed. And I do hope that in Africa, all of us will jealously safeguard the rule of law.

INDEPENDENCE OF THE JUDICIARY IN AFRICA IN 2020



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The two great aspects of independence of the judiciary are decisional independence, which is that of the judges to be left free to decide cases on the basis of the evidence and the law before them. The second aspect, which is equally important, is the financial autonomy. The Executive arm of government is a major litigant, mainly a defendant in quite a number of cases that are filed in court (and) the courts make decisions which will not always please the government. So, as a result of that, they can restrict the funding. The global community came together and proposed that they should get a percentage of the national budget as reasonable to enable the Judiciary to function properly. The funds that were meant for quite a number of projects were understandably directed to the Ministry of Health, and as a result of that, we have very serious challenges. We can't be able to operate as would have been expected. You can't afford to close the judiciary even for a day or a week.

Court orders, especially orders of the Superior Courts, are part of the law. So disobeying a court order is actually the same thing as disobeying an Act of Parliament. When orders are issued and especially those affecting the government, and they are not obeyed, it sends a very wrong message. The ordinary citizens sometimes wonder why they should obey orders when the government is not obeying. We sat together with the Commissioner General of Prisons, the DPP, the Inspector General of Police and the Law Society of Kenya, and agreed that we would do our very best to decongest the prisons. As the Judiciary, we agreed that there were some cases that would not be handled like we used to. Going forward, we will harness technology even more. This will go a long way in dispensing justice.

We have made quite a number of decisions which have helped a lot in the rule of law. All I would say is that we maintain it, and ensure that the Judiciary is well facilitated; where training is required, the judges are trained. I have great hope that we are moving forward. We have seen even from other jurisdictions; that they are coming up boldly and making judgments that sometimes, surprise the powers that be. That's the way it should be.

As a democracy, we have chosen to be ruled by the rule of law. We must obey the law.

CHIEF JUSTICE HON. DAVID MARAGA
President of the Supreme Court of Kenya



GOVERNANCE IN AFRICA IN 2020



I do think the future of the rule of law lies in the text of our constitutions. If the rule of law is not supported by for example, a caring language - a language that wants to enhance social justice, we may have a challenge. You do want to use the law as a tool to transform the lives of our people.



Namibia has a supreme constitution and so we are obviously a constitutional democracy, and some of our key principles on which our governance architecture is anchored on, is obviously Democracy, the Rule of Law and Justice for all. What has happened over the past eight to nine months, since the first case of coronavirus arrived in Namibia, was that we used the tenets of the Namibian constitution to guide the legal and health responses to the pandemic. When we had the first case of coronavirus, and when it was declared a health pandemic, we also declared a state of emergency, and we went into a lockdown on 17th March 2020. What we also did is that we consistently updated the regulations that were associated with declaring a state of emergency. In total we had over 20 regulations that we updated on a monthly basis as the epidemiological profile of the country was changing. We had a Cabinet Committee that focused on coronavirus. We also had what we called an Extended Communications Committee with officials from different departments such as media, medical and various other experts. They were part of and continue to be part of monitoring what we called our Coronavirus Dashboard. We established a COVID-19 Communication Center, so on a daily basis, twice a day, there were regular updates. There were experts that were responding to various issues. We've done our part as a government to try and ensure that the law is known and that it's properly promulgated. We've made sure it's of general application, it's not discriminatory, that people know what the law says and we've also tried to make sure that it's practical.

The principle of Separation of Powers has been something that that the Namibian government holds very sacredly. The Employers Federation took the Executive to court because they were not happy about the decision that we had made, in light of what was happening around the pandemic. This is an indication that the Judiciary is independent, because, the court actually found against us. In respect of the National Assembly, which is our Parliament; made up of the National Assembly and the National Council, they have an oversight function to supervise the implementation of the state of emergency. If we ever wanted to extend the state of emergency Post-September 2020, we were supposed to take it back to the National Assembly and ask them whether or not we could do that. Members of the Executive also sit in the National Assembly and that's another opportunity for other members of the National Assembly to interrogate the measures that the Executive has taken.

We must guard and protect the rule of law with all we have. We must trust the systems that we have in place. Systems such as your Judiciary, systems such as the Office of the Prosecutor General and Anti-Corruption Commission. But for us to trust them, we must equally provide sufficient funding for those important autonomous bodies to do their work. I do think the future of the rule of law lies in the text of our constitutions. If the rule of law is not supported by, for example, a caring language - a language that wants to enhance social justice, we may have a challenge. You do want to use the law as a tool to transform the lives of our people.

We have a chance as Africans to show the world how to respond to, and be successful in keeping the coronavirus numbers at a very low scale.

DEMOCRACY AND ELECTORAL RIGHTS IN AFRICA IN 2020



Countries have to really plan ahead for future elections and for future occurrences beyond the borrowed solutions that we are seeing today. From your voter registration, to your voter education, to campaigns, your election logistics and more importantly, post-election activities such as retrieval of voting materials.



Several countries around the globe are faced with the predicament of how to hold an election during the COVID-19 pandemic without spreading the virus, and at the same time, without compromising the outcome of the election. The danger of holding or not holding elections in times like this, is that it tends to undermine the health of democracy. We have countries such as Malawi that have conducted credible elections in the middle of the pandemic, and at the same time, we also have countries such as Burundi that have held very highly contentious elections. We need to be alive to the fact that governments have imposed lockdowns to mitigate the spread of the virus, but these have been used to a large extent, to crack down on perceived enemies, and as such, has actually influenced the outcome and determination of elections in countries such as Tanzania, Burundi and Cote d' Ivoire to a large extent.

I believe that it's possible to have credible elections as long as measures are put in place in the electoral processes, that embrace COVID-19 mitigation measures without compromising elections. Countries have to really plan ahead for future elections and for future occurrences beyond the borrowed solutions that we are seeing today. From your voter registration, to your voter education, campaigns, election logistics and more importantly, post-election activities such as retrieval of voting materials. We tend to import processes from abroad that do not necessarily sit well within the context of our own countries. Countries can look at either extending the period of voting, or increase the number of polling stations so as to avoid overcrowding. You can also put in measures and safeguards that would allow for social distancing during voting. You can also look at early voting but this has to be accompanied by strong electoral oversight mechanisms, given the potential for malfeasance during elections in Africa. The laws make it very difficult to postpone elections and in most cases, it can be done in the extreme of circumstances, such as natural disasters or pandemics of this nature. Take South Africa for example, they had to go to the courts to seek for postponement of elections. My country Zimbabwe, even though it's not a very good case study, had to use provisions of the Public Health Act in order to postpone elections. There are dangers of postponing elections. It sets a very dangerous precedent that might undermine electoral democracy and the functionality of representative democracy in the future. It might also be abused for term elongation by those seeking to extend their terms beyond what is provided for in constitutions.

The Rule of Law is under threat in Africa, especially with the advent of COVID-19 in the region. The enforcement of COVID-19 mitigation measures has been used to undermine the rule of law. The struggle for the entrenchment of the rule of law is very real and we should strive to now start building very strong institutions that not only help to consolidate, but also to deepen and entrench the rule of law in the region. With stronger institutions, with stronger advocacy around the oversight mechanisms that are in place, I think we can to some extent, be able to try to mitigate some of this backsliding that we are witnessing in the region. Especially with the advent of COVID-19 and the enforcement of its mitigation measures.

INTERNATIONAL CRIMINAL JUSTICE SYSTEM & FIGHTING IMPUNITY IN 2020



Africa and the developing world, should simply take ownership of those organizations that it can influence. For instance, the International Criminal Court. The African bloc of states in the International Criminal Court is the biggest of all. They have direct influence over that institution. The developing world has a very strong voice in the WHO. In that sense, they can take ownership of these international bodies, and advance the progressive human rights-based agenda that can counterbalance the cynical power politics of the big powers.



We have made strides in the past let's say 20 years or so, towards this ideal of ending impunity. The International Criminal Court, various regional courts, and the strengthening of domestic criminal justice systems all play together into a sort of a global effort to end impunity. With the ICC, the focus traditionally has been on the so-called core crimes; crimes against humanity, war crimes and genocide. But I think that the COVID-19 pandemic and economic crimes have sort of shifted the debate towards a more comprehensive view of what we mean by ending impunity, because there are other systemic crimes that are also impacting on the lives of ordinary people. Widespread systemic corruption is impacting on people in the very real way. You can even compare it to crimes against humanity.

Unfortunately, the International Criminal Court only has jurisdiction over war crimes, genocide, crimes against humanity and aggression. In order to fight the type of crimes that are also of systemic impact, economic crimes, corruption, money laundering, we will have to look elsewhere. (And) that elsewhere for the time being is to strengthen domestic criminal justice systems. That goes hand in hand with strengthening mutual legal assistance, cooperation between States and in that sense I think the African Union has a key role to play. To strengthen its mechanisms, to cooperate between States in the fight against economic crime, systemic crimes, corruption and so on. In that sense I hope that the Malabo Protocol that is supposed to create this African Criminal Court or African criminal jurisdiction will be realized quite soon. I think that's a very positive development and it should not be seen as if it is in competition with the International Criminal Court. I think it goes hand in hand with a concerted effort to fill all the gaps at the international, regional and domestic level.

The pandemic exposed a lot of governance issues in the international system. If you compare the way that the United States under President Trump reacted to the World Health Organization's efforts to counter the pandemic and to cooperate, and to bring the international community together for domestic political reasons; the USA effectively counter-programmed the WHO. It exposed the fundamental flaw in the international system as we have it today and that is still at the mercy of the big powers. Until we have a drastic reform of the international justice system, especially the Security Council, we will never get away from this idea that the big powers have a system for their purposes, and then there's a system for the rest of us. Africa and the developing world, should simply take ownership of those organizations that it can influence for instance the International Criminal Court. The African bloc of States in the International Criminal Court is the biggest of all. They have direct influence over that institution. The developing world has a very strong voice in the WHO. In that sense, they can take ownership of these international bodies, and advance the progressive human rights-based agenda that can counter-balance the cynical power politics of the big powers.

What the long-term effect of COVID-19 will be on issues like the rule of law and efforts to counter impunity, I think it's too early to tell. If we are going to see a prolonged period of the pandemic not being solved, then it will have an impact on what we understand to be a functional criminal justice system. The future of international criminal justice, the rule of law and the fight against impunity, in my opinion, lies at the domestic and regional levels.

CONSTITUTIONALISM IN AFRICA IN 2020



There is a need to ensure that regardless of the circumstances, all extra powers that are given to government must go hand in hand with extra oversight measures and mechanisms to ensure that they don't abuse this. This is the time to prepare for the next pandemic. There is no room for complacency.



In so far as the political class in most countries in Africa are concerned, there are two things which have happened. First, many autocratic regimes have taken this opportunity to grab more power for themselves, to silence their critics and to undermine the rule of law; feeling secure in the knowledge that the world is too occupied with attempts to fend off the ravages caused by the virus, to take any notice. Secondly, most of the emergency funds that were set aside to buy Personal Protective Equipment to protect the most vulnerable members of society, especially Healthcare workers, were looted by the political class and in many cases, sub-standard equipment were bought. There are hundreds of ongoing investigations into how politicians and their cronies have exploited this opportunity to embezzle large sums of money at the expense of the poor, many of whom have died. Government-organized food parcels in many countries were stolen by politicians or distributed mainly to supporters of the government. Because of the hunger, hardship and in some instances, limited understanding by ordinary citizens of the nature and effect of the pandemic, many citizens did not always comply with the lockdown rules. Law enforcement officials were let loose on them.

Constitutional designers during the Post-1990 reforms tried to introduce measures that will on one hand facilitate the rapid, effective and efficient response to emergencies, and on the other hand, prevent the human rights abuses that were usually associated with such declarations of state of emergencies. The COVID-19 pandemic crisis has shown that these constitutional reforms did not go far enough to prevent the abuses which take place when states of emergency are declared. Instead of governments using laws on constitutional state of emergency, they introduced legislative state of disaster, which prevented Parliament and the Courts from exercising and playing the normal role of oversight. And as a result, they got away with a lot of abuses.

More needs to be done to actually reconfigure our constitutions to deal with such crises. There is urgent need to review what has happened, and make all positive changes permanent and to remove those measures that are no longer necessary to deal with the pandemic. Remove all the temptations for governments to take shortcuts. There is a need to ensure that regardless of the circumstances, all extra powers that are given to government must go hand in hand with extra oversight measures and mechanisms to ensure that they don't abuse this. This is the time to prepare for the next pandemic. There is no room for complacency.

PROFESSOR CHARLES FOMBAD

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Vice President, International Association of Constitutional Law.*

SOCIO-ECONOMIC RIGHTS IN AFRICA IN 2020



I would like to encourage our governments to look at how the resources are being used so that those resources can be directed more towards providing access to socio-economic rights. Access to these rights is key in the fight against COVID-19. It is key in promoting public health. It is key in protecting ourselves against future pandemics.



The outbreak of COVID-19 presented a threat to the right to life, which is the most basic of all rights. Different governments, undertook measures to try and combat the virus. Amongst the measures that I think were necessary were the lockdown measures. As a result of not being able to freely move around, individuals, for instance, could not access their livelihoods; in some cases, because they did not have the necessary conditions for them to comply with this stay-home-orders because some live from hand to mouth. Some did not even have a home to confine themselves to because they did not enjoy access to adequate housing. Some were brutally assaulted. Some were tortured.

Speaking generally across the Sub-Saharan region, we have the problem of lack of constitutionalism. A lot of our constitutions have domesticated an international law principle of necessity and proportionality. Some governments take advantage of crises to deepen authoritarianism as opposed to protecting life. I think the solution lies in doing two things, in my view. First and foremost, is to educate the public and sensitize them on their rights during a pandemic. There are rights that may be suspended, but certain rights cannot be suspended. Even where a person has failed to comply with the stay -home-orders, the punishment can never be inhumane and degrading treatment. The second thing for me is capacity building for the judiciary. It is possible that a number of our judicial officers are also yet to be exposed.

We are going to have a much bigger rule of law deficit Post-COVID-19. I would like to encourage our governments to look at how the resources are being used so that those resources can be directed more towards providing access to socio-economic rights. Access to these rights is key in the fight against COVID-19. It is key in promoting public health. It is key in protecting ourselves against future pandemics.

DR. JUSTICE MAVEDZENGE
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ALTERNATIVE DISPUTE RESOLUTION AND MEDIATION IN AFRICA IN 2020



Communities have always had their ways of resolving problems at the village level. Chiefs sometimes get involved or people just elect eminent "wazees". But this time, as from 20th of August 2020, the Chief Justice (of Kenya) launched the Alternative Justice System Policy, so that there's an umbrella where all these traditional justice systems can be practiced.

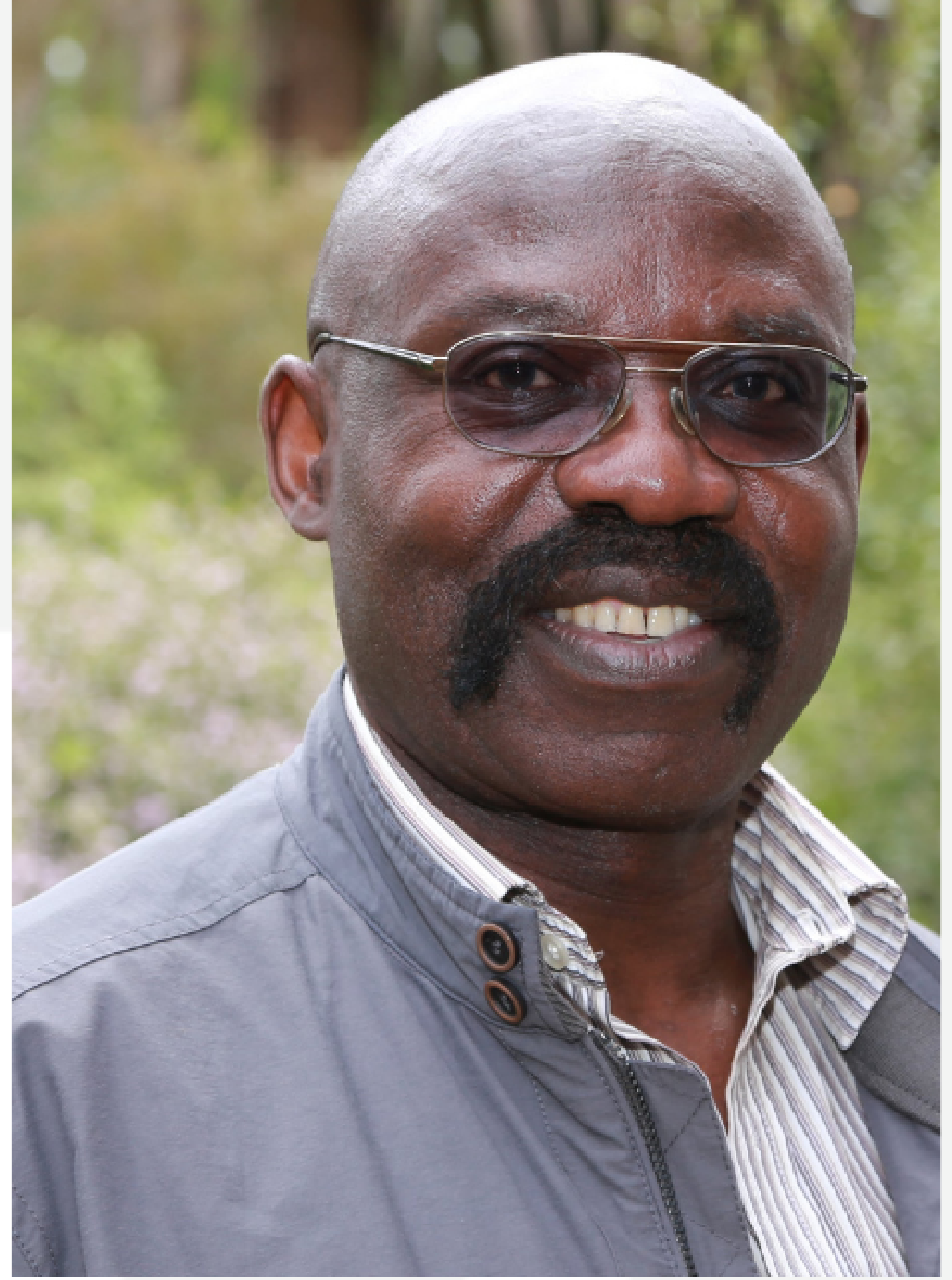


Alternative Dispute Resolution has a lot of space and a lot of scope in today's world especially during the COVID-19 pandemic. Every topic; commercial, family, employment - all these can be mediated. Mediation is a process which is confidential, fast, it costs parties less and gives them the opportunity to have a discussion. They are in charge of arriving at a settlement that they can live with. I've realized that most people, especially business people, want things that move fast. You might have been in the courts for five years, but most mediation matters, like commercial matters, take at least three to four hours.

The pandemic has increased opportunities for ADR, more so now, because it can be done virtually. Before going virtual, there were things happening and people didn't know where to go. So, that space was then filled a lot by ADR. The current Constitution, under Article 159(2)(c) embraces ADR. Certain sections of the Civil Procedure Code were amended to create a Mediation Accreditation Committee. Communities have always had their ways of resolving problems at the village level. Chiefs sometimes get involved or people just elect eminent *wazees*. But this time, as from 20th of August this year, the Chief Justice (of Kenya) launched the Alternative Justice System Policy, so that there's an umbrella where all these Traditional Justice Systems can be practiced, and that is promoted within the Constitution of Kenya.


African countries have to be prepared to invest in the rule of law.

LADY JUSTICE JOYCE ALUOCH
Former Vice President, International Criminal Court
Certified International Mediator



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