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MR. PRESIDENT!

Eric Theuri elected to succeed Nelson Havi as LSK President

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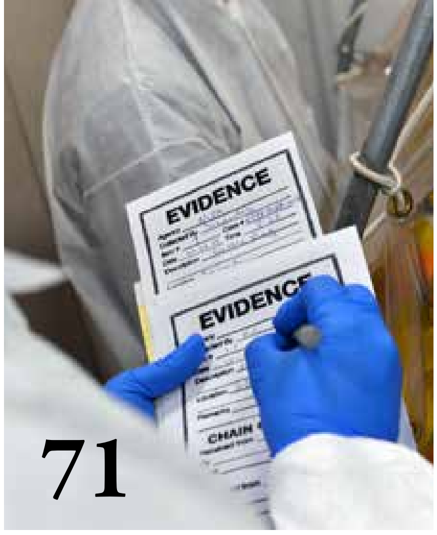

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OUR OPINION

Uninhibited, robust, and wide-open: a reminder to the Supreme Court of Kenya of the essence borne by freedom of expression

On 31st March 2022. the Supreme Court of Kenya delivered its judgement in Supreme Court Petition No. 12 of 2021(The Attorney General & 2 Others v David Ndii & 79 Others otherwise known as the BBI case. We will be making our opinion known on the decision of the case after reading it at a later date.

Our attention has been drawn to criticism made by the Supreme Court after the delivery of the judgment against advocates Mr. Ahmednassir Abdullahi, Senior Counsel, Mr. Nelson Havi and Miss Esther Ang'awa. The Supreme Court was angered by what it stated to be comments made on social media by the aforementioned counsels, comments the Court deemed cast aspersions on the Court and that the making of such comments amounted to unethical conduct and as such actionable by dint of section 61 of the Advocates Act, Chapter 16 of the Laws of Kenya. *(This section deals with Reports by Disciplinary Committee established under Section 57 of the Act that is vested with the authority to deal with complaints against advocates and action thereon)*. These comments are alleged to have been made invariably between 15th and 19th February 2022. What was said in the social media posts that aroused the ire of the Supreme Court? On March 22nd 2022, Mr. Ahmednassir Abdullahi, Senior Counsel stated as follows on his twitter handle @ahmednasirlaw:

"Is it OK for a judge when interpreting the constitution to consider as a factor his/her loyal to State House/ the office of the President as one of the interpretive techniques or considerations in constitutional interpretation in the Kenyan context? @ Kenyajudiciary @lawsocietykenya

Ahmednassir Abdullahi

This particular tweet by Mr. Ahmednassir Abdullahi, Senior Counsel was cited as the latest in the series of demeaning social media messages that are intended, in the Court's view to demean and slander the Court. It is used as a demonstration of what peeved the Supreme Court leading to its public chastisement of the three Advocates.

The Supreme Court of Kenya is constitutionally placed as the highest court in the land and as such, it is certainly aware of the responsibility it bears with regards to the Constitution and Human Rights, as a court that should nurture our rights-based constitution that embodies a moral vision of the Kenyan society, the inextricable endeavour being to give meaning to our constitutionalized moral values. It is against this background that we take particular exception to the thin skin approach adopted by the Court in its public upbraid of Mr. Ahmednassir Abdullahi, Mr. Nelson Havi and Ms. Esther Ang'awa and it is important that we at the Platform speak the truth to the Supreme Court as a holder of public power and that we shall and must do boldly and fearlessly.

The right to freedom of expression has ancient roots.2 Expression was important to the ideas of Aristotle, with the human considered as the zoon politicon or political animal who must express his/herself. Article 33 of the Constitution of Kenya guarantees freedom of expression, with the internal modifiers or qualifiers to that right being that the right does

Nelson Havi

Nelson Havi

not extend to propaganda for war, incitement to violence, hate speech or advocacy to hatred, which would suffice in instances of ethnic incitement, vilification of others or incitement to cause harm or any statement that is based on the grounds of discrimination specified or contemplated in article 27(4). Article 33 on the freedom of expression appears to be properly demarcated such as to leave no room for conjecture or supposition as to its scope. Let's start from an established position: the freedom of expression must be subject to a lesser degree of interference when it occurs in the context of public debates relating to public offices and public figures such as judicial officers. The African Court of Human and Peoples' Rights in the case of **Lohé Issa Konaté v. The Republic of Burkina Faso Application No. 004/2013** delivered on 5th December 2014, reinforced the principle that authorities should be slow to interfere with freedom of expression especially when the expression occurs in the public space as against public figures. It is a principle that has received judicial affirmation in many cases around the world including, but not limited to **New York Times Company v. Sullivan 376 U.S. 254 (1964)** (which espouses an actual malice test with regards to establishing culpability in defamation mounted by a public official). Freedom of speech is recognized as a crucial political principle in liberal societies such as Kenya.

The rationale for freedom of expression vary. Freedom of

expression is extoled for its argued ability as a vector for individual autonomy and equally, for its capacity to enhance democracy and societal interests. Essentially, freedom of expression is argued to be means for the advancement of individual autonomy, the advancement of knowledge/ discovery of truth; and equally important, as means for effective participation in democratic society. Justice Yvonne Mokgoro of the South African Constitutional Court in her separate opinion in the case of **Case v. Minister of Safety and Security** 1996 (3) SA 617 (CC) explained the rationale for freedom of expression in the following manner: *"Freedom of expression is a sine qua non for every person's right to realize her or his full potential as a human being, free of the imposition of heteronomous power. Viewed in that light, the right to receive others' expressions has more than mere instrumental utility, as a predicate for the addressee's meaningful exercise of her or his own rights of free expression. It is also foundational to each individual's empowerment to autonomous self-development"*

Freedom of expression must, additionally be viewed from the prism of being ensconced in a Bill of Rights, constitutional provisions that are part of a web of mutually supporting rights aimed at promoting democracy, human dignity and social transformation. It is therefore puzzling and disturbing for the Supreme Court of Kenya to have gone against the grain of the doctrinal meanings and importance attached to freedom of expression as a right in the Constitution. The assumption we make is that the Supreme Court was relying on the common law rule of sub judice when it publicly berated social media commentary, sub judice as a worn out principle when employed in the context of public discussion, is rationalized on the premises that it is intended to prohibit public discussion of matters under judicial consideration. Which begs the question; is there any justification for stopping any public discussion of a matter before any court by members of the public especially in light of the normative guarantees of the Bill of Rights? What prejudice would be suffered by any court if members of the public discuss generally its conduct and the manner in which it conducts its business? Indeed, public discussion of public offices and the conduct of a public office is perfectly in order under the Kenyan Constitution 2010, which has enshrined transparency and accountability as a foundational principle, an envisaged moral and legal bedrock of the Kenyan State. Discourse about the Supreme Court certainly does not fit within the parameters of prohibition, the internal qualifiers to the freedom of expression at article 33, not even by the widest of shots. Article 33 of the Constitution communicates a powerful and unambiguous message, that it is broad enough to capture virtually any human activity which might be construed as expression/ speech and the only exceptions to the freedom are those enumerated at article 33(2) and 33(3). Criticism, mockery and certainly annoying public officers is protected under the Constitution.

To the Supreme Court, a reminder is apt. Free speech is recognized equally as a Human Right and particularly under Article 19 of the *Universal Declaration of Human Rights* (Universal Declaration), adopted by the United Nations General Assembly in 1948 that, in very broad terms, acknowledges that freedom of expression is a basic human right:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers."

The Supreme Court certainly should be aware that the normative status of Freedom of expression qua constitutional right and/ or human right and that the accorded status signifies the fact that it cannot be abridged by judicial fiat ex cathedra. The Constitution of the State of California further provides an important reminder with regards to this particularly valuable freedom; *'Every person may freely speak, write and publish his or her sentiments on all subjects, (of course) being responsible for the abuse of this right.'*

To public officers, judges included whose anger may be piqued by caustic remarks by the public and certainly by commentators in the public sphere, ours is to remind you that that is the price to pay while serving in the market place of ideas. Be slow to wield that sledge hammer that comes to you by virtue of your offices as this may be construed as an attempt to muzzle free expression. Commentary on anything which might touch on a public official's fitness for office is relevant and should not be stifled under the menace of sanction. After all, Kenya is a liberal democratic society. The Supreme Court of all institutions bears the responsibility to see it remain as such. Justice Brennan writing for a unanimous Court in the case of New York v Sullivan bears some choice, sagely words, emphasizing a profound doctrinal commitment; *'The principle is that debate on public issues should be uninhibited, robust, and wide-open' , that this 'may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials'.*

On the eve of his imprisonment in China, the Nobel laureate, Liu Xiaobo wrote that *'Freedom of expression is the basis of human rights, the source of humanity and the mother of truth. To block freedom of speech is to trample on human rights, to strangle humanity and to suppress truth.'* Freedom of expression must and shall be protected for all. We may not like what is said but we shall certainly defend their rights to say it…... Voltaire's remark we all remember, 'Sir, I do not share your views but I would risk my life for your right to express them.' Public discourse must remain uninhibited, robust, and wide-open.

The Supreme Court outlaws Building Bridges Initiative

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court

Orders: The Court partly allowed the consolidated appeals

Background:
Following the Constitution of Kenya (Amendment) Bill, 2020 (***the Amendment Bill***), which was a proposal to amend the Constitution, 2010, 8 petitions were filed in the High Court challenging the process that resulted in the Amendment Bill and its contents on the ground that they were not in accordance with the Constitution. The High Court in a Judgment dated 13th May, 2021 allowed the petitions in part and issued a number of Orders. Thereafter, appeals were filed in the Court of Appeal and by a judgment dated 20th August, 2021 the Court of Appeal set aside some of the orders of the High Court.

Aggrieved with the Court of Appeal's decision, the Attorney General, Independent Electoral Boundaries Commission and Mr. Morara Omoke filed appeals in the Supreme Court which were eventually consolidated. The consolidated appeals were basically asking the Supreme Court to interpret the provisions of Chapter Sixteen (Articles 255- 257) of the Constitution which provides for how the Constitution can be amended and determine whether the Court of Appeal's judgment was sound in law.

Having appreciated the consolidated appeals, the Supreme Court framed seven issues as arising for its consideration and

has partly allowed the appeals in the following terms:

1.
(a) The basic structure doctrine is not applicable in Kenya.
(b) In order to amend the Constitution of Kenya 2010, the four sequential steps are not necessary as pronounced by the two Superior courts below. *(Ibrahim, SCJ dissenting).*

Reasons for the 1st finding:
The Majority held that no gaps had been identified with regard to Chapter Sixteen of the Constitution, which deals with amendments to justify the application of the basic structure doctrine. Further, the Constitution is self-executing in dealing with any threat of any possibility of abusive amendments as witnessed in the pre- 2010 era. In addition, the Court held that the basic structure doctrine does not form part of the general rules of international law which are applicable in Kenya under Article 2(5) of the Constitution.

Dissenting, *Ibrahim, SCJ* agreed with the High Court and Majority of the Court of Appeal that the basic structure doctrine is applicable in Kenya. He agreed with the High Court that fundamental features of the Constitution, which are to be identified on a case by case basis by the courts, could only be amended by the People in exercise of their primary constituent power. He further found that genuine exercise of primary constituent power can be identified through the four- sequential steps prescribed by the High Court.

2.
(a) The President cannot initiate Constitutional amendments/ changes through the popular initiative under Article 257 of the Constitution. *(Njoki Ndungu, SCJ dissenting).*
(b) The President initiated the amendment process in issue *(Njoki Ndungu & Lenaola SCJJ dissenting).*
(c) Consequently, under Article 257 of the Constitution, the Constitution Amendment Bill of 2020 is unconstitutional *(Njoki Ndungu & Lenaola SCJJ dissenting).*

Reasons for the 2nd finding:
The Majority held that Article 257 in providing for the popular initiative amendment route was conceived and designed to serve as a citizen-driven process of amending the Constitution to the exclusion of the President. Secondly, the process of amending the Constitution through the Constitution of Kenya (Amendment) Bill, 2020 was initiated by the President rendering the subject amendment process unconstitutional as it was contrary to the provisions of Article 257 of the Constitution.

Dissenting, *Njoki Ndungu,* SCJ found that the President can initiate/move constitutional changes while exercising his constitutional functions under Articles 132 and 141 of the Constitution as well as under the power delegated to him as a democratically elected representative of the people under Article 1 of the Constitution. She equally found that State Organs may also move constitutional changes in exercise of the delegated authority given to them under Article 1 of the Constitution. In addition, she held that a popular initiative is based on several steps laid out in Article 257, the success of which depends on the promoters ability to attain numerical thresholds at each stage.

Lenaola, SCJ whilst agreeing with the Majority that a popular initiative is a preserve of citizens to the exclusion of the President, held that the President did not initiate or promote the Constitution of Kenya (Amendment) Bill, 2020. In his view, the initiation of the subject Amendment Bill was done by the BBI National Secretariat.

3. The Second Schedule of the Constitution of Kenya (Amendment) Bill, 2020 is unconstitutional for being in breach of Article 10 (2) of the Constitution of Kenya 2010 there having been no public participation on the Schedule. (Unanimous)

Reason for the 3rd finding:
The Court found that the Second Schedule of the Constitution of Kenya (Amendment) Bill, 2020, which apportioned and allocated the proposed additional seventy (70) constituencies, was a late addition to the subject amendment process and was not subjected to public participation as required by the Constitution. In concurring, *Njoki Ndungu, SCJ* held that the Second Schedule of the Constitution (Amendment) Bill had not been enacted into law and as such, a constitutional challenge on it is not ripe. However, in her view there are circumstances in which there is an exception to the doctrine of ripeness, and in this case it did apply hence she found that if the Amendment Bill was passed into law, the Second Schedule would be unconstitutional, as it introduced amendments to substantive Articles of the Constitution without an attendant proposal to amend those specific Articles.

4. Civil proceedings cannot be instituted in any court against the President or the person performing the functions of the office of the President during their tenure of office in respect of anything done or not done under the Constitution of Kenya 2010. (Unanimous)

Reasons for the 4th finding:
The Court found that the intention of Article 143(2), which provides immunity to the President, is to immunize/protect the President from civil proceedings during his tenure in office for acts or omissions connected with the office and functions of the office of the President. The two Superior courts below erred by attempting to amend the provisions of the Constitution through a Judgement.

5.
(a) There was no obligation under Article 10 and 257 (4) of the Constitution, on IEBC to ensure that the promoters of the Constitution of Kenya (Amendment)

Bill, 2020 complied with the requirements for public participation. (Unanimous)
(b) There was public participation with respect to the Constitution of Kenya (Amendment) Bill, 2020 *(Mwilu; DCJ & VP, Ibrahim and Wanjala, SCJJ dissenting).*

Reasons for the 5th finding:
The Court found that there is no legal provision placing such an obligation on IEBC. While on the second part, the majority of the Court has held that there was uncontroverted evidence of public participation with respect to the Constitution of Kenya (Amendment) Bill, 2020 save for the Second Schedule. While *Ibrahim, SCJ* agreed that there was public participation in regard Amendment Bill, he found that the same was not reasonable or meaningful.

Dissenting, *Mwilu, DCJ & VP*, and *Wanjala, SCJJ* found that there was no evidence of public participation with respect to the subject Amendment Bill.

6. The IEBC had the requisite composition and quorum to undertake the verification process under Article 257(4). *(Ibrahim, SCJ dissenting)*

Reasons for the 6th finding:
The Majority held that IEBC Act ought to be read in conformity with Article 250(1) of the Constitution which envisages that it is properly constituted with a minimum of three Commissioners. Although the paragraph 5 of the Second Schedule of the IEBC Act fixed the quorum at five Commissioners, this cannot override the Constitution. Moreover, there was a Judgement of the High court in the ***Isaiah Biwott Kangowny v. Independent Electoral Boundaries Commission & Attorney General***, HC Constitutional Petition No. 212 of 2018; [2018] ***(Isaiah Biwott Case)*** which was in rem. It was held that the IEBC was quorate and therefore the Commission cannot be faulted for following the said Decision.

Dissenting, *Ibrahim, SCJ* held the view that the IEBC Act was enacted to give effect to the Constitution hence courts ought to give effect to statutory provisions unless the same is declared unconstitutional. He therefore, found IEBC was not properly composed or quorate at the time of verification of signatures. He however held that since IEBC was relying on the ***Isaiah Biwott Case***, which remained unchallenged, meant that the actions it took in the intervening period were lawful.

7. The question raised regarding the interpretation of Article 257(10) of the Constitution on whether or not it entails/ requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions was not ripe for determination *(Njoki Ndungu, SCJ concurring).*

Reasons for the 7th finding:
The Majority were of the view that IEBC had not had an opportunity to address its mind and make a determination on whether Article 257(10) of the Constitution requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions. In her concurring opinion, *Njoki Ndungu, SCJ* held that although the question was premature and not ripe, the exception to the doctrine of ripeness applied, and therefore IEBC may only present one question at Referendum: Yes or No to the draft Bill; further Section 49 of the Elections Act is inconsistent with the provisions of the Constitution.

Consequently, the consolidated appeal is determined as follows;

(1) **The appeal is allowed on the issue No. 1.** The basic structure doctrine is not applicable in Kenya;
(2) **The appeal is allowed on issue No 4.** Civil proceedings cannot be instituted in any court against the President or the person performing the functions of the office of the President, during their tenure of office in respect of anything done or not done under the Constitution of Kenya 2010;
(3) **The appeal is allowed on issue No. 5.** There was no obligation under Article 10 and 257 (4) of the Constitution, on IEBC to ensure that the promoters of the Constitution of Kenya (Amendment) Bill, 2020 complied with the requirements for public participation. Further there was public participation with respect to the Constitution of Kenya (Amendment) Bill, 2020;
(4) **The appeal is allowed on issue No. 6.** IEBC had the requisite composition and quorum to undertake the verification process under Article 257(4);
(5) **The appeal is allowed on issue No. 7.** The question raised regarding the interpretation of Article 257 (10) of the Constitution, on whether or not it entails/ requires that all specific proposed amendments to the Constitution should be submitted as separate and distinct referendum questions was not ripe for determination;
(6) **The appeal is disallowed on issue No. 2.** The President cannot initiate Constitutional amendments/changes through the popular initiative under Article 257 of the Constitution. The President initiated the amendment process in issue and consequently, under Article 257 of the Constitution, the Constitution Amendment Bill of 2020 is unconstitutional;
(7) **The appeal is disallowed on issue No 3.** The Second Schedule of the Constitution of Kenya (Amendment) Bill, 2020 is unconstitutional for being in breach of Articles 10 (2) and 89 of the Constitution of Kenya 2010;
(8) **Each Party shall bear their own costs.**

Dated at Nairobi this 31st Day of March, 2022.

FRESH TRANSITION AT THE LSK

Platform Monthly Interview with the LSK President, Mr. Eric Theuri

By Nyaga Dominic

Every two years, to secure their welfare under a steady leadership, Kenyan Advocates turn into the preeminent concerns as to whether the candidates seeking the Law society presidential position are, firstly, regarded with trust and confidence based on experience in the practice of law, and secondly, what role they have played in promoting institutional legitimacy in the previously held leadership positions.

With respect to the first concern, honest and upright lawyers are likely to be more persuaded by candidates who possess the *first among equals* status: vast experience in the practice of law and deep intellectual rigor evident in their active involvement in ground-breaking jurisprudential questions seeking to maintain and advance constitutionalism, justice and the rule of law.

On the other hand, a desirable candidate must draw attention to a previous track record of strong moral compass and good governance: integrity, transparency and accountability. They should exhibit qualities of any true lawyer: pacifist over a mere provoker.

Interestingly, that an Advocate is eligible for election as a president of the LSK by possessing similar qualification requirements as Judge of the Supreme Court of Kenya in accordance with Section 18 of the LSK Act, 2014 read together with Article 166 (3) of the Constitution of Kenya, 2010 implies the high premium that is placed on the President elect to serve members diligently and impartially. The ever-present expectation is that he or she would ultimately improve conditions of practice as well as welfare of the legal professionals. Such is the standard that Mr. Eric

Theuri shall be held to during his 2022-2024 tenure following his most recent ascendancy to the office of LSK President.

Judging by the early lead during the elections and following the positive reactions that greeted his successful election, the majority vote in his favour against the four other worthy contestants is the right one. Mr. Theuri was well prepared for the outcome as evident in the bristling confidence that he exuded prior to the elections having cemented an impressive legacy as the former Chairperson of the LSK Nairobi branch.

Now, with the oath of office taken and instruments of power and authority under his custody, Mr. Theuri seeks to build an enduring legacy through distinction and courage in performing his statutory obligation of advising and assisting Advocates, the government, and the public at large in the administration of justice. The platform had an exclusive interview to discuss his strategic plan for service delivery to the Advocates.

Following the elections on 10 March 2022 and having most recently been sworn into the office of the President of Law Society of Kenya (LSK), how is your public service experience as a council member and Chairman of LSK Nairobi branch going to influence the undertaking of your current mandate towards effective governance of the society?
There is no qualification in terms of technical competence for one to become the LSK President. You are eligible for as long as you are an Advocate of the High Court, in good standing and have met the 15-year experience statutory requirement as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field. Therefore, anyone with that minimum requirement is qualified to run the affairs of the society once elected.

However, the reality is that beyond the qualification, one needs certain competencies acquired and developed over time which culminate into becoming a great lawyer who is sufficiently exposed to diverse sectors of the law. Excellent grasp of the law is particularly important to the LSK presidential role owing to the high demand for legal opinion and call for commentary on cross-cutting legal issues which consequently influence other views. The duty to speak on behalf of all lawyers with a demonstrable understanding of the law on diverse topical issues assures lawyers of your ability to execute the mandate once elected to the office. Besides the requirement of being a good lawyer, other aspects include the management of personnel, money, ability to map out the challenges of the law society and provide solutions all of which demands crafting and implementing a strategic plan. The ability to do all these demands the ability to lead and especially an opportunity to participate in committees of the society that are critical to the day to day running of the LSK. This gives you the inner view as to how the society operates and upon getting leadership, you can understand the management aspect for successful fulfilment of your presidential mandate. My prior service as a council member and Chairman of LSK contributed to both: shaping me into a better lawyer and ability to understand what it takes to successfully deliver services for the general membership.

One of the most glorified and publicly favored successes of the previous Mr. Nelson Havi led LSK regime lies in the aggressiveness with which the leadership took public interest matters. Yet, there are several leadership challenges that were witnessed including the friction between the council and the secretariat, all which lie in the past now. What lessons are you going to borrow from the immediate LSK regime, and how do you intend to apply them to leverage your priority areas during the two-year tenure?
We shall deal with the in-tray as we find it and implement our own vision in terms of how we think the society is meant to be run. It is important to note from the outset that the council acts in perpetuity and having taken over, we proceed from where Mr. Havi had left.

There was a resolution that had been passed earlier on as well as various motions that have been moved by the membership for the review of the LSK Act. I intend to see these to their logical conclusion because there are some issues we need to fix, especially regarding the society leadership and composition of council as well as how voting is carried out. Additionally, there was a committee that had been set up for purposes of coming up with the road map for constructions in the LSK owned Gitanga Road plot. It is also a plan I intend to investigate much more keenly to determine how we can bring it to fruition. Further, the ongoing forensic audit was not finalized by the time we got into council, and we are hoping that we can finalise on it during our office term.

Is the forensic audit, that you intend to see effectively carried out within your first 100 days in office, likely to unearth the basis of the embezzlement and fraud allegations by the previous LSK administrations? What are the remedial steps that the council shall take upon the forensic audit?
The forensic audit report shall have its recommendations based on the findings which shall be tabled to the membership for adoption after which it shall be our duty to ensure we implement the resolutions of the report adopted by the members. We shall then endeavour to thereby take the necessary accountability steps to the satisfaction of the membership.

What will be the distinguishing feature between the LSK under your leadership compared to the previous regimes we have had in Kenya even before and after independence. Do you identify with the leadership or legacy of any of your predecessors since the days of the first LSK President in 1949, Humphrey Slade, to date?
The Presidents of the law society have operated at different times with various challenges which reflected how they managed themselves as a council. For instance, Presidents who served during the agitation for multi-party democracy

were responding against the one-party suppressive regime. Therefore, their leadership style was different from those who came into office upon promulgation of the 2010 constitution who were concerned with its implementation given that the old regime had fallen and were keen on entrenching the constitutional gains.

In a way, and without saying that others may not have been impressive, what stands out for all those Presidents whose legacy has been cemented have been those who stood firm against repression, firm in the advancement of rule of law, constitutionalism, independence of the judiciary and the bar as well as efficient administration of justice.

I served in 2014-2016 with Mr. Eric Mutua and I loved his style of leadership in terms of boardroom management, striving to acquire team consensus and his performance in checking excesses of the government on questions of rule of law and administration of justice. On those accounts, he did extremely well even though his regime suffered from the agitation of the membership of international arbitration centre. The lesson I took from that was that if the President wishes to achieve a certain vision, notwithstanding how well intentioned they are, they avail to the the members as much information as possible to allow them buy into the idea, especially in case where you wish them to commit to an intensive capital-related project. Even if you are trying to do fulfil something for the membership, the lack of adequate and meaningful consultation will lead to the failure of your vision and objectives.

One of the functions of the LSK by virtue of Section 4 (e) of the Law Society of Kenya Act, 2014 is *to set, maintain and continuously improve the standards of learning, professional competence and professional conduct for the provision of legal services in Kenya.* How do you intend to address the increasing reproach against modern day legal training which includes concerns about falling standards in the provision of quality legal education and services to trainees?

There is a general concern across the divide and especially by the key stakeholders on legal education and legal work regarding decline of legal professionalism and ethics as is evident in several reports. As the LSK, what is important is to take a much active role in ensuring these recommendations are being implemented by addressing the challenges that may have led or are contributing to the declining legal standards.

Young lawyers in Kenya have, on innumerable number of occasions, cited immediate and pressing issues concerning negligible pay and poor working conditions among others. What are the structural steps do you plan to adopt in an attempt to rebrand the LSK to one that creates a conducive practice environment for the young bar while maintaining the pristine traditions of law to which many senior lawyers subscribe?

It is a very valid and genuine concern but the answer to it is also extremely complicated and difficult to implement. We must remember that the relationship between an Advocate and his associate is essentially an employer-employee relationship falling under the presumption that the parties have negotiated at arm's length. The LSK is therefore not a regulator of the employment but of the profession concerned with the ethics and standards of practice. Apparently, any senior lawyer who is responsible for an unconducive environment is engaging in unethical conduct which falls within the ambit of the office. For LSK, it becomes very difficult to get into the realm of the lawyer's office.

On poor pay for young lawyers, what would be practical is to have a discussion on the possibility of having a guide on the minimum range of remuneration for lawyers, considering the high living standards in various practice areas. There are many factors that come into play including housing and vicinity of working place among other complexities.

The other thing we can easily do is to have an inspectorate that deals with quacks who mushroom all over. I foresee a difficulty that lies in having the inspectorate walking into a lawyer's office to inspect and interrogate the associate on their employment relation which makes it very unpopular. This makes us to appreciate how much complex of a problem it is to deal with.

It is important for LSK to be extremely involved in the matters relating to welfare and Advocate's conditions of welfare. The smoother it is to practice and determine matters, the easier it is to make money. Our focus is to reduce the efficiencies that are present in the system to address the practice environment by protecting the traditional areas of practice even as we expand and equip young Advocates

to be much more relevant and competitive in the regional and international market. Whether through statutory interventions, we can charge the young Advocates less while waiting for them to make a name and have a grounding in the legal market. Since most of the time the various charges are paid by the employers, it would be easier for the law firms to realise the benefit perhaps leading to an increase in remuneration of the young advocates.

Finally, we need to raise awareness on how toxic work environment contributes to declining standards of the legal profession and perhaps the other way is to shout and celebrate the employers who give their employees the best returns possible.

In your view, is the Kenyan legal profession keeping pace with contemporary societal needs and global standards? If yes, how, if no, what is the missing link and how are you going to bridge the gap in your presidential capacity?
A lot of firms are getting into global strategic business partnerships with other international law firms with a vision to expose different kinds of challenges. For instance, getting into a partnership with a UK based law firm with over 1, 000 partners, there is a gap for growth especially for the local legal industry. The biggest law firm here is *Anjarwalla and Khanna* but a comparison with average medium law firms in other jurisdictions with over 1000 partners signals that we are still small. However, when it comes to expertise there are areas that are coming up such as international commercial arbitration in which lawyers in this country pride themselves in, rightly so, being experts. That shows that we are on the rights track, but we also need to build our capacity and the skill for our lawyers to be globally competitive.

As Kenya goes to the ballot for General Elections on 9 August this year, how do you intend to strike a balance in the discharge of your duties to ensure respect and promotion of the rule of law and constitutionalism without being part of the governments or political actor's machinations to maintain or acquire power?
The LSK is at all times faced with that question of the right balance. For me, it is important to always tilt heavily on protecting the public interest. The reality of it is that there can never be equality of all bodies such as the LSK and the ministry of interior affairs in terms of state resources and access to information. The default should be that LSK should serve the public interest but where desirable, there should be an engagement on things like elections which are multifaceted in terms of the players who need to have a discussion to ensure that the wheels grind. Notably, the institutions that we need to work more with are the independent constitutional commissions so that we can support them to discharge their mandate, and therefore improve on aspects of holding the government to account for its actions or inactions as opposed to a more aggressive engagement with the government itself.

Finally, how will you ensure a lasting impact in your role to advance constitutionalism, promote access to justice and restore hope for the rule of law from a point of view of the LSK members?

Having put in motion strategies to make the Secretariat more responsive to the concerns of the Advocates with regards to matters of welfare and practice, I see the defining feature of my regime as one that would be remembered for defense of the rule of law and upholding the administration of justice. I intend to also leave branches that are stronger and more empowered to deliver on their mandate. During our term in office, we will create a society that is much more visible in terms of the quality of interactions it will be having with the various arms and other stakeholders LSK will relate with.

If we can be able to achieve these, we would leave an enduring legacy for having set the secretariat on the path to diversify its income generation streams. This way, those that will come in future will find a society that is rich and able to effectively discharge its mandate for the good of the entire LSK membership.

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The proverbial faith without action that is prosecution of conflict related sexual violence: Launch of the Handbook on the prosecution of conflict related sexual violence at Strathmore University, Nairobi, Kenya

By Annette Kanyugo

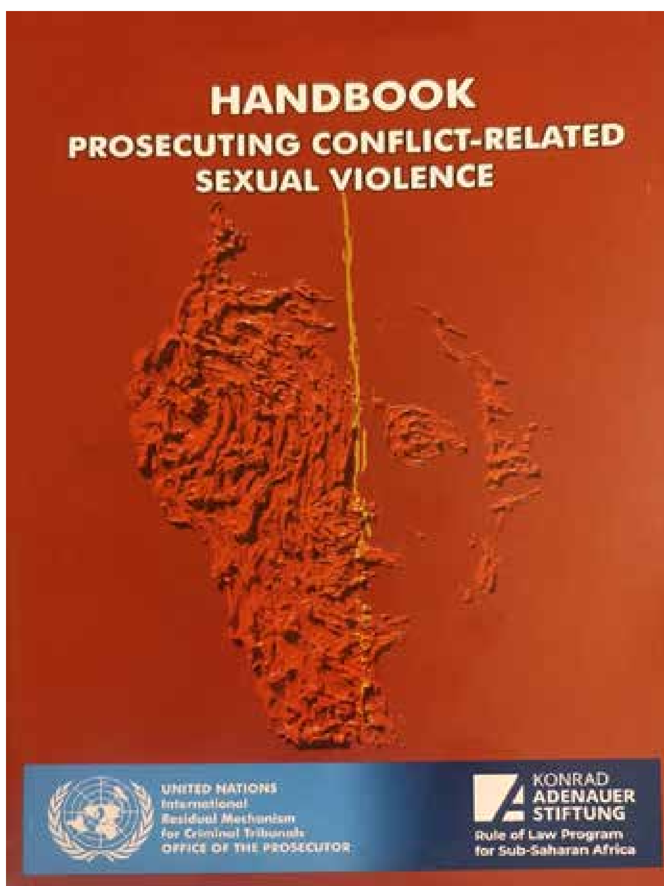
Retired Lady Justice Joyce Aluoch

The International Criminal Court (ICC) Appeals Chamber in the *Ntaganda* judgement unequivocally expressed that *there is never a justification to engage in sexual violence against any person.* Unlike any other international crime, such as killing of soldiers hors de combat, there is not a single imaginable explanation as to the infliction of any sexual related violence on any human being. Yet it remains one of the most challenging crimes to prosecute, both domestically and internationally. Encumbrances faced at the *ad hoc* Tribunal for the former Yugoslavia and Rwanda inspired their successor, the International Residual Mechanism for Criminal Tribunals (hereinafter 'the IRCMT'), headed by the Chief Prosecutor, Baron (Dr.) Serge Brammertz, to come up with a phenomenal handbook, which enunciates these challenges, proposes solutions to use as training manual for prosecutors from Kenya, Uganda, and Rwanda, and ultimately prosecutors from all over the globe.

Prosecutors from the IRMCT, financed and supported by the Konrad Adenauer Stiftung (KAS) Rule of Law Foundation, conducted a 3-day training programme for prosecutors at Strathmore Law School, Nairobi, Kenya, a training which culminated in the launch of the handbook at the Strathmore Business School on the 16th of March 2022. The event was graced by dignitaries from various institutions: Stefanie Rothenberger, director of the Konrad Adenauer Stiftung Foundation, Dr. Brammertz, Ms. Laurel Baig and Ms. Thembile Segoete, all prosecutors at the IRMCT. Other key figureheads at the launch included Ms. Jacinta Nyamosi, the Acting Deputy Director in the Department of Offences Against the Person, representing Mr. Noordin Haji, the Director of Public Prosecutions, Kenya, Hon. Gitobu Imanyara, Founder and the Publisher of The Platform for Law, Justice and Society, and deans from various law faculties all over Kenya. The Keynote address was given by Hon. Lady Justice Joyce Aluoch (Rtd.) – First and former Vice President of the International Criminal Court.

'A case is only as strong as it's prosecutor' - this erudite statement was made by Lady Justice Aluoch in her keynote address. Thes remark carries portentous weight coming from a renowned judge who spent nearly 44 years, surrounded by prosecutors who made submissions before her and other interactions beyond the court. The supposition is extremely well-founded, seeing as prosecutors are the gatekeepers of justice. Lady Justice expressed the dire need of having properly trained prosecutors, especially in the notorious task that is the prosecution of conflict-related sexual violence. The handbook is therefore aimed at addressing these challenges by educating and training prosecutors to prosecute conflict-related sexual violence cases at the national level primarily, as well as the international level. The aim of the training workshops is to create an effective and complementary system of international criminal justice, seeking to end the impunity for one of the most egregious violations of human rights, especially owing, partly, to effective prosecutorial insufficiency.

The one hundred- and eleven-page handbook has seven detailed chapters addressing the processes of investigating, classifying, charging and conflict-related sexual violence.



After a brief introduction, chapter two educates prosecutors on when sexual violence constitutes an international crime, which necessitates the proving of key elements of the crime, the sexual violence itself as well as the contextual elements that qualify an act as a war crime, crime against humanity or genocide, clearly setting out the parameters necessary to qualify an act as either one of the three recognized international crimes. It proceeds onto a brief but extremely comprehensive discussion of elements of the various forms of sexual violence, elements that need to be proved, the challenges that occur when proving such crimes. Chapter four proceeds onto the modes of liability, answering the most pertinent question: 'Who is held responsible and how are they to be held responsible?'

It is undebatable that international criminal law is geared toward holding senior military, governmental and civilian leaders accountable for crimes that were physically committed by forces under their control. This is no foreign nuance, especially to Kenyan understanding, taking the situation in Kenya stemming from the 2008 post-election violence at the ICC, where top government leaders were the focus when it came to liability. This chapter focuses on showing how to prove liability by satisfying various elements; individual criminal responsibility, command, or superior responsibility as it addresses the differences between the ICC and Customary International Law requirements to prove responsibility, i.e., under customary international law, one need not prove a causal link for command or superior responsibility, while the ICC applies different standards for proof of the same.

It would be superfluous to attempt to summarize the whole book in this brief article, but it would also be an extreme disservice not to address one of the key points addressed by the book and highlighted in the keynote speech, concerning the stigma surrounding sexual violence of any kind. Needless to say, sexual violence is one of the most, if not the most stigmatising crimes to endure, from survivors being doubted, to being blamed – and as such, it is imperative that prosecutors be appraised on how to handle survivors and witnesses in a manner that does not propagate this stigma. Lady Justice Aluoch brought up an extremely obvious yet underlooked aspect of prosecuting conflict-related sexual violence: the mental turmoil and anguish associated with living and re-living these ordeals in court is unimaginable. It would therefore be prudent to have witnesses and survivors appear in courts with mental health experts; counsellors and psychiatrists alike, making one of their most egregious moments a bit simpler.

Aside from discussing the processes involved in prosecution of conflict-related sexual violence crimes, the handbook addresses common assumptions that could lead to prosecutorial errors, and subsequently prove detrimental to cases. One such demystification is the definition of genocide as mass killings that subconsciously leave out any possibility of sexual violence crimes, or rape as genocide. This is remarkably different from the ICC's Elements of Crimes in which Article 6's definition of genocide encompasses any conduct that takes place in the context of a manifest pattern of similar conduct directed against a group and could lead to destruction of any such group. The resource is peppered with multiple clarifications, distinctions and definitions that are calculated towards, education of prosecutors and any interested party at large, ensuring proper prosecution of conflict-related sexual violence cases, ensuring that victims, survivors, and victim witnesses get the justice they rightfully deserve.

Finally, one of the most outstanding features of the handbook is its presentation. It is one thing to have hundreds of pages of useful material and it is another thing to have the readers interact with it. The legal profession is loaded with myriads of articles that could prove quite galling to read. The handbook takes a uniquely interesting approaching: the design is extremely engaging with case notes, spread out through the book, carefully utilized graphics, that break the usual monotony of bulky material on the subject of law. The handbook will undoubtedly prove to be an extremely useful resource for any prosecutorial team around the world. The Director of Public Prosecutions, in his introductory remarks as delivered by Ms. Nyamosi, expressed the same remark, promising that the training proffered to the prosecutors. The handbook shall be heavily utilised to promote the prosecution of conflict-related sexual violence cases within and beyond Kenya.

The basic structure doctrine in Kenya and the case of limiting executive engineered unconstitutional constitutional amendments

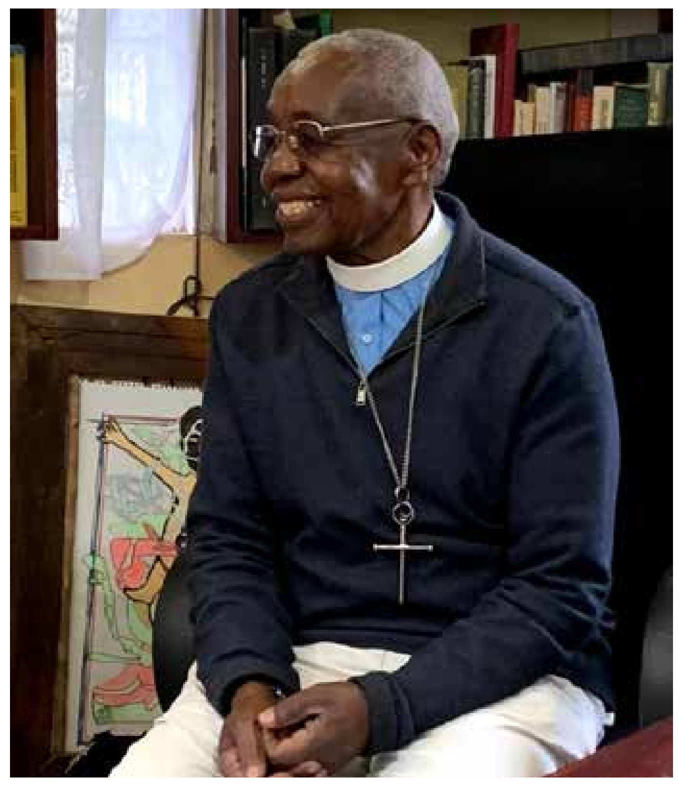
By Mukuha Fiona Waithira

Introduction

In 2010, there was the promulgation of then a new constitution[1] that built upon various principles such as limitation of presidential power through effective checks and balances and the separation of powers.[2] It was established that the Constitution of Kenya is the supreme law of the land and binds all persons and all State organs at both levels of government.[3] It is not to be interpreted as an act of parliament but to be followed in a manner that embodies its values and principles and brings out the purpose as to which it was framed.[4]

In recent times, there has been a referral to the element of the basic structure doctrine found in the new constitution following the Building Bridges Initiative (hereafter referred to as BBI), that the President of Kenya initiated, even following the contestation at the court, as an amendment bill. It is described as an implied constitutional limitation that does not permit the changing of the constitution in a way that affects its framework and its identity.[5]

The unfolding of the BBI opened up the legal-judicial floor to many questions about the basic structure doctrine. Chiefly: as to whether it has always been a part of the Kenyan Constitution to which the High court and the Court of appeal established that it does[6], and whether it promotes constitutionalism? Does it defeat democracy as a national value and principle of governance? In which its amendment should be followed under articles 256 and 257 on matters concerning national values and principles.[7]



Timothy Njoya

This essay is of the opinion that the basic structure doctrine was present in Kenya before and is as a result of the BBI amendment bill.[8] This is following the infamous case of *Timothy Njoya and 6 others v Attorney General,*[9] and the Wako draft that came after on aspects relating to democracy and constituent power. This essay seeks to show that the basic structure doctrine has been present and applied by the Kenyan courts to promote constitutionalism through protecting its features in cases where unlimited or unregulated power may be exercised wrongfully by

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[1]Kenya President ratifies new constitution', BBC News Africa, 27 August 2010.
[2]Greste P,'Kenya's new constitution sparks hope of rebirth' *BBC East Africa Correspondent*, 2010, --- < https://www.bbc.com/news/world-africa-11103008#:~:text=Kenya%27s%20new%20constitution%20sparks%20hopes%20of%20rebirth > on 27 August 2010.
[3]Article 2(1), *Constitution of Kenya* (2010).
[4]*Timothy Njoya and 6 others v Attorney General* (2004) eKLR.
[5]Roznai Y, 'The basic structure doctrine arrives in Kenya' Verfassungblog on matters constitutional,2021, --- < https://verfassungsblog.de/the-basic-structure-doctrine-arrives-in-kenya/ > 19 May 2021.
[6]*David Ndii v Attorney General* (2020) eKLR.
[7]Article 255(1)(d), *Constitution of Kenya* (2010).
[8]Roznai Y, 'The basic structure doctrine arrives in Kenya' Verfassungblog on matters constitutional,2021, --- < https://verfassungsblog.de/the-basic-structure-doctrine-arrives-in-kenya/ > 19 May 2021.
[9](2004) eKLR.

Kesavananda Bharati

the arms of government particularly the executive. This shall be illustrated by discussing how independence of the judiciary, separation of powers and the rule of law have been promoted by the basic structure doctrine as essentials of constitutionalism.

Origin of the basic structure doctrine

The Basic structure doctrine is not something that only affects Kenya as it originated and spread from Germany to India where its origin and development was majorly influenced by Dietrich Conrad, a German scholar.[10] This, later on, set the pace for the groundbreaking judgement in the case of *Kesavananda Bharati v State of Kerala* in India.[11] Conrad used great concepts brought to light by previous scholars such as Carl Shmitt who pointed out that amendment should not change an implied limitation of the constitution which is the basic structure. That it does not mean annihilation or abolition of a constitution and that the implied limitation is a doctrine of last resort that should be applied to prevent and stop the abuse of power.[12]

As the basic structure had migrated to India its rationale has seemed to protect the identity and the core of the Indian constitution giving it value in itself as it brought about democracy and individual freedom.[13] This was following the *Kesavananda v Kerala* case where the majority decision stated that one can amend the solemn document that the founding fathers had given to the people for their care as much as they would like, but the constitution is a heritage whereby its identity cannot be destroyed.[14] It also gave the meaning of amendment where it stated that the old constitution should not lose its identity to the alterations made to it in that the basic structure and framework should be retained , as it cannot be done away with.[15]

In Kenya, it is argued that if the proposal amendments interfere with existing procedural or substantive rules then it is not necessary to engage with the proposed amendment. The basic structure doctrine is unamendable, but it requires a source of power that is primary constituent power.[16] This is procedurally limited and exercised after 4 sequential processes are followed. The first is civic education provided to the public for sufficient information followed by public participation where they are able to give their views, constituent assembly debates to shape issues through representatives and a referendum to ratify the draft.[17]

Promotion of constitutionalism

Constitutionalism refers to the promotion of the constitution and its constitutional principles. It is the idea that the powers are derived from the constitution and that you should abide by those limits and there should be fidelity to those norms and principles.[18]

Okoth Ogendo states in his paper that there is a problem when it comes to African application of constitutionalism. In that, the political elite use the constitution to organize power by using it as an instrument to legitimize the way they use that power so that the public sees that what they are doing is right. He also states that there seems to be a situation in which only the idea of a constitution has been able to survive. That the most fundamental functions of a constitution at least with regards to liberal democratic states is to regulate the executive use of power.[19]

Constitutionalism is a source of power, but it also sets limits on those powers that it grants.[20] It includes features

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[10]Polzin M, 'The basic structure doctrine and its German and French origins: a tale of a migration, integration, invention and forgetting' Volume 5 *Indian Law Review* Issue 1, 2021, 45.

[11]Noorani A, 'Behind the" basic structure" doctrine' Frontline, 28 April 2001,1.

[12]Polzin M, 'The basic structure doctrine and its German and French origins', 46-50.

[13]Polzin M, 'The basic structure doctrine and its German and French Origins', 60.

[14]*Kesavananda Bharati v State of Kerala* (1973), Supreme court of India.

[15]*Kesavananda Bharati v State of Kerala* (1973), Supreme court of India.

[16]Tushnet M,' Varieties of constitutionalism' I. CONnet, 2016,1. --- < http://www.iconnectblog.com/2016/04/varieties-of-constitutionalism-i%C2%B7con-14-issue-1-editorial/ > on 14 April 2016.

[17](2004) eKLR.

[18]Ogendo O, 'Constitutions without constitutionalism: Reflections on an African Paradox' in Douglas Greenberg (eds) *Constitutionalism and Democracy: Transitions in the Contemporary World*, The American Council of Learned Societies Comparative Constitutionalism Papers,1993, 66-67.

[19]Ogendo O, *Constitutions without constitutionalism*, 79.

[20]Ghai Y, 'Constitutionalism and the challenge of ethnic diversity' The American Bar association,2008,2.

that limit over-stepping functions by the government to enhance responsibility and accountability by the arms such as independence of the judiciary, separation of powers through checks and balances and upholding the rule of law.[21] These the provisions of the constitution are so basic that they cannot be easily amended at the whims of the political leaders thus the courts should apply the basic structure doctrine to protect them.

a) Independence of the judiciary

An independent judiciary is the protector of the rule of law and is the tool as to which the scheme of checks and balances in the separation of powers is enhanced.[22] In the Kenyan constitution, it is enunciated under Article 160(1) of the constitution where the arm of government is only subjected to the constitution and the law, not to any other authority or person.[23] An outside independent arm is needed to ensure there is no concentration of power on one arm and cannot be swayed to go against the rights of the people.[24]

Former Chief Justice Justice Maraga

Clause 44 of the BBI amendment bill set to create a Judicial ombudsman that would be nominated by the President by the approval of the senate and whose tenure would last for five years. The amendment clause outlined various functions of the ombudsman some including that the appointee shall receive and make enquiries into complaints made against registrars, judges, other officers and staff of the judiciary in order to make the judiciary accountable among other listed proposals.[25] It was stated by Justice Maraga on behalf of the Judicial service commission that the result of the BBI proposal is a direct conflict of the duplication of roles between the Judiciary Ombudsman and the Judicial service commission that imposes on the independence of the judiciary.[26]

The proposal sought to amend article 171(2) of the Constitution that states that increases the number of presidential appointees in the judiciary from four to five.[27] The Court of appeal judge, Justice Musinga, believed that the amendment would bring about terror in the judiciary in two ways. Firstly, that the function of the Judicial ombudsman would also consist of the removal of judges from the judiciary. This is contrary to Article 168(2) of the constitution which states that removal of judges from office shall only be done by the Judicial service commission acting on its motion or from a petitioner from the Judicial service commission.[28]

Secondly, the judges would be cautious to make decisions that would be in favour to please the President as the he may use his appointee to initiate the removal of the judge.[29] Although not directly, an example of this would arise from the first African Attorney general in Kenya, the late Charles Njonjo, who was an appointee of the president. It has been reported that he was feared by the Kenyan judges where he instructed them on the decisions that would be made in those cases that he had interests in or those in which a certain political outcome was preferred. Being that it was later discovered that he had ordered for the detention of Ngugi wa Thiong'o due to his criticism on capitalism made in his book.[30]

Additionally, it is stated that he was the reason that the Chief Justice Arthur Farrel was retired after he reduced the sentence of Bildad Kaggia from one year to six months.[31] This goes to show a possibility that could occur when having an executive appointee in the judiciary as it may lead to

[21]Bazezew M, 'Constitutionalism' Volume 3 *Mizan Law Review* Issue 2, 2009, 358.
[22]Mutua M, 'Justice under siege: The rule of law and Judicial subservience in Kenya' The John Hopkins university press, 2001, 1.
[23]Article 160(1), *Constitution of Kenya* 2010.
[24]The Federalist Papers: No 78.
[25](2020) eKLR.
[26]Maraga D, 'JSC opposed to BBI proposal on creation of Judicial ombudsman' KTN News Kenya, 11 Dec 2020 --- < https://youtu.be/gwOtPE9Pt7c > on 11 Dec 2020.
[27]Article 171(2), *Constitution of Kenya* 2010.
[28]Article 168(2), *Constitution of Kenya* 2010.
[29]*David Ndii and others v Attorney General* (2021) eKLR
[30] --- < https://www.washingtonpost.com/archive/politics/1978/01/24/kenyan-writers-arrest-raises-fear-of-repression/10be3876-6506-4b9a-8aef-9d743aabd812/ > on 24 Jan 1978.
[31]--- < https://www.standardmedia.co.ke/entertainment/the-standard/2001402193/kenyan-law-was-changed-three-times-to-suit-this-man > on 21 Feb 2021.

influence of decisions to the liking of the executive. In the Constitution of Kenya Review Commission, it was stated that the independence of the judiciary should be entrenched in the constitution. That the constitution should ensure that the judiciary is not interfered with by neither the politicians nor the executive.[32]

The Judicial service commission holds that there's a risk of parallel complaints instituted to both organs and there is a likelihood of arriving at different decisions that may result in a constitutional difficulty.[33] Article 172(1)(c) states that the function of the judicial service commission is to 'appoint, receive complaints, investigate and remove from office or otherwise discipline registrars, magistrates, other officers and staff of the judiciary, in a manner prescribed by an act of parliament.'[34]

Taking this into account, In the high court decision of the BBI proposal, the court held that the doctrine is found in the text, structure and context of the 2010 constitution.[35] The constitution of Kenya has some of its provisions that are too fundamental to easily amend them, part of those provisions is the system of government that Kenyans chose and, in this situation, includes the judicial arm of government.[36]

The judiciary of Kenya is protected under chapter ten of the 2010 constitution that is made up of the Judicial authority, the independence of the judiciary, judicial offices and officers and the system of courts. Therefore, not only does the fact that the executive wanted to amend the provision of the constitution dealing with the independence of the judiciary[37] by introducing the Judicial ombudsman and affecting the provision on the removal from office[38] interfere with the separation of powers, but also judicial independence. It would be termed as unconstitutional as it is not in line with the basic structure doctrine.

This then promotes constitutionalism by ensuring that those articles are not interfered with against the spirit and core of the constitution. As political interference remains a serious threat to the independence of the judiciary.[39]

b) Separation of powers

Separation of powers should not be vested in a few but designated to the three arms of government so that none shall have excessive power.[40] It requires a division of powers between the branches so that each play a unique role to curb the abuse of power and put mechanisms that allocate tasks to those bodies that are fit to carry them out.[41] The separation of powers involves a system of checks and balances that has a level of mutual supervision between these three arms of government and allows interference by one arm into the functions and duties of another.[42]

The BBI amendment bill seeks to introduce the position of deputy ministers, whose appointment shall not be made by the parliament. Additionally, the appointed officers together with the deputy prime minister, cabinet ministers, attorney general and the leader of the opposition will seat in parliament. This affects the separation of powers whereby a member of the executive will also be a member of the legislature which sort of shifts the Country from a presidential system to a semi-presidential one.[43]

Provisions that uphold the democratic order are often unamendable provisions that protect principles such as the separation of powers through the basic structure doctrine.[44] In this case, the doctrine of the separation of powers is upheld through a system of checks and balances in two ways.

[32]Constitution of Kenya Review Commission, *Final draft*, 2005, 209.
[33]Maraga D, 'JSC opposed to BBI proposal on creation of Judicial ombudsman' KTN News Kenya, 11 Dec 2020 --- < https://youtu.be/gwOtPE9Pt7c > on 11 Dec 2020.
[34]Article 172(1)(c), *Constitution of Kenya* 2010.
[35](2020) eKLR.
[36](2020) eKLR.
[37]Article 160(1), *Constitution of Kenya* 2010.
[38]Article 168(2), *Constitution of Kenya* 2010.
[39]Mbaku J, 'Is the BBI ruling a sign of judicial independence in Kenya?' Africa In Focus, 19 August 2021 --- < https://www.brookings.edu/blog/africa-in-focus/2021/08/19/is-the-bbi-ruling-a-sign-of-judicial-independence-in-kenya/ > on 19 August 2021.
[40]Emanuel K and Kimberly W,' A perspective on the doctrine of the separation of powers based on the response to court orders in Kenya' 1 *Strathmore Law Review* 1, 2016,222.
[41]Kavanaugh A, 'The Constitutional Separation of Powers' Oxford University press, 2016, 230.
[42]Kavanaugh A, 'The Constitutional Separation of Powers' Oxford University press, 2016, 222.
[43](2021) eKLR.
[44]Roznai Y, 'The Basic Structure Doctrine arrives in Kenya' Verfassungblog on matters constitutional,2021, --- < https://verfassungsblog.de/the-basic-structure-doctrine-arrives-in-kenya/ > 19 May 2021.

The first is that the judiciary steps in to prevent the executive from overstepping its functions and having some of its members take seats in the legislative arm of government. Being that the amendment bill proposal was initiated by his Excellency President Uhuru Kenyatta who is a member of the executive arm of government seeks to introduce offices into the legislature which is a clear overstep of the executive's function. This is so because the judges at the court of appeal held that the president does not have the power to amend the constitution by parliamentary initiative since he is not a member of parliament.[45]

President Uhuru Kenyatta

In the repealed 1963 constitution, Kenya was in operation of the parliamentary system where it had been built around the reverence of the executive and the subordination of the legislature to the executive.[46] The trend had begun with presidential incentives and constitutional amendments such as section 2(a) that introduced Kenya as a *de jure* state and eventually led to the revocation of the parliamentary privilege that allowed the legislature to obtain information from the office of the executive. This meant that the members of parliament had indirectly lost their constitutional rights to the executive and became subordinated to the presidency and the ruling party of KANU.[47]

Additionally, an event that happened before Act 14 of 1986 was passed into parliament where a criminal case had taken place in which a Kenyan woman was murdered by an American marine in Mombasa. The judges gave the verdict that the man shall be fined five hundred Kenyan shillings and bonded for one year probation. The then Attorney General responded to the verdict and criticised the judge's decision, he soon after lost his position. Later, the office of the Controller and Auditor general raised an issue of concern as to why a private lawyer had been used in this particular case. The President took these two actions as threats to his leadership and thus pressured the parliament to enact amendments to give him more authority over the judiciary and the audit department.[48]

The police were also given the mandate to through the Act to detain critics of the regime and by this time the parliament was functioning largely as a puppet for the policies initiated by the presidency.[49] Unlike in the repealed constitution where such instances would happen and critical actions would not be taken against them, the 2010 constitution upholds the separation of powers by instituting the checks and balances as a fundamental principle forming the basic structure doctrine.

Therefore, the Kenyan courts stating that appointing members of the executive into the legislature is a violation of the separation of powers may be justified as it prevents tyranny from taking place as it did with the 1963 independence constitution as there's a possibility that the president may use those appointees to affect the functions and decisions made by the legislative arm of government. As Montesquieu states that the organs should not interfere with each other's work.[50]

Secondly, the judiciary exercises Judicial authority and review by applying the separation of powers on the executive and in the legislature. In Kenya, the constitution states that any law or action inconsistent with the constitution is null and void[51] and it grants the Judiciary an authority[52], when the two are connected the power of judicial review is set in the Judiciary. The courts check the powers of the executive throughout the amendment bill of the BBI where both the high court and the court of appeal declared the bill to be unconstitutional.[53] This was on the grounds that the proposal made by the bill sought to change alter the basic structure doctrine, bringing the issue that there is a difference between the amending and changing the constitution.[54] The courts should never abandon their role and function in maintaining this balance.[55]

[45](2021) eKLR
[46]Fombad C, '*Separation of powers in African constitutionalism*,' Oxford University Press, Oxford, 2016, 118.
[47]Korwa G, 'The Internal and external contexts of Human rights practice in Kenya: Daniel Arap Moi's Operational rule 'Volume 4 *African Sociological Review* Issue 1, 2000, 77.
[48]Korwa G, 'The Internal and external contexts of Human rights practice in Kenya,' 78.
[49]Korwa G, 'The Internal and external contexts of Human rights practice in Kenya,' 78.
[50]Kavanaugh A, 'The Constitutional Separation of Powers' Oxford University press, 2016, 221.
[51]Article 2(4), *Constitution of Kenya* 2010.
[52]Article 159, *Constitution of Kenya* 2010.
[53](2020) eKLR.
[54](2020) eKLR.
[55]*Keroche Industries Limited v Kenya Revenue Authority & 5 others* (2007) eKLR.

Former President Mwai Kibaki upholding the promulgated constitution.

The courts are allowed to get into the constitutionality or lack of it on the actions of the members of the legislature or the executive.[56] That through Judicial Review the courts at any instance based on the application of orders on issues given accordingly restrain the tow arms of government.[57] The authority of the courts under the 2010 constitution demonstrates that they have the interpretive role including the last word in determining the constitutionality of all government action.[58] Therefore, the separation of powers through Judicial review is protected by the basic structure doctrine.

Conclusion and way forward

Government's authority is determined by the law in a bid to prevent arbitrary governments. In endorsing the Basic structure doctrine in line with the judicial mandate under article 259(1) of the constitution have promoted constitutionalism. The President is not above the law and should not have the liberty to change the constitution at his own liberty. Where one of the principles that the constitution places the responsibility on to promote the rule of law is Article 259(1). Another factor of the rule of law is that it puts constraints on government power.[59]

It comprises of constitutional and institutional means in which the powers of the government and its officials are limited under the law.[60] Additionally, it also ensures that authority is evenly distributed and in a manner that no single organ of the government can exercise unchecked power. It addresses the effectiveness of the institutional checks of government power by the legislature, the judiciary which serves as an important role in monitoring government actions by holding the arms of government accountable while also promoting the independence of the organs.[61]

In as much as some of the judges in the Kenyan courts may be corrupt and have weak judicial hearts, Judges and the Kenyan Constitution are not by presumption toothless bulldogs.[62] To conclude, the basic structure doctrine is certainly a core element of the constitution and is applicable in Kenya. This essay has sought to look into ways through which it limits governmental power by promoting the principles of constitutionalism. Doubtlessly, this is a step forward for Kenya and the courts should continue to endorse in line with the constitutional mandate for the wellbeing of the Kenyan people.

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[56]*Njenga Mwangi & another v The Truth, Justice and Reconciliation Commission & 4 others* (2014) eKLR.
[57]Emanuel K and Kimberly W,' A perspective on the doctrine of the separation of powers based on the response to court orders in Kenya,' 226.
[57]Emanuel K and Kimberly W,' A perspective on the doctrine of the separation of powers based on the response to court orders in Kenya,' 226.
[58]Trusted Society of Huma Rights & others v Attorney General & others (2012) eKLR
[59]Article 259(1), *Constitution of Kenya* 2010.
[60]--- < https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2021/factors-rule-law > 2021.
[61]--- < https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2021/factors-rule-law > 2021.
[62]*Wachira Weheire v Attorney General* (2010) eKLR.

The role of Independent Electoral and Boundaries Commission in advancing the two-third gender principle under the constitution of Kenya, 2010

"A political Party has the obligation to present Party lists to Independent Electoral and Boundaries Commission (IEBC), which after ensuring compliance, takes the requisite steps to finalise the 'elections' for these special seats. In the event of non-compliance by a political party, IEBC has power to reject the party list and to require the omission to be rectified, by submitting a fresh party list or by amending the list already submitted."[1] - ***The Supreme Court of Kenya.***

By Kipkoech Nicholas Cheruiyot

Introduction

Since Kenya is in an electioneering period, she has to put her house in order. During this period, there are a number of issues which ideally crop up as a result of the conduct of campaigns and subsequently elections. Such issues include violence, hate speech and so on. What is often times overlooked is the issue of gender, which in a number of instances affect the outcome of the elections process. Due to the nature of the Kenyan politics logistically, and the unfavorable past on women leadership, a number of women shy away from running for elective seats. This sees more men than women grabbing elective positions, majorly being in Parliament and at the County Assemblies.

Gender issue has been a thorn issue in Kenya given that Kenya has for a long time been a patriarchal society,[2] with women majorly taking care of their families and never holding any leadership position(s). As such, women have been on the receiving end of such state of realities. The position is however no longer the same, thanks to the Kenyan 2010 Constitution of Kenya (The Constitution) which champions for equality of all persons and the equal representation of all genders in each and every public sphere. Under Article 27 of the Constitution, there is provided for two-thirds gender principle.

Meeting the two-thirds gender principle is subject to a progressive realization, as was held by the Supreme Court of Kenya in its *Advisory Opinion No. 2 of 2012.*[3] In the matter, the former Attorney General of Kenya Prof. Githu Muigai had requested the Supreme Court to give an advisory opinion on whether the two-thirds gender principle was to be realized in the first general election under the new Constitution in 2013 or over a longer period of time.[4] In its ruling, the Supreme Court had directed that Parliament draft a legal framework for the realization of the two-thirds gender rule by 27th August 2015.[5] Parliament however failed to act on the directive within that time and extended it by one year, upon which that window was closed. It is quite unfortunate that Parliament has failed, refused and neglected the passing of a legislation to that effect up to date. This, on the part of Parliament, is a gross violation of among others Articles 10, 21 and 100 of the Constitution.

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[1] *Moses Mwicigi & 14 others V Independent, Electoral and Boundaries Commission& 5 Others* [2016] eKLR.
[2] Liz Guantai, 'The Position of African Women within the Realm of Culture, Patriarchy and the Law: A Case of Kenya' (2016) 1 *Young African Leaders Journal of Development,* 3.
[3] In the *Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR.
[4] Ibid, Par. 1.
[5] Ibid, Par. 3.14.

Two-thirds gender principle under the 2010 constitution of Kenya

The 2010 Constitution of Kenya, recognizing the history of Kenya has introduced what has been termed as the 'two-thirds gender principle'. Article 27 (3) of the Constitution states that 'women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.' To give a full effect to the realisation of this right, the Constitution under Article 27 (6) requires the State to take legislative and other measures including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. The State is also mandated under Article 27 (8) to take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. In *FIDA-Kenya v. The AG*,[6] the court observed that the purpose of Article 27 (8) was to provide or place an obligation upon the state to address historical injustices that may have been encountered by or visited upon a particular segment of the people of Kenya.

To supplement these provisions, the Constitution provides that 'it is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.'[7] These rights undoubtedly include the rights under Article 27 of the Constitution.

These rights are also recognizable and are indispensable under the international bill of rights. This is seen under a number of treaties and conventions which have been ratified by Kenya pursuant to Article 2 (6) of the Constitution. *The leading is The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*. Article 3 of the Convention requires state parties to take measures to ensure full development and advancement for purposes of guaranteeing women the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men.

Failure of parliament to meet the two-thirds gender principle

Parliament, since the adoption of the Constitution in 2010 has failed to meet the constitutional requirement that not more than two-thirds of its members shall be of the same gender. Parliament has failed to enact a legislation to give effect to this provision. Lamenting on the status quo, the immediate former Chief Justice David Maraga on 21st September 2020, while exercising his role under Article 261 (7)[8] of the Constitution advised the President to dissolve Parliament.[9] This was after Parliament and the Honourable Attorney General had failed to act upon an order issued by the High Court in *Constitutional Petition No. 371 of 2016*, directing them to take steps to ensure that the required legislation is enacted within a period of sixty (60) days from the date of that order.[10]

Justice John Mativo

In the matter, Justice John Mativo, while breathing life to Article 27 on gender equality had taken a judicial notice of the discriminatory history that Kenya had been in, which had to a larger extent disadvantaged women and denying them fundamental human rights. He had stated that:[11]

> *"The Constitution entrenches the principle of equality and requires the state to adopt affirmative action programs and policies to "redress any disadvantages suffered by individuals or groups because of past discrimination." More specifically, it requires that elective and appointive bodies should be composed of "not more than two-thirds of either gender." The Constitution of Kenya recognizes women, youth, persons with disabilities and ethnic minorities as special groups deserving of constitutional protection…. The constitution espouses the rights of women as being equal in law to men, and entitled to enjoy equal opportunities in the political, social and economic spheres."*

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[6]*Federation of Women Lawyers (FIDA-K) & 5 others V Attorney General & Another* {2011} eKLR.

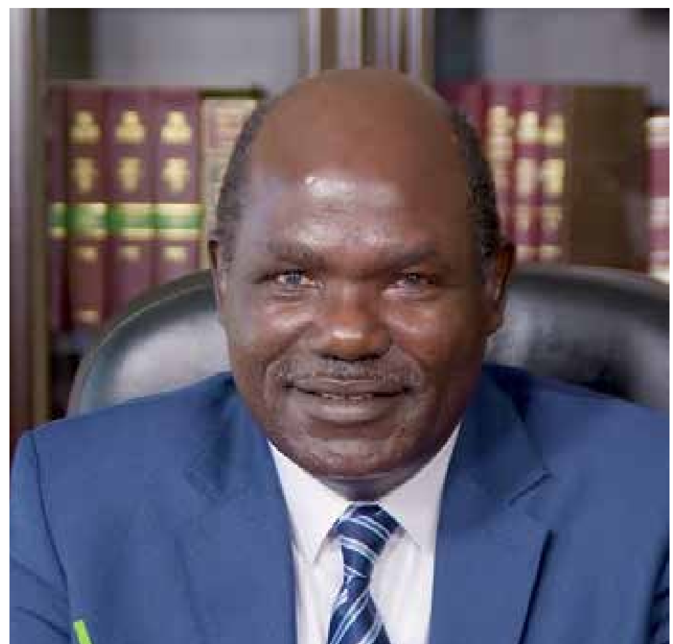
[7]The 2010 Constitution of Kenya, Article 21 (1).

[8]Article 261 (7) of the Constitution authorizes the Chief Justice to advice the President of the Republic of Kenya to dissolve Parliament should it fail to enact the relevant legislation within any constitutionally stipulated timeline.

[9]See *Chief Justice's Advice to the President Pursuant to Article 261 (7) of the Constitution*. Available at www.judiciary.go.ke.

[10]*Centre for Rights Education and Awareness & 2 Others v Speaker the National Assembly & 6 Others* [2017] eKLR.

[11]Ibid.



IEBC chairman Wafula Chebukati

All the organs of government including the executive, the legislature and the judiciary which constitute the Kenyan state together with its members have to be seen to be taking steps towards meeting these progressive constitutional aspirations. The President has however never acted on the Chief Justice's advice, and Parliament is still in operation despite its unconstitutionality. Parliament has on the other hand never been able to pass a legislation to aid in meeting the two-third gender principle. Since Parliament is about to be dissolved ahead of the general elections in August, actions ought to be taken by the State to ensure that Parliament meets this constitutional threshold after the 9th August polls. The body that is mandated, and has the authority to ensure that this threshold is met is the Independent Electoral and Boundaries Commission (IEBC).

The role of IEBC in advancing the two-thirds gender principle

IEBC is established under Article 88 of the Constitution. It is one of the independent commissions established under Chapter 15 of the Constitution.[12] Among the objects of IEBC as a Commission is to secure the observance by all State organs of democratic values and principles,[13] and to promote constitutionalism.[14] They are the roles which IEBC does independently, since it is an independent commission paying allegiance only to the Constitution and other attendant laws of Kenya.[15] IEBC under Article 88 (4) of the Constitution is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution and any other elections.

IEBC is also mandated to regulate the process by which political parties nominate candidates for elections,[16] to settle electoral disputes including disputes arising from nominations,[17] and to register candidates for election.[18] Article 82 of the Constitution requires Parliament to enact a legislation to provide for the nomination of candidates[19] and also aid in regulating the conduct of elections and referenda and ensuring efficient supervision of elections and referenda including the nomination of candidates for elections.[20] In line with this provision, Parliament enacted the *Independent Electoral and Boundaries Commission Act, 2011* and the Elections Act, 2011. The *Elections Act of 2011* was amended by the *Elections (Amendment) Act, 2021*.

The *Independent Electoral and Boundaries Commission Act of 2011* (The Act) provides for the mode of operation for the effective performance of IEBC. In line with the provisions of Article 88 (4) of the Constitution, the Act under Section 4 provides for the functions of IEBC. Among them is the regulation of the process by which parties nominate candidates for elections. In fulfilling its mandates, IEBC under Section 25 of the Act shall, in accordance with the Constitution, ensure that not more than two-thirds of the members of elective public bodies shall be of the same gender. IEBC has powers to make regulations under Section 31 of the Act for the proper carrying out of its functions.[21] Such regulations may provide for appointment and the confirmation of appointments,[22] the termination of appointments and the removal of persons from any office, in respect of which IEBC is responsible.[23]

The *Elections Act* further requires that political parties have to adhere to the two-third gender principle in submitting their lists for nominations. Section 36 (7) of the *Elections Act* requires that in accordance with Article 177 (1) (b) of the Constitution, IEBC shall, in liaison with political parties, draw from the list submitted to it by political parties such number of special seat members necessary to ensure that no

[12] *The Constitution of Kenya 2010*, Article 248 (2) (c).
[13] *The Constitution of Kenya 2010*, Article 249 (1) (b).
[14] *The Constitution of Kenya 2010*, Article 249 (1) (c).
[15] *The Constitution* states under Article 249 (2) that the commissions and the holders of independent offices are subject to the Constitution and the law, and are independent and not subject to direction or control by any person or authority.
[16] *The Constitution of Kenya 2010*, Article 88 (4) (d).
[17] *The Constitution of Kenya 2010*, Article 88 (4) (e).
[18] *The Constitution of Kenya 2010*, Article 88 (4) (f).
[19] *The Constitution of Kenya 2010*, Article 82 (1) (b).
[20] *The Constitution of Kenya 2010*, Article 82 (1) (d).
[21] The *Independent Electoral and Boundaries Commission Act of 2011*, Section 31 (1).
[22] *The Independent Electoral and Boundaries Commission Act of 2011*, Section 31 (2) (a).
[23] *The Independent Electoral and Boundaries Commission Act of 2011*, Section 31 (2) (c).

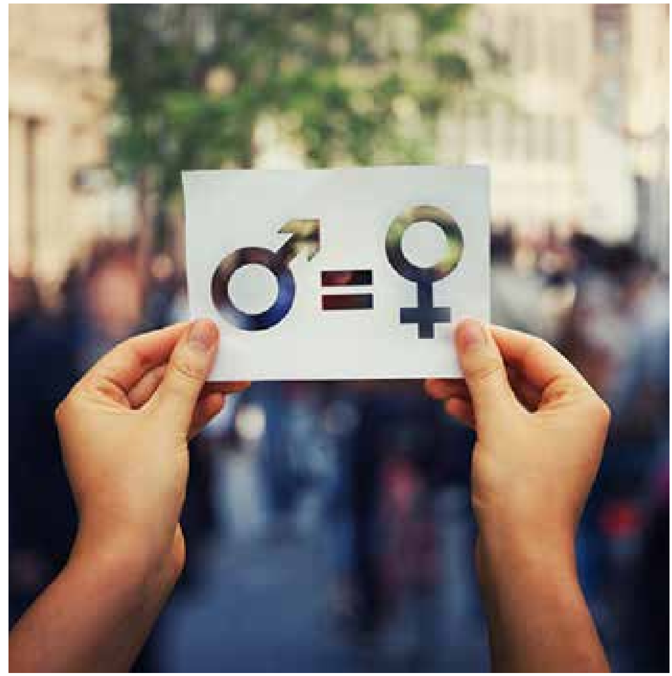
more than two-thirds of the membership of the assembly are of the same gender.

The same is also provided for under the *Political Parties Act of 2011*, as amended by the *Political Parties (Amendment) Act of 2021* (The Act). The Act requires that during the process of application for provisional registration by the registrar of political parties, such an application must be signed by the applicants, of whom not more than two-thirds shall be of the same gender.[24] Additionally, one of the conditions for a provisionally registered political party to be fully registered is that not more than two-thirds of the members of its governing body are of the same gender.[25] This principle also has to be reflected in the Constitution or the governing rules of a political party in the membership of its party organs, bodies and committees in aggregate.[26] One of the consequences of not abiding by the two-thirds gender requirement is not receiving any funding from the Political Parties Fund.[27] Among the functions of the money allocated to each and every political party as a share of the political parties fund is promoting the representation of women, persons with disabilities, youth, ethnic and other minorities and marginalised communities in Parliament and in the County Assemblies.[28]

In the exercise of its powers, the IEBC made *Elections (Party Primaries and Party Lists) Regulations, 2017*, which were amended by *The Elections (General) (Amendment) Regulations, 2017* (the Regulations). The Regulations under Regulation 20 requires political parties to submit the names of all the nominated candidates who stand to be elected to IEBC. Such a list shall ensure fair representation and must take into consideration the principles of Article 81 (b) and Article 100 of the Constitution on the promotion of gender representation. Under Regulation 26, IEBC has powers to reject a party list that *inter alia* do not conform to the requirements of the Constitution, the Elections Act or the Regulations.

The role of IEBC in advancing the two-thirds gender principle was considered in *Katiba Institute v. IEBC.*[29] In the matter, Katiba Institute had filed a Petition at the High Court against the IEBC seeking among others the following reliefs:[30]

> *a) A declaration that Political Parties are bound by the provisions of Articles 10, 19, 20, 27, 28, 56, 81(b) and 91(1) of the Constitution and hence any action under taken by them, including nomination process for candidates for members of parliament, must comply with the requirements of those provisions;*



> *b) A declaration that the power conferred to IEBC in Article 88 (4) (d) of the constitution of "Regulation of the process by which parties nominate candidates for elections" obligates IEBC to ensure that nominations carried out by political parties meet the requirements of the constitution, especially Articles 10, 19, 20, 27, 28, 56 and 91(1); and*

> *c) A declaration that Articles 10, 19, 20, 27, 28, 56 and 91(1) of the Constitution obligates IEBC to reject any nomination list of a political party for its candidates for the 290 Constituency based elective positions for members of National Assembly and 47 County based positions for the member of the Senate that do not comply with two-third gender rule.*

While pronouncing itself on the important role played by political parties in as far as the two-third gender principle is concerned, the court stated that:

> *[34] The constitution binds all persons, including Political Parties. They are bound by Article 91(1) to promote human rights, fundamental freedoms, gender equality and equity. Political Parties also play a key role in determining who is elected to Parliament, through nomination of candidates at Party primaries. Those nominated proceed to contest for various constituency and Senate seats in the General Elections, and the winners end up in Parliament. Simply put, political*

[24]*Political Parties (Amendment) Act of 2021* Section 6(1).
[25]*Political Parties (Amendment) Act of 2021* Section 7 (2) (b).
[26]*Political Parties (Amendment) Act of 2021*, Section 9 (2).
[27]*Political Parties (Amendment) Act of 2021* Section 25 (2).
[28]*Political Parties (Amendment) Act of 2021* Section 26.
[29]*Katiba Institute v Independent Electoral & Boundaries Commission* [2017] eKLR.
[30]Ibid, par. 5.

Parties are a vehicle to legislative bodies and eventually into leadership positions.

The Court went ahead to make one of the most progressive rulings on gender representation and the role of IEBC in advancing the two-third gender principle of all time. It pronounced itself thus;

[64] The two- third gender principle should not be downgraded to a contest between men and women. It is not. It is about human dignity, equality, equity, social justice, human rights and fundamental freedoms, essential values in an open and democratic society. It is a right under Bill of Rights, and the Bill of Rights applies to all laws and binds all state organs and all persons, Political parties included. They are not exempt from observing the Bill of Rights, and Article 27 (8) in particular, as a way meant to secure equal rights for women, and address past gender discrimination. The respondent has constitutional mandate while approving Party Nomination Rules and "regulating" nominations by these parties, to demand that Political Parties put in place measures to embrace the two-third gender principle.

The court then took the view that the IEBC has been mandated under the Constitution to manage and regulate the nomination process. Additionally, that IEBC is duty-bound to ensure and demand that the political parties meet the constitutional two-third gender rule. [31]

IEBC therefore has all the legal powers to promote the constitutional two-third gender rule. Since the country is in an electioneering mood, IEBC need to continue sensitizing political parties on these requirements, ahead of the party primaries in April and the general elections in August. IEBC being an elections and party nominations "referee," it is not enough for it to sit on its role and watch as the political parties contravene the Constitution. In series, such contravention will see yet another constitution of a Parliament that is not the two-third gender principle compliant.

This applies not only to Parliament,[32] but to the County Governments as well who under the Constitution have to be two-third gender-principle compliant.[33] To avoid that, IEBC ought to be at the forefront as early as now. It has to bring all its legal arsenals on board, and put them into practice to ensure that all the registered political parties comply.

Conclusion

IEBC has a constitutional mandate of ensuring compliance with the two-thirds gender rule by political parties ahead of the nominations and subsequently general elections. IEBC has powers to make regulations that bar political parties that do not meet the two-third gender requirement in the nomination of candidates for elections from taking part in elections. As such, IEBC has powers to reject any nomination list from political parties that do not comply with this requirement. The IEBC now, more than ever must lead the way and take steps including guidelines and standardized rules to guide nominations by political parties, that take into account the two-third gender principle. The Bill of Rights is binding on all state organs and persons,[34] and IEBC has an obligation to ensure compliance with the law. Despite the reluctance by political parties, IEBC has a constitutional mandate to put in place administrative arrangements that will cause the political parties to comply with the law.

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[31]Ibid, par. 67.

[32]See Articles 97 of *the Constitution* in the case of the National Assembly, and 98 in the case of the Senate.

[33]Article 177 (1) (b) of the Constitution states that 'a county assembly consists of the members of special seat members necessary to ensure that not more than two-third of the membership of the assembly are of the same gender.'

[34]Notably, the two-third gender principle is part of the rights entrenched under the Bill of Rights.

The basic structure doctrine in Kenya and its promotion of constitutionalism

By Mogeni Eileen Nyarinda

Introduction

The basic structure doctrine dictates that the constitution has a core character whose amendment can only be done through the people exercising primary constituent power.[1] Essentially the basic structure doctrine empowers the people and limits the powers of their representatives when it comes to constitutional amendments.

In 1991, the High Court of Kenya was approached with a question of whether constitutional amendment power was limited in the case of *Gitobu Imanyara v Attorney General*.[2] The court in this case was not very clear on its stance. In 2004, the same question was presented before the court in *Njoya v Attorney General* and issue of the basic structure doctrine came into light quite strongly in this case.[3] The recent case of *David Ndii and others v Attorney General and others*[4] commonly dubbed the "BBI case" elaborated on what the basic structure doctrine is, and it was said that the doctrine is applicable Kenya. However, various concerns have been raised regarding the basic structure doctrine and the rationale behind its applicability in Kenya,[5] considering it was not an idea that originated in Kenya. It is a concept that was adopted from the Indian case of *Kesavananda Bharati Spiradagalvaru v State of Keral*,[6] which was decided in the supreme court of India.

There is a question of whether the doctrine guarantees the liberty and rights of individuals in a society and prevents tyranny,[7] and whether it is a doctrine for the people and by the people. This paper will show that the basic structure doctrine is a means of achieving constitutionalism by the courts as they execute their task of interpretation that the people gave to them through the constitution.

David Ndii

To do this, the essay will in part one, briefly discuss sovereignty of the people and show that judges derive power from the people. The second part will discuss the various available perspectives that judges can take when it comes to interpretation such that they end up with the basic structure doctrine. The third part will also take a brief look at the history of constitutional amendments before the 2010 constitution to show the importance of the basic structure doctrine in protecting the core character of the constitution as well as the will of the people of Kenya. Part four serves as the conclusion of the essay.

The People are Sovereign

The people in a democratic country like Kenya, are considered sovereign.[8] This sovereignty is considered primordial and cannot be taken away from the people by anyone including the government or even the constitution itself.[9] Supremacy of the people comprises of three major elements, the power to constitute a frame of government,

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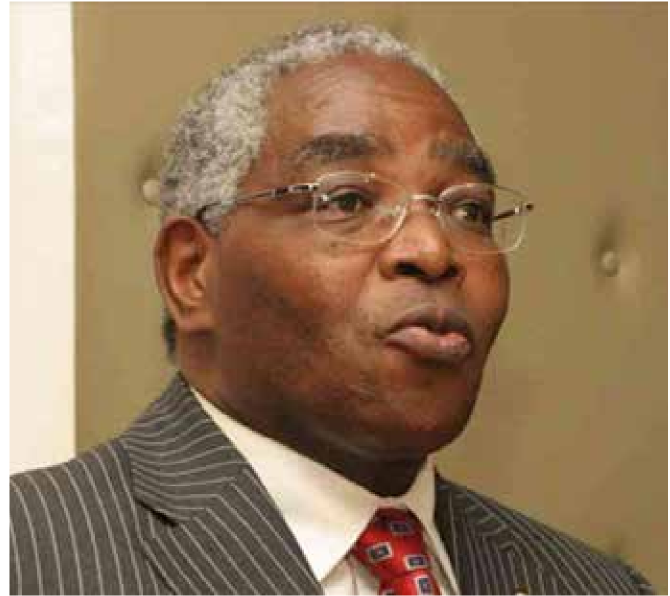
[1]Andhyarujina T, *The Kesavananda Bharati case-The untold story of struggle for supremacy by the supreme court and parliament*, Universal Law Publishing, Delhi, 2012.
[2]*Gitobu Imanyara v Attorney General* Misc. Application 7 of 1991 (Unreported).
[3]*Njoya & others v Attorney General & others* (2004) KLR.
[4]*David Ndii and others v Attorney General and others* (2020) eKLR.
[5]The judges in the BBI case failed to fully elaborate on their reasoning behind their conclusion that the doctrine is applicable in Kenya. Their arguments were pointed out to be rather implausible especially by the respondents when they appealed to the decision to the court of appeal.
[6]*Kesavananda Bharati Spiradagalvaru v State of Keral,* Supreme court of India (1973).
[7]Reynoids NB, 'The ethical foundations of constitutional order: A conventionalist perspective' 4(1) *Constitutional Political Economy*, 1993, 79. This is Reynoids take on the definition of constitutionalism.
[8]Kangu M, '"We the people" as a sovereign in the theory and practice of governance' 1(2) *Moi University Law journal*, 2007, 214.
[9]*Njoya & others v Attorney General & others* (2004) KLR.



Justice Ringera

the power to choose those who will run for government and the powers involved in governing.[10]

Justice Ringera in his hallmark *Timothy Njoya* case stated that the constitution of Kenya derives its supremacy from the people.[11] The people of Kenya exercise their constituent power in three different ways; primary constituent power, secondary constituent power and constituted power.[12] Primary constituent power is the power of the people to frame and reframe the government through drafting or radically changing the constitution. This form of constituent power is the one that is exercised when the basic structure of the constitution is to be changed. Secondary constituent power is the authority to make changes that do not go to the core of the constitution and constituted power is the limited power of parliament to amend the constitution.[13]

The people in 2010 exercised their primary constituent power by 67% of voters voting in favour of the 2010 Constitution.[14] They made a choice to accept and adhere to the new constitution to its entirety. The constitution also stated the tasks of every government actor and how they are meant to execute their tasks. Since the law that the people made does not generate meanings on its own, it must be interpreted.

The 2010 constitution in Chapter 10 talks about the arm of government that deals with interpretation of the law. It talks about the judiciary and their powers as well as their limitations.[15] In Article 10,[16] it lays out the values that must be adhered to when implementing the constitution. Further, it states under Article 259,[17] the manner in which the constitution should be construed by the interpreting body. Besides these provisions that the constitution gives, the BBI case identified four principles of interpretation. Interpretation of the constitution is dictated by its structure, its nature (the 2010 constitution is a transformative charter), the history of the people of Kenya (through articles 10 and 259) and statutes (like the Supreme Court Act and binding precedents).[18]

With regards to sovereignty of the people, the issue of judicial review comes up. Judicial review, simply put, is where judges review laws made by the legislature.[19] Alexander Bickel in his book, *The Least Dangerous Branch*, says that judicial review faces a counter majoritarian difficulty since judges have not been elected by the people, yet they overrule the law making of representatives who have been elected by the people.[20] Duncan Kennedy also pointed out the same issue. He believes that the people of South Africa have given adjudicators more power to make laws as compared to the law-making arm of the government which they elected as their representatives.[21] Alexander however notes that the 78th federalist paper upholds the will of the people[22] by saying;

> *'that power of the people is superior to both and that where the will of the legislature declared in statutes, stands in opposition to that of the people, declared in the constitution, the judges ought to be governed by the latter rather than the former.'* [23]

The federalist paper notes that the people are sovereign, and judges can only perform their role if it is the will of the people as stated by the supreme constitution.

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[10]*Njoya & others v Attorney General & others* (2004) KLR. The peoplehave the power to frame the government through the constitution. They also have the power to run for various seat in the government and serve as representatives of the people. The powers involved in governing are the powers they execute on behalf of the people.

[11]*Njoya & others v Attorney General & others* (2004) KLR.

[12]Roznai Y, 'The basic structure arrives in Kenya' Verfassungblog on Matters Constitutional, 19 May 2021 -<https://verfassungblog.de/the-basic-structure-doctrine-arrives-in-kenya/> on 23 December 2021.

[13]Roznai Y, 'The basic structure doctrine arrives in Kenya'.

[14]Macharia J and Obulusta G, 'Kenya votes "Yes" to new constitution' Thomson Reuters, 5 March 2010 -<https://reuters.com/article/us-kenya-referendum-idUSTRE6743G720100805> on 4 January 2022.

[15]Chapter 10, *Constitution of Kenya* (2010).

[16]Article 10, *Constitution of Kenya* (2010).

[17]Article 259, *Constitution of Kenya* (2010).

[18]*David Ndii and others v Attorney General and others* (2020) eKLR.

[19]Find citation

[20]Bickel A, *The least dangerous branch: Supreme court at the bar of politics*, 2, Yale University Press, New York, 1962, 16.

[21]Duncan Kennedy, *A critique of adjudication* (1997).

[22]Bickel A, *The least dangerous branch.*

[23]Federalist paper 78.

Article 159(1),[24] states that the power of the judiciary is derived from the people hence judges are required to follow the rules of interpretation that the people have given to them in the constitution. They are required to make their judgements within the bounds that the supreme law of the land has given. Therefore, the judges in the Kenyan courts can only derive the concept of the basic structure from the constitutional requirements of interpretation.

Interpretation of the Constitution

Considering that the 2010 constitution is a transformative charter,[25] the people at the core of achieving this transformative constitutionalism are judges.[26] Judges are at the forefront of achieving transformative constitutionalism. According to Karl Klare, they are the ones who are meant to spearhead social change. Prominent scholar Etienne Mureinik sees it fit to study what judges do as it is the most instructive way to understand the law itself.[27] The role of judges is so great and so delicate hence it must be done as correctly as possible.

Karl Klare

The requirements for interpretation in the constitution[28] appear to be very clear and easy to follow, the interpretive process is however a lot more complex than it appears. This challenge of complexity comes from three major factors: the indeterminate nature of the law,[29] the silence of the law one some issues and the contradictory nature of some of the legal texts (for example, article 8 and the preamble of the Kenyan constitution[30]). These issues with interpretation give rise to judges using various methods of interpretation to interpret the law. The judges in the recent BBI ruling determined that the basic doctrine does apply in Kenya.[31]

A few more questions are raised from this judgement, did the judges come to this conclusion by using the values and the guidelines laid down by the constitution? Does their conclusion conform to the provisions of the constitution? Did the judges put in their own ideologies when making the judgement?

To answer some of these questions, there is need to look at Karl Klare's work, *Legal culture and transformative constitutionalism*. According to him, judges are at the core of achievement of transformative constitutionalism.[32] From Klare's work, one can deduce a formula for reading legal documents. He says that adjudicators need a combination of the hard law[33], their own ideological positions as well as the social practices of the people whom they are interpreting to.[34] His idea appears to combat the concept of formalism which is simply reading the law as is without including ideologies of the interpreter or the people being interpreted to. Formalism, in theory, appears to be the most suitable way of interpretation as it does not go beyond the legal texts. However, the issues that have been pointed out earlier concerning the uncertainty of the law (indeterminacy, silence and contradiction) make it very challenging to follow through with the theory of formalism.

Klare's formula points towards a broad interpretation of the law if transformative constitutionalism is to be achieved. Klare states that the transformative constitution of South Africa encourages; social rights and substantive conception of equality, affirmative state duties, horizontality, participatory governance, multiculturalism and historical self-consciousness.[35] These transformative elements in the South African constitution are also present in the

[24]Article 159(1), Constitution of Kenya (2010).
[25]*David Ndii and others v Attorney General and others* (2020) eKLR.
[26]Klare K, 'Legal culture and transformative constitutionalism' *South African Journal on Human Rights*, 2017 -<https://doi.org/10.1080/02587203.1998.11834974> on 24 December 2021.
[27]Mureinik E, '"Dworkin and apartheid" in Hugh Corder', *Essays on law and social practice in South Africa*, 1988, 181.
[28]Article 10, Chapter 10, Article 259, Constitution of Kenya.
[29]Karl Klare. The law is not concrete or definite. It does not provide direct answers hence is in need of interpretation to be done to the law for the actual meaning to be determined.
[30]Article 8 of the constitution says that there shall be no state religion yet in the preamble there is a clear recognition of Christianity through the use of "God".
[31]David Ndii and others v Attorney General and others (2020) eKLR. This case is however still in the hands of the supreme court. This is the ruling of the high court and the court of appeal.
[32]Klare K, 'Legal culture and transformative constitutionalism'.
[33]These are the actual legal documents as they are. For example, the constitution as it is or other statutes as they are.
[34]Klare K, 'Legal culture and transformative constitutionalism'.
[35]Klare K, 'Legal culture and transformative constitutionalism'.

Kenneth Lusaka, Speaker of the Senate

constitution of Kenya especially in the Bill of Rights.[36] All these features of the constitution need not only to be read in a purposive manner,[37] but to also be read broadly so as to fully achieve constitutionalism that benefits the people.

The supreme court of Kenya in the case of *Speaker of the Senate & another v Attorney General & four others* endorsed an interpretive approach of the constitution that protected its core national values and principles.[38] Mutakha Kangu believes that a purposive interpretation of a constitution is the most suitable for reading such constitutional provisions. He believes that this approach is a comprehensive and progressive method that 'draws on textual, structural, contextual, historical and comparative elements'.[39] These elements were also identified by the judges of the BBI case as has been pointed out in part one of the essay.

In 1969, the case of *Republic v Elman* set a precedent of constitutional interpretation called the Elman doctrine. It stated that, 'a constitution is to be interpreted as any act of parliament in that where the words are unclear and unambiguous, they are construed in their ordinary natural sense'.[40] Mutakha Kangu however cautions interpreters of the law against simply construing meanings about the law. He says that interpretation has concrete consequences in the real world and cannot be simply playing around with words.[41] Justice Ringera seems to hold the same sentiment as Kangu as he rejected the Elman doctrine since the constitution is the most supreme law whose interpretation is the most sensitive,[42] unlike other laws that derive validity from it.[43]

The Basic structure doctrine has not been expressly stated in the Kenyan constitution. However, Article 255(1) of the constitution states the provisions of the constitution that need to go back to the people for them to be amended.[44] These provisions require a referendum which is simply the people exercising their primary constituent power. The contents of the basic structure doctrine appear to be catered for under this very provision. The judges in the BBI case identified 5 chapters that form the basic structure; Chapter one, two, four, nine and ten.[45]

A judge led by article 159(2)(e),[46] would rightfully conclude that the basic structure doctrine strengthens the provisions of article 255(1)[47] which is an article that strengthens sovereignty of the people. If the sovereignty of the people is upheld then the supremacy of the constitution will also be upheld; and if the judges perform their roles as per the constitution, they will be executing the will of the people.

We can therefore conclude that the basic structure doctrine is not something that is outside of the constitution of Kenya. The interpretation of the constitution is what led the judges to make such a conclusion. The judges endorsing the basic structure doctrine (through being led by the people) are trying to prevent tyranny in amending the constitution. They are also guaranteeing that the liberty and rights of Kenyans will be upheld since the doctrine strengthens sovereignty of the people. This doctrine puts the people in charge of their government and the actions of their government.

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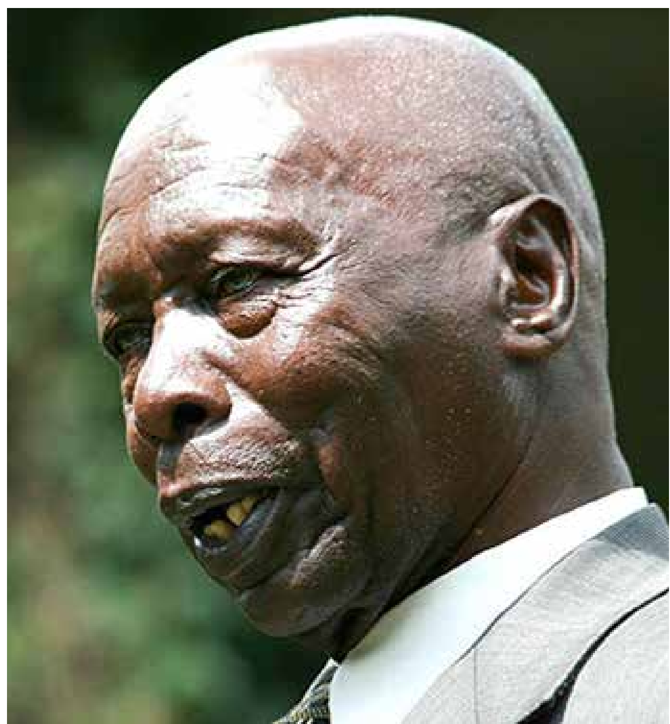
[36]Chapter 4, *Constitution of Kenya* (2010).
[37]Yongo C, "Constitutional interpretation of rights and court powers in Kenya: Towards a more nuanced understanding" 27(2) *African Journal of International and Comparative Law*, 2019, 203-224.
[38]*Speaker of the senate and another v Attorney General and four others* (2013) eKLR.
[39]Kangu M, '*Constitutional law of Kenya on devolution*' 2(1) Strathmore University Press, Nairobi, 2015, 5.
[40]*Republic v Elman* (1969) KLR.
[41]*Kangu M, 'Constitutional law of Kenya on devolution'* ,6.
[42]*Njoya & others v Attorney General & others* (2004) KLR.
[43]Hart HLA, 'The concept of law' (1961).
[44]Article 255(1) *Constitution of Kenya* (2010).
[45]*David Ndii and others v Attorney General and others* (2020) eKLR.
[46]Article 159(2)(e), *Constitution of Kenya* (2010).
[47]Article 255(1), *Constitution of Kenya* (2010).

Late President Jomo Kenyatta



Late President Daniel Arap Moi

History of Kenya's constitutional amendments

The constitutional amendments made by the first two presidents of Kenya (the late Jomo Kenyatta and Daniel Moi) steered Kenya towards executive dominance.[48] This went completely against the concept of separation of powers whose main role is preventing the concentration of power in a way that would help to guard against abuse of power in a manner that would severely circumscribe the liberty of individuals.[49] The constitution was amended in a myriad of fundamental ways without the involvement of the people. Although parliament signed off on these amendments, it cannot be seen to be a fully representative body in an authoritarian regime.[50] Supremacy of the people during Moi's time can be seen to be a myth. If the people are not supreme, then it would also mean that the law they make (that is, the constitution), cannot be considered supreme and hence can be easily flouted by those in power.

The late President Jomo Kenyatta crafted a perfect repressive state that his predecessor the late President Daniel Arap Moi followed through with.[51] Moi's regime could be said to have achieved 'constitutionalism' since all the atrocities he did were put into law such that he was technically following the law. The problem was that the laws themselves were repressive and only favoured him and his tyrannical regime.[52]

The biggest attack to the law by Moi was his siege on the judiciary.[53] As discussed earlier, judges are at the core of achieving transformative constitutionalism. Moi attacked the branch of the Government that was supposed to bring about change and that would have checked the actions of the executive through checks and balances. The 1963 constitution of Kenya guaranteed judicial independence.[54] However, Moi made an amendment that removed security of tenure.[55] The president essentially made himself in charge of hiring and firing the judges. Even when security of tenure was brought back, the president was still in charge of their job security as he had the power to remove judges upon the recommendation of a five-member tribunal that he appoints[56]. The removal of security of tenure forced judges to do Moi's bidding rather than upholding the constitution for fear of loss of their job.

He further infringed on judicial independence by hiring contract judges who would do his bidding. Moi even used a racist argument to validate their hiring. He said that whites were less corruptible than blacks.[57] These Judges also did

[48]Richard S, 'Constituent power and Carl Schmitt's theory of constitution in Kenya's constitution making process' 9(3 & 4) *International Journal of Constitutional Law*, 2011, 591.
[49]Landau D and Bilchitz D, *The evaluation of separation of powers in the global south and the global north*, Edward Elgar Publishing, Massachusetts, 2018, 1.
[50]Richard S, 'Constituent power and Carl Schmitt's theory' 595.
[51]Makau M, 'Justice under siege: The rule of law and judicial subservience in Kenya' *Human Rights Quarterly*, 2001, 98.
[52]Makau M, *Kenya's quest for democracy: Taming leviathan*, Lynne Reinner Publishers, Boulder, 2008, 62.
[53]Makau M, 'Justice under siege'. The article by Makau talks about the atrocities of Moi against the judiciary.
[54]H.W.O Okoth Ogendo, 'Law and government in Kenya: An official handbook' *Republic of Kenya: Ministry of Information and Broadcasting*, 1988, 27-35.
[55]Repealed Constitution of Kenya (Amendment) Act 50 of 1988.
[56]Makau M, 'Justice under siege', 106.
[57]Makau M, 'Justice under siege', 108.

Kenya's President Uhuru Kenyatta holds hands with Kenyan Deputy President William Ruto and Opposition leader Raila Odinga during the launch of the Building Bridges Initiative (BBI)

Moi's bidding to avoid losing their lucrative jobs. They had no interest in upholding the law for the benefit of society but for the benefit of their employer.

Without the existence of formal amendment rules to gatekeep the constitution,[58] Moi had the freedom to do whatever he wished with his executive power. The provisions of article 255(1) of the constitution help to protect the law of the people from fundamental amendments without their involvement. The contents of the basic structure doctrine also help to limit amendment power of even the president who is a representative of the people. The president can only act within the bounds of the constitution, the bounds that the people whom he or she represents have given to him or her.[59]

The provisions of the current proposed BBI bill make one question whether history is about to repeat itself. There is a proposed amendment 172A which if passed will establish the office of the Judiciary Ombudsman whose members will be appointed by the president and with approval of the national assembly[60]. The roles of this accountability office are the same ones as those of the Judicial Service Commission[61] established by Article 171[62] of the constitution. Since the roles are the same, what is the relevance of this ombudsman office? Is the establishment of this office an unnecessary overstep of the legislature and the executive on the judiciary? The BBI case is still in supreme court and the only way to determine if this office is relevant or if it is a repeat of history is to wait for the judgment and see if the people will pass these amendments, possibly on the ballot.

Conclusion

This essay has shown the sovereignty of the people through the supreme constitution. It has also shown how judges can arrive to the conclusion of the applicability of the Basic Structure Doctrine in Kenya through various methods of interpretation which all benefit the sovereign people. It has also shown that the people of Kenya have learnt from the past to ensure that the constitution has formal amendment rules in order to safeguard their supreme law from tyrants like Moi. The Basic Structure Doctrine has served the role of empowering the people with regards to implementations that go to the heart of their law. It serves as a protector of the sovereignty of the people, hence enhancing constitutionalism.

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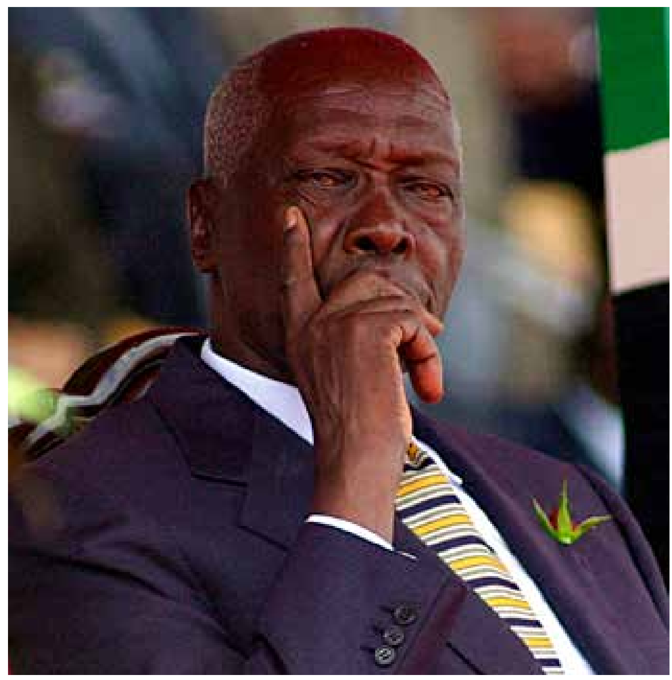
[58]Dixon R and Holden R, 'Constitutional amendment rules: the denominator problem in comparative constitutional design', University of Chicago, Public law working paper no. 346, 2011, 195 -<https://ssrn.com/1840925> on 20 December 2021.
[59]Richard S, 'Constituent power and Carl Schmitt's theory', 593.
[60]Building Bridges Initiative Report, *Fact sheet on the proposed constitutional amendments*, October 2020, 15.
[61]Article 172, *Constitution of Kenya* (2010).
[62]Article 171, *Constitution of Kenya* (2010).

Understanding political apathy in Kenya

By Amelia S. Kendi



Late President Daniel Arap Moi

Politics, according to the Laswellian definition, has been defined as the process in which the decision on who gets what, when and how, is determined.[1] Apathy, on the other hand, is said to be the lack of concern and interest in certain things. Apathy, and especially when it comes to politics, is a trait that could not have been predicted in years, so the question becomes, what has changed? Kenya is a politically vibrant nation and has been since pre-colonialism. Before colonialism, there existed hundreds of communities that were led by either chiefs or councils of elders. These leadership positions were hereditary while some required people to participate in choosing who would fill them by picking the most suitable leader.[2] In the Kalenjin community, for instance, all major decisions in the community were made by senior community members, collectively. These members would not represent their interests but those of their people (these could be their family or clan members).

In colonial and post-colonial Kenya, people were strongly involved in politics, evidenced by the myriad of freedom fighters who put their lives on the line to ensure that the natives were freed from the harsh colonial rule.[3] Through the years after independence, political upheavals have rocked the country to fight oppression. Saba Saba Day, commemorated on the 7th of July is an example of this. This day marked the day Kenyans exercised their citizen power by conducting protests to fight the constitutional amendment that made Kenya a single-party nation, an act put forth by the then President Daniel Arap Moi, after the uprising of a military coup in the country. This is an example of political organization which refers to the process by which people make, preserve and amend the general rules by which they live.[4]

Civic engagement promotes democracy in any given nation and its inadequacy has played a significant role in political apathy in Kenya. Civic education, described as the continuous and organized information given to citizens of a nation to enable their active participation in the country's governance and to promote democracy, undoubtedly needs public participation which is mandated in Article 118 (1) (b) of the Kenyan Constitution.[5] However, rare are the times when any type of civic education is carried out. At the ground level, local administrators such as chiefs and assistant chiefs are needed to offer civic education to citizens. In many parts of the country, the chiefs themselves lack enough knowledge on governance and democracy, some due to sheer ignorance and others simply have no idea they possess this duty since they hold their positions as a result of nepotism and corruption. Moreover, the language used to write civic books or laws in the country is not understood by the majority of the population.[6] A good example where this is evident is in the passing of the referendum by popular initiative. In this process, citizens study the proposed amendment by way of general suggestion or a draft bill which is meant to be signed by at least one million voters.

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[1]Almond, G.A., (1987). Harold Dwight Lasswell 1902-1978: A Biographical Memoir. National Academy of Sciences, pp. 249-274.Washington D.C
[2]Chelimo, F. J., & Chelelgo, K. (2016). Pre-Colonial Political Organization of the Kalenjin of Kenya: An Overview.
[3]Mainwaring, S. (1993). Presidentialism, multipartism, and democracy: the difficult combination. *Comparative political studies*, 26(2), 198-228.
[4]Chelimo, F. J., & Chelelgo, K. (2016). Pre-Colonial Political Organization of the Kalenjin of Kenya: An Overview
[5]The Constitution of Kenya, 2010
[6]Mwangome, A. M. (2021). Public participation in Kenya: a study on the effectiveness of citizen participation in constitution amendments by popular initiative.

In the 2010 constitution, majority of adult citizens had roughly any idea of what was really in the document and most relied on what their political leaders told them was in the document. The translation to Swahili language was equally inefficient; first, due to the huge barrier that exists between the written Swahili taught in school and the 'Street Swahili' which most people use in their day to day lives and due to low literacy levels among most ordinary citizens.

The recent proposed amendment bill dubbed the Building Bridges Initiative (BBI), which came up 10 years after the passing of the constitution, has met the same challenges, or worse. Majority of the Kenyan population has not read the proposed bill and have no idea of what the purpose of the bill is, yet the appeal has reached the Supreme Court. Moreover, a majority of its supporters and opposers are only going with what their political favourites say.

Another cause for the political apathy in the country is corruption and abuse of power which occurs in the form of malfeasance in office.[7] Kenya, in 2020, was ranked 124th out of 180 in the most corrupt countries with 180 being the number of the most corrupt country. This 'research' was done by the Corruption Perceptions Index.[8]

Kenya's corruption has grown to the point where an act done in honesty and good character is considered abnormal. Corruption has become embedded in the nation's fabric, surpassing truth, diligence and good leadership.[9] Every situation becomes predictable, based on who, when, how and where. Politics becomes predictable. It has become quite easy to predict who enters any office, governmental or private so the attitude of many people has become, "Why Try?". By not trying too hard, which is actually a law of nature in some religions like Confucianism, one worries less and peace of mind is maintained. Unfortunately, unlike the results expected from these religions, in Kenya, this indifference has led to a worse state of affairs. The country has been handed to the 'chosen few'. Corruption, coupled with malfeasance in office, makes it quite hard for citizens to stand up for their rights or challenge those in authority as they fear ending up dead, as has been the case and trend for the past couple of years. As the old saying goes, if you cannot beat them, join them. Or better yet, let them be, as is clear in the atmosphere regarding politics in Kenya.

It is ironical that in the age of social media and the internet, where people can acquire so much information, ignorance has anything but lessened. According to research done on social media and youth's political participation in Zimbabwe, social media networks, in Sub-Saharan Africa promote anti-revolution.[10] Signing petitions online and sharing political posters online only does so much and unfortunately, most people, especially the youth, have the notion that this is all that is needed to effect change. Political participation in social media spaces is performative and real issues facing the country are not profoundly discussed. Those in authority are not being held accountable enough despite them carrying the decision-making process. Politics is almost a taboo on social media with political discussions evoking deep emotions and throwing rationale out the window, which has resulted to most people steering away from such discussion at all. Moreover, with the current atmosphere of fear and intimidation in this country, most people shy away from publicly initiating political conversations for fear of being arrested or ending up in some river in a remote part of the country.

In as much as there are constant efforts to try and change the attitude of apathy in Kenya, that is unlikely to change, especially with many citizens feeling quite hopeless with the country's leadership and future. It would take a change in mind of many citizens and the eradication of corruption, all of which will take years and years to happen. In the meanwhile, as sad as it is, there is not much that an ordinary citizen can do to change the status quo apart from observing it all from a distance with the hope that one day people will be courageous enough to say enough is enough and use their citizen power to demand change that steers the country in the right direction.

[7]Ekwenchi, O. C., & Udenze, S. (2014). Youth and political apathy: Lessons from a social media platform. International Journal of Social Sciences and Humanities Review, 4(4), 1-8

[8]Baumann, H. (2020). The corruption perception index and the political economy of governing at a distance. International Relations, 34(4), 504-523.

[9]Akech, M. (2011). Abuse of power and corruption in Kenya: will the new constitution enhance government accountability? *Indiana Journal of Global Legal Studies*, 18(1), 341-394.

[10]Chiweshe, M. K. (2017). Social networks as anti-revolutionary forces: Facebook and political apathy among youth in urban Harare, Zimbabwe. Africa Development, 42(2), 129-147.

Continuous disobedience of court orders and its effect on constitutionalism and the rule of law in Kenya: a critical analysis of lawyer Miguna miguna and Jimi Wanjigi firearms saga cases

'The instant matter is a cause of anxiety because of the increasing trend by Government Ministers to behave as if they are in competition with the courts as to who has more "muscle" in certain matters where their decisions have been questioned, in court! Courts, unlike the politically minded minister, are neither guided by political expediency, popularity gimmicks, chest-thumping nor competitive streaks. Courts are guided and are beholden to law and to law only! Where Ministers therefore by their actions step outside the boundaries of law, courts have the constitutional mandate to bring them back to track and that is all that the courts do. Judicial review orders would otherwise have no meaning in our laws. . . Court orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away is to underestimate and belittle the purpose for which courts are set up... ... .'[1]

Lenaola Justice.

By Kipkoech Nicholas Cheruiyot

By Bett Rickcard Kipruto

1.0 Introduction

One of the most celebrated constitutional moments in the history of the Republic of Kenya is 2010, during which the 2010 Constitution of Kenya (the Constitution) was promulgated. The moment can best be termed as "the birth of a second republic." The whole process was so important that upon signing of the Constitution into law by the former President of Kenya H.E. Mwai Kibaki, it was honored with a twenty-one-gun salute with the military band playing the Kenyan national anthem.[2]

Importantly, the adoption of the 2010 Constitution was a shift from the previous authoritarian regime which was characterised by imperial presidency.[3] Under the pre-2010 dispensation, the president and the entire executive was

Former President Mwai Kibaki

vested with so much unfettered powers, where he controlled the government and the entire criminal justice system wielding unregulated powers of appointment and dismissal.[4] As such, there was completely no regard for the rule of law, in an environment that was characterised by endless human rights violations.

The executive arm of government was infallible, and the rest of the arms were vulnerable being on the sad receiving

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[1]Hon. Justice Lenaola in *Kariuki & 2 others v Minister for Gender, Sports, Culture & Social Services & 2 others* [2004] 1 KLR 588.

[2]Peter Greste, 'Kenya's New Constitution Sparks Hopes of Rebirth' BBC News (27 August 2010) <https://www.bbc.com/news/world-africa-11103008> accessed 6 January 2022.

[3]Imperial Presidency connotes presidential supremacy, which is created through among other actions the appropriation by the president of the powers reserved by the constitution to the other branches of government. For more, see Arthur Schlesinger, The Imperial Presidency (1973).

[4]Dr. Migai Akech, 'Institutional Reform in the New Constitution of Kenya' (2010) *International Center for Transitional Justice*, 26.

end. The executive arm, by 1969 onwards had become so powerful that the legislature and the judiciary had been turned into mere puppets of the executive. The judiciary showed no ability or inclination to uphold the rule of law against the express or perceived whims and interests of the executive and individual senior government officials, their business associates, and cronies. The government acted swiftly and expeditiously to discipline or dismiss individual judges and magistrates who occasionally had failed to carry out its wishes.[5] As a result, almost all the adjudications were choreographed to please the State, specifically the President.[6]

The Constitution therefore seeks to bring to an end to presidential hegemony through a number of constitutional mechanisms and safeguards.[7] As opposed to the pre-2010 dispensation, which was characterised with authoritarianism, the 2010 Constitution is anchored on accountability for every administrative action or otherwise by every State Officer. Every action has to be justified, and it must be legal in the strictest sense. In the Kenyan context, the Constitution can best be termed as a bridge from a culture of authority to a culture of justification.[8] A culture of justification requires that governments must provide substantive justification for all their actions, in terms of the rationality and reasonableness of every action and the trade-offs that every action necessarily involves, in terms of proportionality,[9] and so on.

The continuous actions by a number of the members of the executive spanning from disregard of the rule of law to the disobedience of court orders is alarming, seeking to drag back the progressive changes which have been brought by the Constitution. This paper seeks to analyse the issue of disobedience of court orders, and the effect that it has on Constitutionalism and the Rule of Law. The paper notes that there are a number of incidences of disobedience of court orders since the adoption of the Constitution in 2010. It however, as case examples, looks at the most recent incidences being the cases of Lawyer Miguna Miguna and Jimi Wanjigi.

2.0 The Post-2010 Judiciary of Kenya as an Arbiter of Disputes and Its Role in Transformative Constitutionalism

Chapter ten of the Constitution establishes the judiciary as an independent organ of government. As such, it is subject

Miguna Miguna

only to the Constitution and the law and is not subject to the control or direction of any person or authority.[10] The judiciary is the arbiter of disputes that may arise between and within the executive, the legislature and the Kenyan people. The judiciary is therefore mandated to stand in the gap that exists between the Kenyan people and the constitutional interpretation through transformative adjudication (Emphasis added). Without its midwifing role of judicialism, then the Constitution would be just a 'good on paper' document.

Judicialism embodies the aspect that the judiciary has the ultimate power to give meaning to the law such that all other state organs have no option but follow and submit to its determination.[11] In Kenya, judicialism and transformative constitutionalism are the two main ideologies defining the 2010 Constitution, and the judiciary is the greatest beneficiary of the changing philosophies in the Constitution.[12] It is worth noting that judicialism is at the core of transformative constitutionalism since the concept places faith in the law as an instrument of social and political change, and in the courts as the 'midwives' of the transformation since courts are legally mandated to interpret

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[5]Makau Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001) 23 Human Rights Quarterly, 96. Available at: https://digitalcommons.law.buffalo.edu/journal_articles/569.

[6] JT Gathii 'The Dream of Judicial Security of Tenure and The Reality of Executive Involvement in Kenya's Judicial Process' (1994) II *Thoughts on Democracy Series*, 10.

[7]Ibid.

[8]Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights,'(1994) 10 *South African Journal of Human Rights*, 31.

[9]Cohen-Eliya M And Porat I, 'Proportionality and the Culture of Justification' (2011) 59 *The American Journal of Comparative Law*, 463.

[10]*The Constitution of Kenya 2010*, Article 160 (1).

[11]This is a mandate vested upon the High Court under Article 165(3) *of the Constitution*, which has an original and an exclusive jurisdiction to hear any question in respect of the interpretation of the Constitution, including the question of whether any law is inconsistent or in contravention of the Constitution.

[12]JB Ojwang, *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power In A Democratising Constitutional Order* (2013).

and apply the law. This was the position in *Trusted Society of Human Rights Alliance v AG,*[13] where the court termed itself as a 'co-ordinate' and 'co-equal' arm of government with the mandate of interfering with the decisions of the political arms which offend or exceed the limits of the Constitution and the law generally.

The judiciary must therefore assume a more assertive position than in the ordinary traditional contexts.[14] This was underscored in *Communications Commission of Kenya v Royal Media Services Limited,*[15] where the Supreme Court of Kenya recognised that '[t]he judiciary has been granted a pivotal role in midwifing transformative constitutionalism and the new rule of law in Kenya.' The confidence of the judiciary in its adjudicative role stems from the concept of 'separation of powers' which, as will be elaborated in the next part of this paper, presupposes that every arm of government sticks to its own constitutionally delimited lane.

3.0 The Concept of Separation of Powers in a Democratic Society

What guarantees the success of a democratic society is a situation where, in jurisdictions that have different branches of government, every branch has its own functions and powers clearly provided for. It immediately follows that such branches limit their actions and stick to their constitutional lanes. The idea of separation of powers is an idea that the branches of government and other institutions of the State should be functionally independent, and that no individual should have powers that span these offices. This doctrine can be traced back to Aristotle (384-322 BC)[16] who offered three main elements that every constitution and the law giver must look for what is advantageous to it, the judiciary being one of them.

The clearest element on the doctrine of separation of powers was however given by Baron De Montesquieu in 1748 when in *The Spirit of Law*[17] he wrote;

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.... there is no liberty if the powers of judging are not separated from the legislature and the executive.... there would be an end to everything, if the same man or the same body.... were to exercise those powers.

The same position had also been earlier on held by Locke,[18] who warned against the concentration of state powers in a few hands. He pointed out that where state power is entrusted in a few persons, the liberty and the security of citizens are always in imminent danger. What Locke supplied to this proposition is an idea of distributing state power to different individuals and institutions. Locke posited three powers, a legislative, an executive and federative.

It is imperative to note that a strict interpretation of the doctrine of separation of powers connotes that none of the three branches may in any way exercise the power of the other, nor should any person be a member of any two of the branches.[19] Instead, the independent action of the separate

[13] *Trusted Society of Human Rights Alliance v Attorney-General & 2 Others [2012]* eKLR.
[14] Dr. Erick Kibet and Charles Fombad, 'Transformative Constitutionalism and The Adjudication of Constitutional Rights in Africa' (2017) 17 *African Human Rights Law Journal 340-366*, 18.
[15] *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others*, [2014] eKLR.
[16] Aristotle, Politics (322-384 BC) Translated by Benjamin Jowett and Introduction done by Max Lerner. In the book, Aristotle points out that:
'There are three elements in each constitution in respect of which every serious lawgiver must look for what is advantageous to it; if these are well arranged the constitution is bound to correspond to the differences between each of these elements. The three are, first, deliberative, which discusses everything of common importance. Second, the officials and third the judicial element.'
[17] Montesquieu Charles De Secondat Baron De, *The Spirit of Laws* (1748). Translated and edited by Anne Cohler, Basiz Miler and Harold Stone (1989).
[18] John Locke, *Second Treatise on Civil Government* (1690) Chapter XII, 143.
[19] Van Der Vyver JD, 'Political Power Constraints in the American Constitution' (1987) *South African Law Journal.* This is captured under *the Constitution of Kenya, 2010.* An example is where the President is barred from holding any other position under Article 131 (3). Further, a Cabinet Secretary under Article 152 (3) shall not be a member of Parliament.

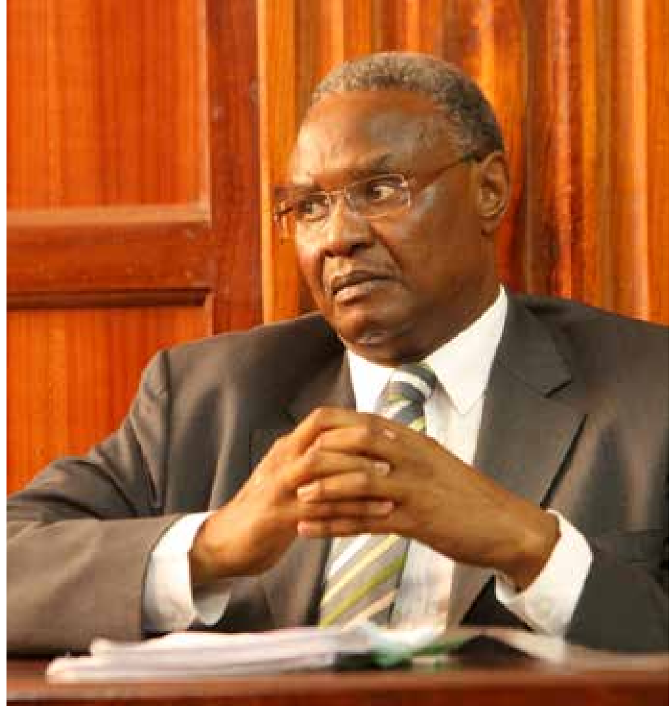
institutions should create a system of checks and balances between them.[20] Given that the doctrine of separation of powers in the pre-2010 dispensation has been discussed at length, the next part of this paper will discuss the concept of 'separation of powers' in the post-2010 era.

3.1 The Doctrine of Separation of Powers and Institutional Independence in the Post-2010 Era

The adoption of the 2010 Constitution was a game-changer, coming in to salvage the country from the shackles of lack of constitutionalism and a total disregard of the rule of law. This was a shift from the previous authoritarian regime, into a regime in which every exercise of power is expected to be justified.[21] The litmus test for every action or inaction is the Constitution as the *Grund Norm* and other laws of Kenya including legislations adopted in strict conformity with the Constitution.[22]

One of the greatest imports of the Constitution was on the aspect of separation of powers, clearly delimiting the powers and the roles of each and every arm of government.[23] Anchored on the principle of separation of powers is the concept of independence, where every organ is independent and is not subject to the directions or controls of the other branches. Every arm is subject to the Constitution only, and other attendant laws of Kenya. Article 93 (2) of the Constitution on the functions of Parliament states that 'the National Assembly and the Senate shall perform their respective functions in accordance with this Constitution.' Article 129 on the other hand on the principles of executive authority states that the 'executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution.' Article 159 on judicial authority is also couched on the same terms, stating that 'judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.'

Additionally, Article 160 of the Constitution states that 'in the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control of any person or authority.' In *Dr. Christopher Murungaru v Kenya Anti-Corruption Commission*,[24] the court stated that since the Kenyan nation has chosen the path of democracy rather than dictatorship, the courts must stick to the rule of law



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even if the public may in any particular case be of a contrary opinion.

As opposed to the Independence Constitution where the executive arm of government was too powerful controlling the other arms,[25] the 2010 Constitution has redesigned the executive in order to make it more accountable to the other arms of government, thus ensuring that there is a functional separation of powers.[26] This doctrine effectively ended the reign of 'imperial presidency.' This, in the relationship between the executive and the judiciary, has been achieved through the strengthening of the capacity of the judiciary.[27] Arguably, this is a departure and a major improvement from the previous constitutional order where there was no express vesting of judicial power in the institutions that constituted the judiciary. The previous regime left open the possibility of the legislature asserting itself by giving judgments in specific cases, which could be done through the bills of attainders, where Parliament could pass a legislation condemning a certain individual(s) saying, for example, that they are guilty of treason and meting out a desired punishment.[28] Such possibilities, including a possibility of a fusion of judicial and executive power has been eliminated by the express

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[20]Charles Mwaura Kamau, *Principles of Constitutional Law* (2014), 41.

[21]Supra note 8.

[22]Article 2(4) specifically provides that any law that is inconsistent with the Constitution shall be void to the extent of its inconsistency. This is to the effect that all other laws, including legislations and customary laws have to be Constitutionally justified for them to operate.

[23]Every arm of government has been established under the Constitution, with its own distinct powers and functions. Chapter 8 establishes the Legislature which is comprised of two houses, i.e. the National Assembly and the Senate, Chapter 9 establishes the Executive and Chapter 10 establishes the Judiciary.

[24]*Dr. Christopher Murungaru v Kenya Anti-Corruption Commission & Another* [2006] 1 KLR 7, par. 7.

[25]The Executive could control the decisions of the courts either directly or through parliamentary legislations.

[26]Supra note 20.

[27]Article 160 of the Constitution provides that in the exercise of judicial authority, the judiciary shall be subject only to the Constitution and the law and shall not be subject to the control or direction of any person or authority.

[28]JB Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (1990) 158.

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constitutional provisions regarding the vesting and exercise of judicial power by the 2010 Constitution.[29]

Against the backdrop of the previous authoritarian regime using various means to obstruct justice, the Constitution has been clear enough on how justice ought to be administered. Some of the principles[30] guiding the courts and tribunals in their operation are that justice is to be done to everyone regardless of their status, justice shall not be delayed, and that justice shall be administered without undue regard to procedural technicalities. The structure of the Judiciary has also been enhanced through the establishment of the Supreme Court[31] with its own original jurisdiction.[32] The independence of the judiciary has been enhanced through the establishment of its own financial independence.[33] Other features of judicial independence include the process of appointment of judges[34] and the security of tenure of judges.[35] One of the major threats that the judiciary face which extends to the threat to constitutionalism and the rule of law, as will be seen in the next part of this paper is the disobedience of its orders.

4.0 Disobedience of Court Orders in Kenya; A Set-Back to Constitutionalism and the Rule of Law

One of the greatest impediments which have hampered constitutionalism and the rule of law in Kenya is the disobedience of court orders, worse by the members of the executive and the legislature. It is an unfortunate situation given that the three arms of government are supposed to work together on the basis of independence, mutuality, cooperation and coordination.[36] The greatest recipe for chaos in every democratic society is disobedience of court orders. The judiciary being an arbiter of disputes and the sole body vested with the interpretation of the law, the choice to disregard its orders threatens not only its legitimacy and credibility but also that of the Constitution and the rule of law. This is since such a disobedience will in one way or another interfere with the independence of the judiciary, negating the real purpose of separation of powers. Chief Justice Brian Dickson clearly stated in the *Queen v. Beauregard*[37] that:

> the role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system. '

The immediate consequence of such a lack of credibility is that the citizens will lose confidence in the judiciary, leaving it with no legal recourse for any injustice suffered by them.[38] There have been a number of incidences of disobedience of court orders in Kenya since 2010, situations which have interfered with the effective implementation of the Constitution. This paper will look at two major and the latest incidences, which are the disobedience of Court orders by the executive in the incidences of Lawyer Miguna Miguna and DCI George Kinoti. As will be seen herein, the executive has blatantly disobeyed court orders ordering among others the production in court and the returning into the country of Lawyer Miguna Miguna, and the returning of firearms by the DCI to Businessman Jimmy Wanjigi.

4.1 Back to Authoritarianism and Tyrannical State of Affairs? Lawyer Miguna Miguna Fiasco

The almost three years citizenship debacle involving

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[29]Elisha Z. Ongoya, 'Separation of Powers' in PLO Lumumba, M.K. Mbondenyi and S.O. Odero, *The Constitution of Kenya: Contemporary Readings* (2011) 193.
[30]See Article 159 (2) of the *Constitution*.
[31]Notably, the Highest Court under the Independence Constitution was the Court of Appeal.
[32]Article 163 (3) of the *Constitution* grants the Supreme Court original and exclusive jurisdiction to hear and determine disputes relating to the elections to the office of the President arising under Article 140 of the Constitution.
[33]Article 160 (3) of the *Constitution* states that 'the remuneration and benefits payable to or in respect of judges shall be a charge of the Consolidated Fund. See also Article 173 on the establishment of 'Judiciary Fund.'
[34]The judges to the Higher Courts are appointed by the President upon recommendations by the Judicial Service Commission. See Article 166 of *the Constitution*. The Judicial Service Commission appoints the registrars, magistrates and other judicial officers and other staff of the Judiciary pursuant to Article 172 (1) (c) of *the Constitution*.
[35]A sitting judge can only be removed from office by filing a petition before the Judicial Service Commission (JSC) or the JSC acting on its own motion pursuant to Article 168 (2) of *the Constitution*. See also Article 167 of *the Constitution* on the 'tenure of office of the Chief Justice and other judges.'
[36]This is not forgetting that the three arms ought to act as watchdogs, ensuring that the other arms perform their roles in accordance to the Constitution.
[37]*The Queen v. Beauregard* (1986) 2 S.C.R. 56.
[38]Emanuel Kibet & Kimberly Wangeci, 'A Perspective on the Doctrine of the Separation of Powers based on the Response to Court Orders in Kenya' (2016) *1 Strathmore Law Review, 226.*

Canadian-based Kenyan lawyer and activist Dr. Miguna Miguna has fully exposed Jubilee Government's underbelly in terms of compliance with court orders.[39] The issue dates back to 2018, when the then self-declared National Resistance Movement (NRM) General in a mock ceremony sworn in the then National Super Alliance (NASA) leader and presidential candidate Raila Odinga.[40] Immediately afterwards, he was arrested and detained by the State, before being forcefully deported to Canada against a valid court order that had been issued against the move. Since then, there has been a series of court battles, one order being issued by the court and disobeyed by the members of the executive after another.

The officers who arrested him had been directed by Hon. Mulochi (RM) to produce him in court on 6th February 2018. They had failed to produce him leaving the Magistrate waiting in court up to beyond 7:00 pm. It later on emerged that he had been produced before Milimani Law Courts, against the court's directions. On the same day, the Interior Security Cabinet Secretary Dr. Fred Matiang'i had published a notice that Miguna Miguna remain in prison custody awaiting his deportation to Canada, since he is not a Kenyan citizen and is a threat to national security.[41] Following the notice, The Director of Immigration Services had considered himself entitled to give effect to that declaration hence the deportation of Miguna Miguna.

Interior Security Cabinet Secretary Dr.Fred Matiang'i

Another order was being issued, for him to be produced before Justice Luka Kimaru. This was made in *High Court Misc. Criminal Application No. 57 of 2018*. Before staying any criminal proceeding against Lawyer Miguna Miguna and ordering that he be produced before him on 7th February 2018, the learned judge had made the following assertion:

> "It is apparent that the 2nd and 3rd respondents are in contempt of the orders of this court. They have refused or failed to surrender the applicant to this court so that he can be released in terms of the orders of the court issued today. It is clear that unless this court takes appropriate remedial action, the 2nd and 3rd respondents will continue to treat the orders of this court with impunity…."

Unfortunately, he was removed out of the country that very night. On 7th February, upon the State failing to procure him in court, a battery of his lawyers made heated and impassioned submissions. This culminated into yet another ruling, with the Learned Judge stating *inter alia*;

> "From the submissions made, it is clear to this court that there is an obvious contempt of the orders of this court and a deliberate attempt by State agencies to subvert the Rule of Law in this country. Court orders once issued must be obeyed…."

He further directed that the then Director of Criminal Investigations, the Police Inspector General and the Director of Immigration services appear before court to show cause of their actions on 15th February 2018. As expected, they did not appear before the court, asking the court to rely on their written and filed affidavits. In their absence, the Learned Judge among others made the following orders:

(i) A declaration that the orders issued by Fred Matiang'i be declared null and void and of no legal effect having been issued in contempt of the orders of the court;
(ii) A declaration that the valid passport of Lawyer Miguna Miguna be surrendered to the Registrar of the High Court within seven (7) days; and
(iii) A declaration that Fred Matiang'i and the Director of Immigration Services Gordon Kihalangwa give undertakings to comply with the orders of the Court, and such undertakings be delivered before the court within seven (7) days.

Stung and aggrieved by the orders, they appealed against the ruling in *Fred Matiang'i and 2 Others v Miguna Miguna*

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[39]James Kahongeh, 'Miguna, Moses Kuria Cases Add to Long List of Defied Court Orders | Kenya' <https://nation.africa/kenya/news/miguna-moses-kuria-cases-add-to-long-list-of-defied-court-orders-240486?view=htmlamp> accessed 7 January 2022.
[40]Kamau Muthoni, 'Miguna Miguna's Lawyer Back in Court after Hyped Return to Kenya Ends at a Berlin Airport - The Standard' <https://www.standardmedia.co.ke/national/article/2001429402/miguna-migunas-lawyer-back-in-court-after-hyped-return-to-kenya-ends-at-a-berlin-airport> accessed 4 January 2022.
[41]Dr. Fred Matiang'I, 'Ministry of Interior and Co-Ordination of National Government Declaration Under Section 43 of the Kenya Citizenship and Immigration Act 2011, Laws of Kenya,' notice dated 6th February 2018.

Dr. John Khaminwa

& 4 Others.[42] The main issue of contention by the appellants was that the Learned Judge had made the ruling against Fred Matiang'i in violation of his Constitutional right to a fair trial as he was not a party to the proceedings before the High Court, that he was not given an opportunity to be heard. They then urged the court to stay the execution of the orders of the High Court pending the determination of the appeal.

At the Court of Appeal, the court, having examined all that transpired, pointed out that it will not, and in fact no court should take lightly any incident of a contempt of court. It pronounced itself thus;

> When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who decides to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.

Against the arguments of the applicants, the court found no merit or justification in the claim that the presence of Lawyer Miguna Miguna was a danger to the national security and may occasion any form of injustice on the State or any member of the executive. The court found that:

> We also do not see how the return of Miguna portends a clear and present danger of social upheaval or a breakdown of law and order. Beyond the possibility that those whose acts were invalidated by the learned Judge may suffer some embarrassment, we are unable to discern any real loss or prejudice. Moreover, there is nothing irreversible that could occur as a result of those orders subsisting while the appeals intended are processed, prosecuted and decided by this Court. If anything, there is something to be said about a Kenyan born litigant being accorded the opportunity, consistent with his right to a fair trial, to return to the country of his birth and attend to the cases filed by and against him.

Finding no merit in the application, the Court of Appeal dismissed it with costs, leaving the orders of the High Court standing with the full effect of the law.

It is rather unfortunate that the orders of the High Court have never been complied with, raising many unanswered questions on how the executive and its members treat court orders. The same has also been followed by a number of other declarations ordering that Lawyer Miguna Miguna be allowed into the country, and that the Canadian and other countries put no obstruction on his travels back to Kenya.

The latest incident was the denial of Miguna Miguna's travel back into the country, leaving him stranded Berlin, Germany, following a Red Alert issued to the Travel Company Air France by the Government of Kenya. In his petition to the High Court through his Advocate Dr. John Khaminwa, Miguna Miguna has accused the Government of Kenya of lying to the court yet it had issued a declaration that Lawyer Miguna Miguna was a prohibited immigrant. He has also sued Air France for failing to honor its side of the bargain even after payments were made by Lawyer Miguna Miguna.[43]

4.1.1 Application of the Repealed Kenyan Law

The law generally does not apply retrospectively. Additionally, a repealed law cannot be applied in presence of a new law to acts which are committed either before or during the subsistence of the new law.[44] What was seen however in the Case of Miguna Miguna was a situation where the State was applying repealed Citizenship and Immigration Law. This is against the Kenyan Constitution and the Citizenship and Immigration Act of 2012. Under Article 14-18 of the Constitution, Lawyer Miguna Miguna is a Kenyan citizen by birth. Additionally, by applying

[42]*Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 Others* [2018] eKLR.
[43]Supra note 40.
[44]See Generally Hans Kelsen, 'Law and Logic' in *Essays in Legal and Moral Philosophy.*

for the Canadian Citizenship, by dint of Article 16 of the Constitution, did not lose his Kenyan citizenship.

Article 97(1) of the Repealed 1963 Constitution provided that 'A person who, upon the attainment of the age of twenty-one years, is a citizen of Kenya and also a citizen of some country other than Kenya shall, subject to subsection (7), cease to be a citizen of Kenya upon the specified date unless he has renounced his citizenship of that other country, taken the oath of allegiance and, in the case of a person who was born outside Kenya, made and registered such declaration of his intentions concerning residence as may be prescribed by or under an Act of Parliament.'

In this regard, it follows that the action to revoke Miguna Miguna's passport on the basis of section 97 of the repealed Constitution is illogical in as far the law is concerned. Wherever and whenever a case is decided based on law that is no longer valid, then such an application of the law defies logic and can best be described as fallacious.[45] On this basis, Section 7 of the Sixth Schedule to the Constitution provides that all existing laws in force before the effective date should be construed with 'the alterations, adaptations, qualifications and exceptions necessary to bring into conformity with the Constitution.' Additionally, Section 30 of the Sixth Schedule provides that 'a Kenyan citizen is a citizen by birth if that citizen acquired citizenship under Section 87 and 88 of the former Constitution.'

Jimi Wanjigi

4.2 The Jimi Wanjigi Firearms Saga

The issue of persistent noncompliance was also evident in a recent instance involving the seizure of guns from Jimi Wanjigi's home. This section of the study will evaluate the facts that led up to the case, the issues before the court, and their resolution. This section shall also look at the issue of contempt of court by the DCI George Kinoti.

4.2.1 Factual Context

The firearms saga started with a raid on Wanjigi's residences in 2017. The raids took place in October 2017 where police stormed into Wanjigi's Nairobi homes and subsequently confiscated firearms and ammunition.[46] The DCI and the DPP justified this action arguing that Mr. Wanjigi did not have the proper licences. According to the Petitioners, the police illegally searched and destroyed their property, broke down doors, destroyed CCTV installations, and terrorised them and their family members during the raid; that during the illegal search, the officers confiscated, among other things, the 1st Petitioner's licenced firearms and ammunition. The confiscated firearms include one pistol, Smith and Wesson serial number SW99; one Glock pistol, serial number UAB 630; one assault rifle, Mini Archer serial number 2013/MIII attached with a laser serial number W3043907; one Glock 19 pistol, serial number UAB 646; one assault rifle, M4CQ serial number CN 005433/13; one Glock 19 pistol, serial number URG 798; and one Glock 19 pistol, serial number UAB 632.

The Petitioners moved to court first to review the decision to confiscate the guns through a judicial review. In the case, the court held that the confiscation and raid on the petitioner's property was unlawful as the respondent's action were procedurally improper, irrational and unjustified.[47] As such the court upheld the validity of the Petitioner's license. In doing so the court awarded an order of *certiorari* to quash the Respondent's decision to revoke and confiscate the firearms.

The undisputed police raids on the *ex parte* applicant's premises and failure to exhibit any search warrants or court orders authorizing the invasion, search and seizures left the court in doubt on the legality and motive of the said actions which were followed by the purported revocation of the license. Additionally, the utterances attributed to the Cabinet Secretary as the court had discussed raised serious doubts in the mind of the court on *mala fides* of the decision.

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[45]Joshua Kembero Ogega, 'The Man Without a Country: An Appraisal of Citizenship in Kenya and The Applicability of Repealed Laws in Kenya After the Miguna Miguna Fiasco,' 12-13.

[46]Charles Lwanga and Lillian Mutavi 'Police raid Jimi Wanjigi home in Nairobi' The Nation (Nairobi, 16 October 2017) https://nation.africa/kenya/news/police-raid-jimi-wanjigi-home-in-nairobi-464232?view=htmlamp Accessed 6 January 2021.

[47]*Republic v Firearms Licensing Board &another; Ex parte Jimi Wanjigi* Judicial Review Miscellaneous Application 46 of 2018 [2019] eKLR

Yash Pal Ghai

Such actions in the view of the court suggested bad faith or a reasonable possibility of ill motive or bad faith in making the impugned decision.[48]

It was expected that after such an action, the Respondent would follow the instructions of the court and release the confiscated firearms. After all, the High Court had re-established the validity of the license and argued that the orders and decision to confiscate them was unlawful. As such, the Respondent bound by the Court's order and in respect of the rule of law ought to have followed such orders. This however was not the case. A few months after the decision, the High Court on the 21 June 2019 ordered that the confiscated firearms should be released. Moreover, the court held that the respondents had breached the Petitioner's fundamental rights including the right to privacy.[49]

On February 11, 2021, the Court found the DCI in contempt of court. The contemnor was instructed to comply with the verdict, but he was yet to do so. On November 18, 2021, the High Court condemned the DCI to four months in jail for contempt of court. On the same day, the DCI, through the Attorney General, filed an instant Notice of Appeal against the sentence. The Notice of Appeal was later withdrawn via a withdrawal notice dated November 22nd, 2021. He later sought to review the ruling. However, the court rejected the Notice of Motion stating that the Applicants had failed to meet the prerequisites of a review under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules.[50] Additionally, the court maintained the arrest warrant issued.

5.0 The Effect of Disobedience of Court Orders on Constitutionalism and The Rule of Law

From the scenarios above, it is clear that the parties involved have continuously failed to obey court orders. This is such a dangerous trend, which interferes with the independence and proper functioning of the courts. Adherence to court orders is important for the general functioning of court procedures. This section shall look at the effect of contempt of court on constitutionalism and the rule of law.

5.1 The Effect of Contempt on Constitutionalism

Constitutionalism is a constitutional concept in which every constitution has safeguards that limits the exercise of state powers.[51] As per Yash Pal Ghai, constitutionalism is a source of power, but it also sets limits on power.[52] This essentially means that it functions to ensure that those in power act within the limits set out by the law. The Constitution enshrines this key concept in Article 2 which enshrines the supremacy of the Constitution. As such, all power originates from the people and is held as a public trust by those in government.[53] The exercise of such authority and power should be in a manner consistent with the supreme law of the land. Constitutionalism comes in to ensure that power is exercised in a manner that is not only in line with the supreme law but also unarbitrary.

The previous constitutional architecture lacked provisions to ensure constitutionalism.[54] As aforementioned, it possessed a somewhat all-powerful administration, a somewhat impotent judiciary, and a robust legislature that, to be fair, lacked the necessary authorities to implement checks and balances.[55] According to Kivuva, the 'imperial presidency' which had perpetuated unequal power relations among the three branches of government, had undoubtedly been

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[48]*Supra* Para 102.
[49]*Jimi Wanjigi & another v Inspector General of Police & 3 others* Petition No. 520 of 2017 [2019] eKLR
[50]Citing *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* Miscellaneous Application 317 of 2018 [2019] eKLR and Col. Tom Martins Kibisu vs. Republic Petition No. 3 of 2014 [2014] eKLR.
[51]Jan-Erik Lane, Constitutions and political theory. (Manchester University Press, 1996) 19. Robert Post, and Reva Siegel. 'Popular constitutionalism, departmentalism, and judicial supremacy' (2004) 92.4 *California Law Review* 1027,1033.
[52]Yash Ghai 'Constitutions and Constitutionalism' in Nic Cheeseman, Karuti Kanyinga, and Gabrielle Lynch (eds) The *Oxford Handbook of Kenyan Politics* (Oxford, OUP, 2006) 121.
[53]*Constitution of Kenya 2010*, Article 73.
[54]Chris M. Peter, 'The Struggle for Constitutionalism and Democracy in East Africa: The Experience of Kenya and Tanzania' (1995) 2.2 *East African Journal of Peace and Human Rights* 158,164.
[55]*Charles O. Oyaya, and Nana K. Poku. The Making of The Constitution of Kenya: A Century of Struggle and The Future of Constitutionalism*. (Routledge, 2018) 34.

the hallmark of Kenya's post-colonial state. It gave the executive the ability to dominate the two other branches of government.[56]

The traditional perception of constitutionalism is based on the limitation of government authority with a view to limit the overt domination by one arm or branch.[57] With this in mind, the law is hence developed in a manner that seeks to ensure that each arm of the government has specific powers and responsibilities. This is clearly seen in Article 1(3) that shares power between the arms of government and Article 1(4) that lays out the division of power at the national and the county level.[58]

Additionally, the judiciary is the defender and the guardian of the constitution.[59] It is established as an independent body that carries out judicial oversight and review on the actions of the other state organs.[60] However, it can only carry out this function where the laws in place are adhered to and its orders are followed. Where there is wanton disregard for the judgments delivered, it becomes a toothless bulldog.[61] Therefore, contempt of court acts against the doctrine of constitutionalism[62]. Acting in contempt implies that one is over and above the limits set by the law and immune to judicial oversight.[63] Being an essential organ that safeguards constitutionalism, the judiciary functions to limit abuse of power and the creation of an imperial executive.[64] It presents a situation where the executive acts without limits and checks.

5.2 The Effect of Contempt of Court on The Rule of Law
The rule of law has a basic meaning in the sense of governing by broad norms established in advance by an acknowledged authority.[65] This is the essential meaning of the rule of law. In this view, the rule of law is concerned with the use of law to guide the behaviour of its people.[66] The concept of a general norm involves the fundamental premise of

equal treatment under it,[67] which is possibly the most significant idea conveyed by the rule of law. In a similar vein to constitutionalism the concept of rule of law is against absolute dominance[68], and it presupposes equality before the law.[69] The rule of law was defined in *Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & another*[70] as a fundamental pillar of the constitution, requiring that the dignity and authority of the courts be preserved.[71]

Essential to the concept of rule of law is the need to ensure that all the citizens, organs and state officials are subject to the law. This has been enshrined under the Preamble, supremacy clause,[72] the national values and principles,[73] and the rights and freedoms.[74]

Ideally, respect for the rule of law maintains the dignity of the Constitution. The judiciary is tasked with the sensitive obligation to safeguard the rule of law through carrying out judicial oversight.[75] Since the current constitutional design has chosen democracy over tyranny, the courts must uphold the rule of law, even though the public may be of a different

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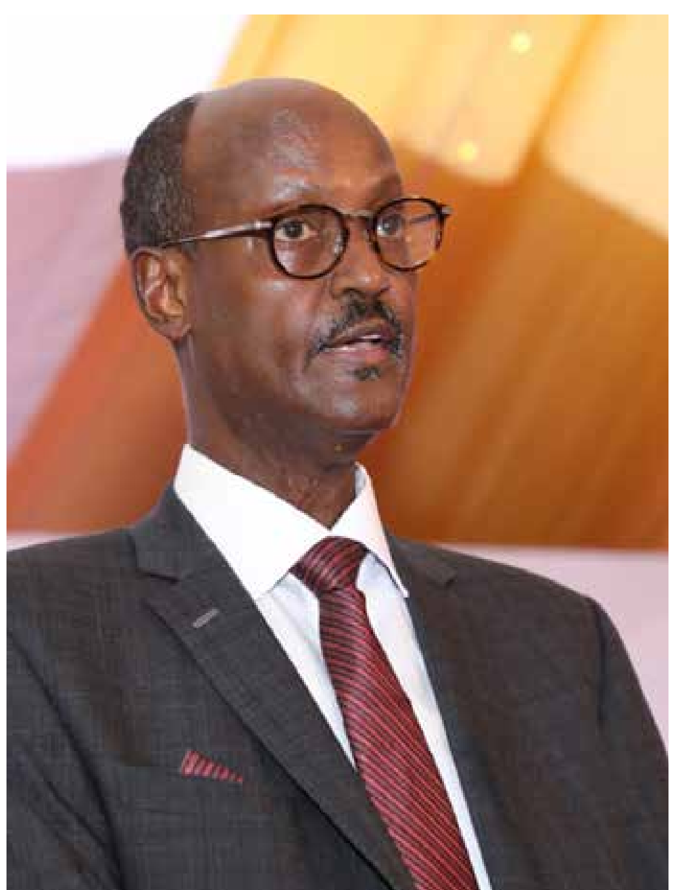
[56] Joshua M. Kivuva, 'Restructuring the Kenyan state' (2011) 1 *Constitution Working Paper Series*, 7-8
[57] *Rameshwar Prasad and Ors. v. Union of India (UOI) and Anor* [2006] Insc 35 (24 January 2006) and *Maru Ram v. Union of India & Ors.* (1981) 1 SCC 107.
[58] Dan Juma, 'Devolution of Power as Constitutionalism: The Constitutional Debate in Kenya and Beyond' in International Commission of Jurists, (Eds) Ethnicity, *Human Rights and Constitutionalism in Africa*, (International Commission of Jurists, 2008) 36,39.
[59] *Kenya Human Rights Commission v Attorney General & another* Constitutional Petition 87 of 2017 [2018] eKLR para. 82.
[60] Justus Kariuki Mate & another v Mar*tin Nyaga Wambora & another* Petition 32 of 2014 [2017] eKLR.
[61] *S v Mamobolo* [2001] ZACC 17.
[62] Githu Muigai, and Ongoya Z. Elisha. 'The Law of contempt of court in Kenya' (2005) 1.2 *Law Society of Kenya Journal* 56,64.
[63] Mriganka S. Dutta and Amba U. Kak 'Contempt of Court: Finding the Limit' (2009) *2 NUJS Law Review* 55, 57.
[64] Walter K. Ochieng 'Judicial Executive Relations in Kenya Post-2010, Emergence of Judicial Supremacy?' in Charles M. Fombad *Separation of Powers in African Constitutionalism* (Oxford OUP) 291.
[65] Joseph Raz, 'Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195,198.
[66] *Republic v Kenya Urban Roads Authority & 2 others Ex-parte Atlas Copco Eastern Africa Limited* Judicial Review 121 of 2016 [2018] eKLR.
[67] Albert V. Dicey, *The Law of The Constitution.* (Oxford OUP, 2013).
[68] *Mtana Lewa v Kahindi Ngala Mwagandi* Civil Appeal 56 of 2014 [2015] eKLR.
[69] *R. v. Secretary of State for the Home Department ex parte Simms* [1999] 3 All ER 400 at 411
[70] [2015] ZACC 10.
[71] Richard H. Fallon, Jr. '"The Rule of Law" as a Concept in Constitutional Discourse' (1997) 97 *Columbia Law Review 1, 3; Albert V. Dicey, Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan, 1959), 193 and 202.
[72] *The Constitution of Kenya 2010,* Article 2.
[73] *The Constitution of Kenya 2010*, Article 10.
[74] *The Constitution of Kenya 2010*, Article 19.
[75] *R v. Horseferry Rd Magistrates Court ex parte Bennett* [1993] 3 WLR 90, 104, *Darker vs. Chief Constable of West Midlands Police* [2000] UKHL 44.



Justice Mohammed Ibrahim

mind in any one case.[76] The courts must continue to provide justice to all people, regardless of their socioeconomic situation.

Concerning the rule of law, Kwach JA held that it is a fundamental tenet of the rule of law that court orders must be obeyed.[77] The rule of law is an essential part of any successful society. The court in *Kenya Human Rights Commission v Attorney General & another*[78] held that:

> The constitution (Article 4(2) declares Kenya a democratic state founded on national values and principles of governance which include the rule of law and democracy. Disobedience and disregard of the authority of the courts violates national values and the constitution. In that regard, courts punish for contempt in order to maintain their dignity, authority, the rule of law, democracy and administration of justice as foundational values in our constitution.

According to the case of *Teachers Service Commission*,[79] the reason why courts would penalise for contempt of court is to protect the rule of law, which is essential in the administration of justice. It has nothing to do with the integrity of the judiciary, the court, or even the sitting Judge's personal ego. It is also not about appeasing the applicant who has petitioned the court by filing contempt proceedings. It is all about sustaining and protecting the rule of law. [80]

Additionally, Ibrahim J in *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another*,[81] the court underscored the importance of obeying court orders, stating:

> It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void.

This was further emphasised by the Supreme Court of India in *T. N. Gadavarman Thiru Mulpad*.[82] Here the court stated that disobeying the Court's ruling goes to the heart of the rule of law, which is the foundation of the legal system. A democratic society is built on the rule of law. The judiciary is the defender of the rule of law. As a result, it is not only the third but also the core pillar of a democratic state. The dignity and authority of the Courts must be safeguarded and protected at all costs if the judiciary is to fulfil its responsibilities and tasks efficiently and stay faithful to the spirit with which they are sacredly entrusted.[83]

The scuffles between the Executive and the Judiciary depicting the outright disregard of court orders tarnishes the spirit of the rule of law.[84] It depicts the evident friction between the two organs which entails an abject disregard for the constitution, which makes it seem as though the two organs are in competition.[85] This was in part noted in the

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[76]*Judicial Service Commission v Speaker of the National Assembly and the Attorney General* Petition 518 of 2013 [2014] eKLR.
[77]*Commercial Bank of Africa Limited v Isaac Kamau Ndirangu* Civil Appeal 157 of 1991 [1992] eKLR
[78]*Supra* note 13 at 56.
[79]*Teachers Service Commission v Kenya National Union of Teachers & 2 others* Petition 23 of 2013 [2013] eKLR, *Stephen K Sang & another* v Chebii Boiyo & another Environment and Land Case 377 of 2013 [2021] eKLR.
[80]*Carey v Laiken* [2015] SCC17.
[81]*Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828.
[82]*T. N. Gadavarman Thiru Mulpad v Ashok Khot and Anor* [2006] 5 SCC
[83]*Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui* Civil Suit 19 of 2020 [2021] eKLR
[84]Supra note 5, 110.

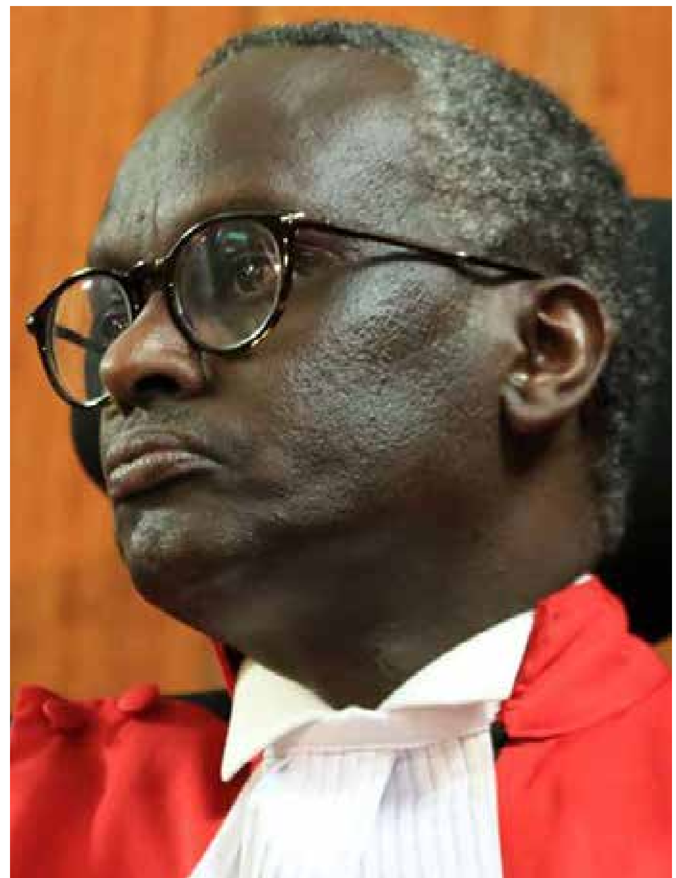
Wanjigi Case and was emphasized by Lenaola J in *Kariuki & 2 others v Minister for Gender, Sports, Culture & Social Services & 2 others*[86] where he held;

> 'The instant matter is a cause of anxiety because of the increasing trend by Government Ministers to behave as if they are in competition with the courts as to who has more "muscle" in certain matters where their decisions have been questioned, in court! Courts, unlike the politically minded minister, are neither guided by political expediency, popularity gimmicks, chest-thumping nor competitive streaks. Courts are guided and are beholden to law and to law only! Where Ministers therefore by their actions step outside the boundaries of law, courts have the Constitutional mandate to bring them back to track and that is all that the courts do. Judicial review orders would otherwise have no meaning in our laws. . . Court orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away is to underestimate and belittle the purpose for which courts are set up. . . If those who have knowledge of court orders and also have knowledge that the way to avoid those orders is to avoid personal service are sleeping well in the guise that by hiding behind the shield of muscle they can escape the long arm of the law, let this be a warning that they will not. The law as applied by the courts studiously and unceasingly, will never sleep, and someday will catch up with those who flout the law and walk away unscathed.'

As such, the jurisprudence laid out in cases of *Miguna Miguna* and *Jimi Wanjigi* where the DCI was complicit in the contempt of court orders are a clarion call to the other arms of government to uphold the dignity of the Constitution and the rule of law. This led to the court ordering the arrest of the DCI on charges of contempt of court. This is viewed as a step in the right direction as the court is bravely upholding the rule of law. Perhaps a nod to the progressive jurisprudence arising from South Africa's Jacob Zuma incident.[87]

6.0 Conclusion

In general, the obedience of court orders is an important recipe for change in every democratic society. A recurring theme of this paper has been the need for state officials and organs to obey court orders. The cases of Miguna Miguna and Jimi Wanjigi detail a common culture of impunity



Justice Isaac Lenaola

and disobedience of court orders. Scholars older than we will obviously feel nostalgic, drawing hints of the pre-2010 era where copious disregard of the rule of law was the order of the day. This paper reaches a conclusion that, the disobedience seen in the cases taints the dignity of the court. It also strains the relationship between the arms of government. It pits the Executive against the Judiciary, leaving them engaged in a never-ending tussle. Such a situation does not further the interests of a democratic nation or the needs of a transformative society. It derails the progress made by the 2010 Constitution.

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[85]Supra note 38, 229.
[86]Miscellaneous Civil Application 389 of 2004 [2004] eKLR
[87]Lesley Wroughton 'Former South African leader Jacob Zuma surrenders to police' The Washington Post (Cape Town 7 July 2021) https://www.washingtonpost.com/world/2021/07/07/jacob-zuma-arrest-south-africa/ Accessed on 10 January 2022.

Fundamental human rights versus contractual rights: an exposition of Justice James Makau judgement in petition no. e249 of 2020

By Odhiambo Jerameel Kevins Owuor Odhiambo

… 'The Constitution of Kenya, 2010 has fundamentally altered this defective governance framework through various far reaching reforms. The most critical of these reforms are the introduction of a new normative framework; Devolution of power through the creation of two levels of government; Constraining of executive power through the introduction of various checks on the Executive; The creation of a bicameral legislature; and the introduction of an expansive Bill of Rights. The Constitution of Kenya, 2010 has been celebrated by the people, human rights proponents, civil society organizations and the reformed political class as one the most transformative and progressive constitutions in a modern democracy. The Constitution provides the normative framework for the recognition, protection and promotion of fundamental, constitutional and human rights and freedoms. The provisions of the human rights are incorporated in Chapter four of the Constitution of Kenya, 2010. The articles of this chapter expressly set forth all categories of human rights that are ordinarily included in international human rights instruments. It contains first generation rights (which consist of the traditional civil and political rights); the second-generation rights, consisting of economic, social and cultural rights; and third generation rights which include such entitlements as a clean environment and peace. In addition to the statement of rights, the Constitution provides mechanisms for the enforcement of protected rights.[1]

Rights can only make sense in the social and political arena when they are coupled with duties on individuals.[2]

Introduction

For the past two decades, the Kenyan real estate market has grown exponentially as evidenced by its contribution to the country's GDP which grew from 10.5% in 2000 to 12.6% in 2012 and 13.8% in 2016. This percentage, it has been noted, has reduced courtesy of the ramifications of Covid 19 pandemic which led to imposition of other measures to curb the spread of the virus. The growth is driven by; infrastructural developments such as improved roads, utility connections, upgrade of key airports; stable GDP growth which has averaged at 5.4% over the last 5 years against a Sub- Saharan average of 4.1%; Demographic trends such as rapid urbanization at 4.4% p.a against the world's 2.5% and population growth averaging at 2.6% p.a; and high total returns averaging at 25.0% against 12.4% in the traditional asset classes.[3]

These factors have therefore led to the development of unique trends across the various real estate themes, as investors sought to gain high returns and buyers sought

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[1]Prof. Christian Roschmann, Mr. Peter Wendoh & Mr. Steve Ogolla, Human Rights, Separation of Powers and Devolution in the Kenyan Constitution, 2010: Comparison and Lessons for EAC Member States. Retrieved from https://www.kas.de/c/document_library/get_file?uuid=1864d0c5-21b0-0920-3696bf118f4d5b26&groupId=252038 Accessed on 20th March 2022

[2]F Viljoen, 'Africa's Contribution to the Development of International Human Rights and Humanitarian Law' (2001) 1 Africa Human Rights Law Journal, p.21

[3]Cytonn, Current Real Estate Trends in Kenya & How They Affect Investors (20th March 2022) Retrieved from https://cytonn.com/blog/article/current-real-estate-trends-in-kenya-and-how-they-affect-investors Accessed on 20th March 2022

aspirational lifestyles and quality products. The Kenyan office sector has grown rapidly over the past decade, in tandem with the improving economy, as firms expanded in their operations while multinational firms continually set up their base in the country which is considered the key gateway to the East African market and a leading economic hub in the Sub-Saharan Africa. The retail sector has grown tremendously, characterized mainly by a continued rise in mall space. With a growing middle class, and thus more disposable income, international and local developers have quickly grabbed the opportunity to tap into the ready market with the mall concept which has seen Kenya become the second largest in mall space in Africa, after South Africa, with 391,000 square meters[4].

Of importance to this article is the residential space. With a rapidly growing population and more so, an increasing middle class, the residential sector has recorded the highest demand with the nationwide housing deficit standing at 200,000 units annually and an accumulated deficit of over 2 million units. However, the largest demand has been for affordable housing to cater for the 61% of urban dwellers who live in slums and shortage in student accommodation accounting for 40% of the deficit. Therefore, we have witnessed more developers increasingly applying low-cost housing construction methods such as alternative building technologies which are known to reduce construction costs by as much as 50%. In addition, with the demand for a live-work-play lifestyle, master planned communities are increasing with areas such as Kiambu and Machakos counties becoming hotspots.[5]

In coming up with the residential housing the developers have the proper legal procedure that they are supposed to follow. Ranging from getting the relevant licences from the relevant county government and getting on board licenced engineers, quantity surveyors, urban planners not to forget to environmental impact assessment of the development.

The rise of population in Kenya as well as Kenya becoming a business hub in the region has led to many seeking residential houses.[6] President Uhuru Kenyatta while addressing Kenyans after his second election stated that he will focus on four major things. They are majorly known as Big Four. The Big Four agenda comprises of

Food Security; Affordable Housing; Manufacturing and Affordable Healthcare. The President envisioned that his administration was to come up with 500,000 new housing projects. Honestly speaking this is now a pipe dream. Regardless investors decided to plunge into the real estate as well to offer housing projects for the ever-growing Kenyan population.

The developers have a duty to come up with buildings that will stand the test of time and as well uphold rights of tenants (contractual and fundamental human rights) who always occupy the buildings. This paper focuses a case which was delivered by Justice Makau which I believe will be a lesson unto other persons in the real estate space in Kenya.

Highlight of Erick Otieno Ogumo & 2 others v Chigwell holdings limited; county government of Nairobi & another (interested parties) [2022] eklr

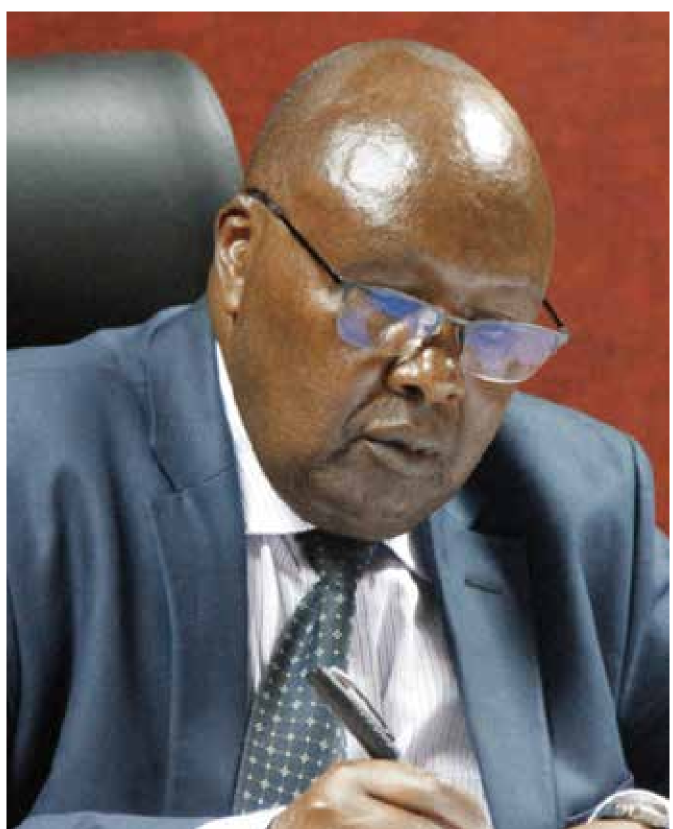
The petitioners in this case namely; Erick Otieno Ogumo, Juliet Nakhanu and Jackson Mwangi moved to High Court to seek justice against the first respondents (Chigwell Holdings Limited). The petitioners brought the suit on behalf of the current residents of Phenom Park Estate within Langata Sub-County in Nairobi County of which the petitioners as well reside in the aforementioned estate.

The Petitioners paid premium for the houses from the respondent on the basis that the respondent had indicated

[4]Ibid

[5]Supra

[6]Nation Lifestyle, Why Nairobi is a hot business hub? (29th June 2020) Retrieved from https://nation.africa/kenya/life-and-style/smart-company/why-nairobi-is-a-hot-business-hub-539514?view=htmlamp Accessed on 20th march 2022. Because of its time zones, high skilled personnel and growing infrastructure, Kenya's capital is a big attraction in Africa. After several decades in the doldrums, Nairobi seems to have discovered a new sheen and spright that is attracting big business. An array of expansionist transnational businesses have been trooping into Kenya's once shunned capital city, in a move whose signature is the opening of huge liaison offices. Some of them, particularly those in the service industries, are relocating to Nairobi because of an increase in the demand for their products in the city's booming hinterland. However, while some are using these bases to serve the local market, to an increasingly large number, their plum capital addresses are playing an even bigger role: a command centre from where they launch their assault on the wider African and regional markets. The list is long, and it is growing by the day as the scramble for Nairobi takes on a new urgency. From American conglomerate General Electric to Korean electronics firm LG Electronics; from Finnish world-leading mobile and fixed phone networks supplier Nokia to Russian financial services group Renaissance Capital. Scions of new business have not been left out either, online search engine Google, being one of the latest entrants, has perched at the Regus business centre in Westlands. The city is slowly becoming the nerve centre from where these companies direct their operations in the whole of the Great Lakes region. However, to many of them, Johannesburg, South Africa, still retains primacy as the headquarters for their African operations.



Justice James Makau

in its marketing brochure that; the project will consist of clean and safe borehole water that will be connected to each house; and there would be designated play areas. Upon moving into their respective houses, the Petitioners discovered that the Respondent had not left designated areas for playing within the phases 1, 2 and 3 now complete. Moreover, according to them National Environment Management Authority gave approvals for the estate despite reports indicating that the borehole water had high concentration of fluorides, bicarbonates and sodium.

The residents sought the audience of the respondent so as to solve the issue. It seems that their pleas for solving the issue fell on deaf ears and never bore any fruit. Thus, the petitioners' children were opting to play on pavements and car parking areas putting them at great risk of being run over by moving vehicles and they were exposed to adverse health risks. This was a clear violation of rights of the children. Hence the petitioners made a raft of reliefs which comprised of: a declaration that the Respondent has violated the constitutional rights of the Petitioners' children as provided under the constitutional Articles; a declaration that the Respondent has violated the Petitioners' rights and those of their children to human dignity and to reasonable standards of sanitation as well as the Petitioners' right to clean and safe water in adequate quantities; an order of Injunction restraining the Respondent by themselves or their agents/ servants from developing Phase 4 of Phenom Park Estate until such a time when it has adequately provided for designated play areas which should not be less than what has been proposed by the World Health Organization; an order for Mandatory Injunction against the Respondent to conduct a fresh environmental impact assessment and obtain new development approvals from the 1st and 2nd Interested Parties within the time set by the Court and in the alternative; an order for Mandamus against the 1st and 2nd interested Parties to revoke the respective approvals issued to the respondent in relation to the development of Phenom Park Estate.[7]

The respondents on the other hand contended that it had performed all obligations under the respective agreements for sale, constructed phases 1, 2 and 3 in strict adherence to the approved drawing and plans which were made available to the petitioners to inspect before execution of the agreements and upon being handed vacant possession of their respective homes. They were of the view that the petitioners lack the locus standi to seek the injunctions pleaded in the petition as the only relationship that subsists between them and the Respondent is limited to phases 1, 2, and 3. Further, barring them from continuing with construction of phase 4 will be breaching the rights of prospective purchasers who have committed/ paid deposits guaranteed under Articles 43 and 40 of the Constitution. It will also make them default on their contractual obligations to the said prospective purchasers leading to adverse economic and legal consequences[8]. On the issue of play area, the respondents stated that demanding for additional playing area by the Petitioners that was not indicated on the approved architectural plans and which they inspected has no contractual basis and would be tantamount to rewriting the agreement between the parties.[9]

Justice Makau found favour in the eyes of the petitioners noted that the respondent violates the rights of the children of the petitioners by not providing the play area. He also issued a declaration that the Respondent has violated the Petitioners' rights and those of their children to human dignity and to reasonable standards of sanitation as well as the Petitioners' right to clean and safe water in adequate quantities. An order was also imposed on the respondent that within ninety (90) days from the date of the judgment to install water filtration systems to houses in Phases 1 and 2 as already done in houses in phases 3. Lastly, the respondent was also instructed to provide children play area that is separate from the vehicle parking place.[10]

[7]Erick Otieno Ogumo & 2 others v Chigwell Holdings Limited; County Government of Nairobi & another (Interested parties) [2022] eKLR
[8]Ibid
[9]Supra
[10]Supra

Long-winded dissection of Justice Makau's judgement
Odhiambo John Dudley Ochiel in his Masters thesis noted as follows while commenting on the Constitution of Kenya 2010:

> *On the 27th of August, 2010, Kenya adopted a Constitution that replaced the previous Constitutional order.[11] This constitutional moment, was a climax to a long quest to radically transform the country's pre-existing socio-economic, political as well as its cultural framework.[12] The move toward a new Constitution was stimulated by the fact that the democratic project became untenable within the previous authoritarian constitution which vested enormous powers in the presidency.[13] The quest for constitutional reform therefore remained on the public agenda for decades, culminating in the promulgation of the current Constitution.[14]*
>
> *As a result, it has been claimed that promulgation of the 2010 Constitution heralded the overthrow of the pre-existing social order and the creation in its place of a nascent political, economic, social, and legal order. In this regard, the current Constitution is seen as the shift from imperialism and authoritarianism to a post-liberal, 'accountable', 'horizontal' and 'responsive' state structure.[15]*
>
> *As indicated in the preamble, therefore, the current Constitution reflects the desire of ordinary Kenyans for a system of governance founded among others on the basis of 'human rights', 'equality', 'freedom', 'democracy', 'social justice' and 'the rule of law.'*

In promulgating a new Constitution on 27 August 2010, Kenya ushered in a new and progressive constitutional dispensation aimed at enhancing substantive equality, democracy, good governance and the protection of human rights and fundamental freedoms. This is encompassed in the preamble of the 2010 Kenyan Constitution (the Constitution), which expresses the commitment of the Kenyan people to nurturing and protecting the well-being of all, as well as to recognising the aspirations of Kenyans to be governed by the values of human rights, equality, freedom, democracy, social justice and the rule of law.[16] The transformative nature of the Constitution can be viewed that it aimed to defy the status quo[17] and restructure Kenya's society.[18] Using the provisions of the Constitution and taking into account the context of the Kenyan culture this paper proceeds to analyse the judgement.

Having noted the positions of both petitioners and respondents as well as the interested parties, Justice Makau was of the view that two issues were in for determination. The two issues were; whether the doctrine of constitutional avoidance is applicable; whether the Petitioners' rights were violated.

On the first issue, the respondents were of the view that the matter at stake was a contractual issue hence there were other alternatives to deal with it. The respondents in buttressing their claims invoked an array of cases.[19] In Anthony Miano & others v Attorney General & others [2021] eKLR, Justice Mrima Antony served that the doctrine of constitutional avoidance[20], deals with instances where a Constitutional Court will decline to deal with a matter because there is another remedy provided in law which the aggrieved party is yet to utilize[21].

Justice Makau did import the decision in *Petition No. 159 of 2018 Consolidated with Petition No. 201 of 2019 (2020) eKLR* in which the court noted that the doctrine of Constitutional avoidance may arise where a litigant is aggrieved by an agency's action, seeks redress from the court of law on an action without pursuing available remedies before the agency itself.

In similar vein in the case of *Geoffrey Muthiga Kabiru & 2 others vs Samuel Munga Henry & 1756 others* the court employed a similar position and set exemptions to the doctrine. The Court noted:

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[11]Willy Mutunga, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions' (Fort Hare University Inaugural Distinguished Lecture Series October 16, 2014) <http://www.constitutionnet.org/files/mutunga__theory_of_interpreting_kenyas_transformative_constitution_2-1_oct_14.docx> accessed on 20th March 2022
[12]Ibid
[13]Morris K Mbondenyi, 'Introduction' in P. L. O. Lumumba, M. K. Mbondenyi and S. O. Odero (eds), The Constitution of Kenya: Contemporary Readings (Law Africa, 2013) 1, 3
[14]Ibid
[15]Speaker of the Senate v AG [2013] eKLR
[16]Preamble of The Constitution of Kenya. The rule of law demands that persons in the positions of authority must exercise their powers and functions in line with the Constitution of Kenya and the laws of Kenya rather than in an arbitrary manner, ad hoc or based on their ideology.
A survey by Afro Barometer observed that, Kenyans overwhelmingly favour a government that follows the law even if it conflicts with the will of its supporters. Only one in 10 citizens according to the survey think a government that enjoys popular support "should be free to do whatever the people want, even if it is outside the law."
[17]Karl Klare, Legal Culture and Transformative Constitutionalism, Pages 146-188. South African Journal on Human Rights, Volume 14, 1998
[18]Nicholas Orago, Limitation of socio-economic rights in the 2010 Kenyan Constitution: a proposal for the adoption of a proportionality approach in the judicial adjudication of socio-economic rights disputes, Potchefstroom Electronic Law Journal (PELJ) Vol.16 No.5 Potchefstroom May. 2013
[19]Petition 503 of 2014: Bernard Murage v Fineserve Africa Limited & 3 others [2015] eKLR. Civil Appeal No. 67 of 2015: Gabriel Mutava & others v Managing Director Kenya Ports Authority & another [2016] eKLR Petition No. 14 of 2014 (Consolidated with Petition No. 14A, 14B & 14C of 2014: Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR
[20]This doctrine is also referred to as doctrine of exhaustion.
[21]Anthony Miano & others v Attorney General & others [2021] eKLR

***To wit; where the exhaustion requirement would not serve the values enshrined in the constitution and permit the suit to proceed before it; where there are valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interest the party wishes to advance in a suit must not be ousted; and where a party alleges violation of fundamental rights.*[22]**

Justice Makau then proceeded to state:

The issues raised by the Petitioners herein are on violation of fundamental rights, which this court has jurisdiction over by virtue of Article 165 (3) (b) of the Constitution. These are constitutional issues which this Court is mandated to determine. I therefore do not agree with the Respondent that the said doctrine is applicable in this matter.

On the second issue it presents interesting case study for the petitioners were suing a private entity an suing it for not according them their rights as enshrined in the Constitution. Was this the case pre-2010? Perhaps Jared Gekombe and Cyril Kubai will help in answering this question. They observe that:

The legal framework for the protection of human rights in Kenya can be traced to the enactment of the independence constitution in 1963. This legal order had entrenched a chapter five, which provided for the protection of fundamental rights and freedoms. Basing on the wording of the 1963 constitution, it was apparent that the state was the only perceived threat to human rights. This was reflected in a number of decisions where the courts held that the duty to respect these rights solely lay on the state apparatus since the duties were designed with the mindset that the state would be the only perpetrator of human rights. Worse still, the Kenyan constitutional order was replete with legislative enactments and/or amendments whose overall effect 'fettered, clogged, diluted, transgressed, vitiated and defeated the fundamental rights and freedoms of the individual rights guaranteed under the bill of rights.'[23]

The legal problems in human rights protection were exacerbated by the inadequacy of the judiciary to guarantee human rights protection to the citizens by adopting an 'unprincipled, eclectic, vague, pedantic, inconsistent and conservative approach to constitutional interpretation' especially in relation to guaranteeing rights and freedoms in the bill of rights. The failure to comply with international human rights obligations and standards worsened the situation.

This traditional human rights regime in Kenya was faulted in its protection of human rights with some scholars arguing that the bill of rights could not be guarantee rights. Notably, the bill of rights was at one instance described as being as dead as a dodo. This ineffective bill of rights was one of the reasons for the clamour for a new Constitution in Kenya. There was a dire need to resuscitate the bill of rights to conform to the developments in the human rights sphere. It is now apparent that non-state actors including private individuals have occupied a vantage position in society and that they are leading in human rights violations.

To radically shift the Kenyan society the inclusion of bill rights in the Kenyan Constitution 2010 was integral to bring sanity and make sure that all persons could get justice whenever their rights were aggrieved. The Constitutional rights in Kenya apply to each and every one whether private entity or public entity thus apply horizontally and vertically.[24] The essence of private entities being included in the human rights discourse is underscored by Balkan in *The Corporation: The Pathological Pursuit of Profit and Power* where he notes:

"The diffusion of political authority in the context of the global economy has led to concerns about the ability of constitutionalism to operate as a check on political power if it speaks only to the state. Moreover, there is growing awareness-perhaps fuelled by recent examples of corporate corruption and wrong doing-that private power as much as public power has the capacity to oppress. "[25]

[22]Geoffrey Muthiga Kabiru & 2 others vs Samuel Munga Henry & 1756 others [2015] eKLR

[23]Jared Gekombe and Cyril Kubai, Horizontality of the Bill of Rights in Kenya: What are the Implications to Private Individuals?

[24]Brian Sang, Horizontal Application of Constitutional Rights in Kenya: A Comparative Critique of the Emerging Jurisprudence, African Journal of International and Comparative Law Volume 26 Issue 1

[25]The Corporation: The Pathological Pursuit of Profit and Power (New York, Free Press, 2004)

Likewise Kiarie Mwaura in, '*Horizontality and the Bill of Rights: Defining Parameters of Corporate Complicity in Human Rights Violation*', argues that that due to globalization and privatization, corporates have become powerful hence likely to exploit human rights in their pursuit for profits.[26] He asserts that there is need to tame these legal entities in the contemporary legal framework.[27]

Joshua Malidzo in '*The Horizontal Application of the Bill of Rights; Article 20 of the 2010 Kenyan Constitution, an Intruder to the Public / Private Law Cleavage*' observes that:

> ***The public and not the private bodies were held to enjoy the monotony of power, and the reason that the past was characterized by strife, oppression and injustice. The bill of rights was to apply vertically in order to keep the government agencies in check, as it is traditionally accepted that Bills of Rights are intended primarily to correct imbalances between the excesses of government power and individual liberty. The vertically application of the bill of rights was a way of enforcing constitutionalism, as it is widely accepted that power in the possession of human beings is subject to be abused. The vertical application was therefore meant to address the oppressive and undemocratic practices, but the reality is that in this modern society today, the public bodies/ the government agencies no longer enjoy the, monotony of power; the private bodies have become more powerful.***[28]

Ochiel Dudley as well takes note that with the dispensation of the 2010 Constitution judicial review applies to both the private entities and private entities.[29]

[30]Jared Gekombe and Cyril Kubai further note on the models of horizontal application as follows:

> *In practise, various models are used in the application of human rights. The models show how constitutional architecture designs the bill of rights in such a way that it applies indirectly or directly to private individuals. However, some scholars have developed the doctrine of state responsibility and have argued that the state may be held liable for human right violations by private individuals.*
>
> *First, there is the indirect approach. This is essentially through the application of private law. This approach permits a consideration of the bill of rights when interpreting and applying private law. This in essence means that indirect approach subjects the provisions of private law to the provisions of the Bill of Rights. The concept of indirect approach has been exemplified by the Drittwirkung doctrine as developed by the German courts in the landmark Luth case. Under this doctrine, indirect approach influences the development and interpretation of the private law.*
>
> *This doctrine has been codified by the 1996 South African and 2010 Kenyan Constitutions. Section 8(3) of the South African Constitution provides that when applying a provision of the Bill of Rights to a natural or juristic person, a court must apply, or if necessary, develop, the common law to the extent that legislation does not give effect to that right. A twin provision is found in Article 20(3) (a) of the 2010 Constitution of Kenya.*
>
> *Similarly, section 39(2) of the South African Constitution provides that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. Similar provision is found in the 2010 Kenyan Constitution in Article 20(4) (b).*
>
> *Secondly, there is the direct approach. This model means that a victim of human rights violation can bring a claim based directly on a provision of the Bill of Rights against a private individual. Conversely, an individual can mount a defence to a private action based on constitutional provisions on human rights. The 2010 Constitution of Kenya envisages direct application of the Bill of Rights under Article 20(1), which provides further that it binds all persons. Scholars have argued that the concept of direct responsibility is a manifestation of the full horizontal application of human rights.*

Nonetheless it is imperative to note that an array of factors come into play before a private individual could be held directly responsible for a given human right.[31] These include the nature of the right, the nature of the duty, the extent of

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[26]Kiarie Mwaura, 'Horizontality and the Bill of Rights: Defining Parameters of Corporate Complicity in Human Rights Violation' (2011) 1 Law Society of Kenya Journal
[27]Ibid
[28]Joshua Malidzo, The Horizontal Application of the Bill Of Rights; Article 20 of the 2010 Kenyan Constitution, an Intruder to the Public / Private Law Cleavage. Available at https://www.academia.edu/34367531/The_horizontal_application_of_the_bill_of_rights Accessed on 20th March 2022
[29]Ochiel Dudley, 'Grounds for Judicial Review in Kenya – An Introductory Comment to the Fair Administrative Action Act, 2015' (2015) 31 Kenya Law Bench Bulletin 26, 26. To implement the provisions of the Article 47 of the Constitution, Parliament has enacted the Fair Administrative Action Act, 2015 (the Act). The Act radically alters the judicial review landscape in Kenya in conformity with the transformative Constitution of Kenya, 2010 which permits judicial review against both private and public bodies.
[30]Supra. A combination of these models of direct and indirect approaches as depicted in the 2010 Constitution of Kenya would only help to cure any inconsistencies between private law and human rights, narrow down the imaginary and illusory divide between public law and private law, and ultimately give full effect to the notion of the horizontal application of human rights.
[31]DM Chirwa, 'In search of Philosophical Justifications and Suitable Models for the Horizontal Application of Human Rights' (2008) 8(2) African Human Rights Law Journal at p.310

Justice Gacheche

the violation, the nature of the non-state actor (read private individual), and the relationship between the non-state actor and the victim. As stated by[32] Gacheche J, horizontal application would not apply as a rule, but it would be an exception, which would obviously demand that the court do treat on a case-by-case basis by examining the circumstances of each case before it is legitimised[33].

Back to the case this paper focuses on. The court did conduct a site visit to the estate and the deputy registrar noted that there was no provision for playgrounds in the courts visited; there was provision for piped water; and the residents rely on water from the borehole. On the designated play areas, the petitioners submitted that the Respondent has violated their legitimate expectation as they relied on the marketing brochures to buy the respondents property on the provision of designated play areas.

The Petitioner further relying on Articles 53(2) and 28 of the Constitution; Section 4(2) of the Children's Act No. 8 of 2011; Article 20 of the African Charter on the Rights of the child; Article 3(1) of the Convention on the Rights of the Child; and the cases of ANM v FPA (suing as the father and next friend of the minor) [2021] eKLR Civil Appeal E 13 of 2020; and L.N.W v Attorney General & 3 others [2016] eKLR Petition 484 of 2014, argued that the child's best interest are paramount and the deliberate refusal to provide play areas as promised has robbed them of their dignity relegating them to the same level with all manner of vehicles as they compete for the same cabro paved driveways to play as the vehicles move around. The Petitioner submitted that there was no public participation when the architectural plans were changed to omit the designated play areas before presenting them to the interested parties for approval.

As it is always the norm the respondent did poke holes into the submissions of the petitioners. As per the respondent the petitioners had not adduced evidence to show how the construction of houses in the estate and failing to provide designated play areas affected their right to a clean healthy environment or pose any potential harm to the environment. According to them, they carried out the constructions as per the approved plans and it is on that basis that they were granted the Certificates of occupation by the Interested Parties.

Furthermore, the respondents argued that that the marketing brochures were only for marketing purposes and not binding unless the same were incorporated in the agreement for sale and or contract executed by the parties. Hence any reliance on them for breach of contract is baseless. In equal measure to them (respondent) legitimate expectation was not applicable herein rather promissory estoppel is which it cannot stand as it has provided a swimming area within the courts and a club house which cater for the children's leisure and recreational activities.

The petitioners in their own wisdom as well alluded to Constitutional provisions especially the rights that they were of the view were infringed by the respondent. They quoted Articles 53 (2), 28 and 43 (1) (b) and (d) of the Constitution which to them were violated by respondent failing to provide designated playgrounds for their children and failing to provide water fit for consumption.

Justice Makau in his judgement stated as follows:

> *42. It is trite law that where a party alleges, the said party must prove as espoused in Section 107 of the Evidence Act. The petitioners have raised issues concerning violation of their constitutional rights. They have cited Article 28 and 53(2) of the Constitution, they have pleaded that there are no play areas for their children and that as a result the children are forced to compete with motor vehicles exposing them to danger. The Respondent has not controverted this contention. I find such failure to provide playground is not in the best interest of the child as espoused in Article 53(2) of the Constitution.*
>
> *43. Mativo J. in MWK v another v Attorney General & 3 others [2017] eKLR observed that human dignity is not defined by Article 28 and made reference to O' Regan J in South African case of S v Makwanyane {1995} ZACC 3; 1995 (3) SA 391(CC) in para [328] on the prime value of dignity as follows;-*

[32]Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi [2011] eKLR at p.9
[33]Supra

"The importance of dignity as a founding value of the ... Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. The right is therefore the foundation of many of the other rights that are specifically entrenched in Chapter 3."

44. The Petitioners have submitted and demonstrated that their children's right to human dignity has been violated. There are no playgrounds in the Estate; hence they are left to compete with motor vehicles for space exposing them to danger. The site report by Deputy Registrar of this Court also confirmed that there are no play areas in the estate and that the ones available have either clothesline, manhole, or electricity torrents hence not fit as playground for the children. The fact that the Respondent has not made any effort since the Petitioners took up issue with it, to address this issue portrays a breach of the children's right to human dignity. The Respondent do not in my view considers that the children are important to have the issue raised addressed. The Respondent inaction leave them in a position where they are competing with motor vehicles for space for parking and playing for the children exposing them to danger which is obviously not in the best interest of the children hence a violation of Article 53 (2) of the Constitution.

45. On the rights under Article 43 of the Constitution to accessible and adequate housing, and to reasonable standards of sanitation the Petitioners have not demonstrated how the Respondent has violated their right to accessible and adequate housing and to reasonable standards of sanitation.

46. On right to clean and safe water in adequate quantities, the Petitioners have adduced evidence and produced reports indicating that the water in the borehole provided by the Respondent is not safe for human consumption. The water by the Nairobi Sewerage Company is also not adequate as admitted by the Respondent. The Respondents have also admitted that the water is not fit for human consumption and the Respondent has to that extent installed water filtration systems to houses in phase 3 and are requesting for more time is an acknowledgement of their obligation. I find in my view that there is violation of Article 43 (1) (d) of the Constitution. The Petitioners have however not demonstrated how the Respondent and Interested Parties have violated their right to public participation.

47. On the issue of lacking locus standi as to the construction of houses in phase 4, I do not agree with the Respondent. The Petitioners by dint of Articles 22 of the Constitution and 258 of the Constitution have the locus standi to bring a suit on behalf of the future and or prospective buyers as there is apprehension that their rights are threatened.

48. The 1st Interested Party has admitted that it is obligated to ensure proper execution and implementation of approved physical development plans and if there is a breach of the approved conditions or there is discovery of a material justifying the cancellation of the approval, it is mandated to revoke or cancel the approval. In my view the Interested Party ought to visit the estate and if the constructions are not as per the approved plan, revoke the approval. This is an issue for consideration by Interested Party.

Justice Makau must have been alive to the provisions of Convention on Children which provide that:

> **When adults make decisions, they should think about how their decisions will affect children. All adults should do what is best for children.**

Governments should make sure children are protected and looked after by their parents, or by other people when this is needed. Governments should make sure that people and places responsible for looking after children are doing a good job.[34]

This principle widely known as Best Child Principle has been domesticated in fact Children Act provide for the same not forgetting [35]Article 53 of the Constitution. Article 31 of the Convention enshrines the fundamental provision that; 'Every child has the right to rest, relax, play and to take part in cultural and creative activities .'[36] This was the right that the respondents in this case were violating. By dint of Article 2 (6) of the Constitution the international treaties and conventions form part of the laws in Kenya. Thus, the provision in the Convention highlighted above is trite law and the learned Judge gave full effect of the same.

Conclusion

This landmark case perhaps will enable developers to ensure that they uphold the rights of tenants including the children as it the case in the case. The fundamental rights like right to water cannot be ignored for water is a basic necessity. Justice Makau definitely administered Justice to this case.

In sum I summon the wise words of Infant Jurist (Joshua Malidzo); '***Human rights cannot be observed, they cannot be enjoyed if a duty is not imposed on the other party to observe them, Over time, fundamental rights have evolved to include an obligation on individuals and private entities to uphold them in recognition of the fact that rights abuses can also be caused by private actors a view that is well captured in the following words; Rights can only make sense in the social and political arena when they are coupled with duties on individuals . "Because rights and duties are inextricably linked, the idea of human right only makes sense if we acknowledge the duty of all people to respect it.***[37]

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[34]Article 3 of Convention on Rights of the Child
[35]53. Children
1. Every child has the right
a. to a name and nationality from birth;
b. to free and compulsory basic education;
d. to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
e. to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and
f. not to be detained, except as a measure of last resort, and when detained,
to be held-
i. for the shortest appropriate period of time; and
ii. separate from adults and in conditions that take account of the child's sex and age.
2. A child's best interests are of paramount importance in every matter concerning the child.
[36]Article 31 of Convention on Rights of the Child
[37]Joshua Malidzo, The Horizontal Application of the Bill Of Rights; Article 20 of the 2010 Kenyan Constitution, an Intruder to the Public / Private Law Cleavage.

The unholy alliance between Court of Appeal and the handmaiden of Justice: an examen of court appeal decisions in adjudicating public procurement disputes in Kenya

By Odhiambo Jerameel Kevins Owuor Odhiambo

"In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this Court. Parties should comply with the procedure, rather than look to Court discretion curing the pleadings before it. This Court's position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place….[1]

"It is this Court's position of principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the Court will consider the relevant circumstances surrounding a particular case and will conscientiously ascertain the best course. It is to be borne in mind that rules of procedure are not irrelevant but are the handmaiden of justice that facilitates the right of access to justice in the terms of Article 48 of the Constitution…. "[2]

'… ….by incorporating the right of access to justice, the Constitution requires us to look beyond the dry letter of the law. The right of access to justice is a reaction to and a protection against legal formalism and dogmatism. ' When a judge follows the letter of the law, her judgment may be considered blinkered by the man in the street. Legal professionals, however, would classify the judgment as formalistic. From a theoretical perspective, formalistic decision-making limits the number of premises on which

the literal meaning of the legal text and to disregard other interpretative premises, like the purpose or function of the law, legislative history or – in civil law jurisdictions – previous court decisions.[3]

Introduction

Whoever propounded the legal maxim, '*Dura lex, sed lex,*[4] ' am certain did have Court of Appeal in his mind or rather s/he envisioned that some judges and legal luminaries will refer to the maxim to justify their 'decisions'. The legal maxim in plain English means 'T*he law is harsh, but it is the law*." It follows from the principle of the rule of law that even draconian laws must be followed and enforced; if one disagrees with the result, one must seek to change the law. The Court of Appeal have demonstrated this whole heartedly by making the procedural law as the alpha and omega in adjudication of disputes for that is the law.

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[1]Telcom Kenya Limited v. John Ochanda and 996 Others [2015].

[2]Kenya Bus Service Ltd & Another v minister for Transport & 2 others [2012] eKLR.

[3]Marcin Matczak, Why Judicial Formalism is Incompatible with the Rule of Law, August 2018Canadian Journal of Law & Jurisprudence Volume 31(Issue 1 February 2018): pp. 61-85. Available at file:///C:/Users/user/Downloads/mmatczak_why_judicial_formalism_incompatible_rule_of_law_29082016.pdf Accessed on 22nd March 2022

[4]Oxford Reference, Guide to Latin in International Law. Available at https://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-591 Accessed on 22nd March 2022

This paper seeks to critique three decisions of Court of Appeal on matters pertaining Public Procurement Disputes. The three decisions are:[5] Aprim consultants versus Parliamentary service commission and another; Civil Appeal No. E598 of 2021 and lastly Civil Appeal No. E012 of 2022. In my view the three decisions reveal how the Court of Appeal has elevated statutory dictates and trampled on the Constitution. One might be tempted to ask is Kenya exercising parliamentary supremacy or Constitutional supremacy. The Court of Appeal has revealed an array of times that they pay homage to the former. This in its strict sense is an affront to the Constitution of Kenya which is the supreme law of the land.

Highlight of the three cases

I. Civil Appeal No E039 of 2021

Last year the Court of Appeal rendered its decision in Aprim Consultants case. Needless to say, the decision was not accepted by many who were of the view that the Court of Appeal is keen on reversing the gains of the 2010 Constitution. What was the main contention? The dispute was in relation to[6] Section 175 of the Public Procurement and Assets Disposal Act.

The aforementioned Section enumerates that an aggrieved party has a right to judicial review of a decision by the board and the provision states further that: the High Court is to determine the judicial review application within forty-five days after an application for judicial review has been made. A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such a decision and the Court of Appeal is to decide within forty-five days and the decision will be final. It is worthy to note that if either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline as noted above, the decision of the Review Board is to be final and binding to all parties.

The Court of Appeal in the decision was of the view that the High Court judgement was null. This according to them was courtesy of High Court rendering the verdict outside the mandatory 45 days as required in[7] Section 175 of Public Procurement and Assets Disposal Act and proceeded to award costs to the appellant[8].

II. Civil Appeal E012 of 2022

This was an appeal from the High Court. In the judicial review before the High Court the Exparte applicant was seeking among other things an order of certiorari to bring into the High Court for purposes of being quashed the decision of Public Procurement Administrative Review dated 21st October in regard to tender for procurement of plant design, supply and installation of Olkaria 1 units, 2 and 3 Geothermal Power Plant Rehabilitation Project[9].

Before the High Court, the applicant sought an order of certiorari to remove to the High Court for purposes of quashing the review board decision or finings made in respect to the review board decision. The High Court considering the consolidated judicial review applications, the learned judge held that the Review Board had no jurisdiction to entertain and determine the review applications and granted the order of certiorari to bring into the court for purposes of quashing the decision of the review board. Moreover, the court dismissed Judicial review Application and ordered each party to bear its own costs of the consolidated applications. Being aggrieved by the said decision the appellant filed a notice of appeal last year December and a memorandum of appeal.

The second and third respondents could hear none of the appeal by the appellants thus the two parties filed an application for the court to strike out the record of appeal. The application was premised on grounds that the subject of the appeal is borne out of the procurement proceedings that were instituted within the framework of Section 175 of the Public Procurement and Assets Disposal Act; that Section 175 (4) of the Act stipulates strict timelines, *inter alia*, appeals to the Court of Appeal to be filed within seven days from the decision of the High Court but the appellant had filed its appeal 28 days from the date of the decisions of the High Court. In support of their submissions, they relied on Aprim Consultants v Parliamentary Service Commission.

Mr Mumia who represented the second and third respondents submitted that the impugned judgement having

[5]Aprim consultants versus Parliamentary service commission and another Civil Appeal No E039 of 2021

[6]Section 175 of the Public Procurement and Assets Disposal Act

[7]Section 175 of Public Procurement and Assets Disposal Act

[8]Joshua Nyawa Malidzo, 'Uncommonly Silly Law' and Hollow Men: A Critique of the Legalistic Interpretation of Time-Limit Clause by the Kenyan Court of Appeal

[9]Civil Appeal E012 of 2022

been delivered on 16th December 2021, the appeal should have been filed by 23rd December 2021 but the same was filed on 13th January 2022. The fourth respondent supported the application to strike out the appeal. He pointed out that the appellant's counsel had backdated the memorandum of appeal to 22nd December 2022 whereas the same was actually filled on 13th January 2022.

On the matter of strict timelines embedded in Section 175 of Public Procurement and Assets Disposal Act the Court noted that the timelines are cast in stone and cannot be varied. According to the Court of Appeal the strict time frames under Section 175 of Public Procurement and Assets Disposal Act underscore the intention of Parliament to ensure that dispute relating to Public Procurements and Assets Disposal are disposed of expeditiously. The Court quoted its decision in Aprim Consultants as follows:

> ***'We think with respect, that the provisions of section 175 are couched in terms that are plain and unambiguous, admitting to no interpretive wriggle room. The Section sets strict timelines for applicants, the High Court and this Court in a sequential manner. All these timelines are patently tight. They also constrict to the usual timelines for the filing and determination of proceedings. For this court for instance, ordinary appeals are initiated by filing of a notice of appeal within 14 days of the decision appealed from. This is followed by a lodging of the record of appeal some 60 days thereafter. There is no set time within 90 days by dint of rule 32 (1), but the Court may still, deliver its judgement outside that period for reasons to be recorded. That case management and disposal scheme is totally upended by Section 75 of the Act which required that what would ordinarily take 6 months at a minimum must be filed, heard and decided within 45 days, which is a tall order indeed .'***[10]

The Court of Appeal as well endorsed the reasoning of Justice Gatembu in Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 others.[11] Justice Gatembu rendered himself on this issue as follows: -

> ***Section 175 of the Act as a whole provides for an elaborate time bound process for escalating the dispute from the Review Board (which must complete its review within 21 days after receiving the request), to seeking judicial review to the High Court (which must be done within 14 days from the date of the decision of the Review Board); to the High Court (which has 45 days after such application to make its decision). A person aggrieved by the decision of High Court may appeal to the Court of Appeal within 7 days of the High Court decision. The Court of Appeals shall make a decision within 45 days which decision shall be final.***
>
> ***The importance of the timelines is buttressed by Section 175 (5) which provides that the decision of the Review Board shall be final and binding to all the parties should the High Court or the Court of Appeal fails to make a decision within the prescribed timelines.***
>
> ***In my view, there is nothing in the elaborate provisions under Section 175 of the Act that goes against the Constitution or that is inimical or likely to lessen or adversely affect or undermine the constitutional underpinning of the remedy of judicial review.[12] Justice Nyamu (as he then was) opined that the elaborate provisions and ouster clauses in the then Public Procurement and Disposal Act 2005 were tailored to accelerate finality of public projects.***

Having adopted such pedantic view of the issue at stake the verdict of the court can be easily guessed. The Court stated as follows:

> *The appellant does not dispute that the appeal was filed outside the stipulated statutory period of 7 days. It follows, therefore, that the appeal is incompetent and cannot be entertained by this Court. The appeal is for striking out, which we hereby do.*
>
> *Having arrived at this firm conclusion, it would be superfluous for us to address ourselves to the application for amendment of the memorandum of appeal or the merits of the appeal as requested by the appellant's counsel. The end is that this appeal is hereby struck out*[13].

[10]Aprim Consultants v Parliamentary Service Commission and Another 2021
[11]Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 others
[12]Republic v. Public Procurement Administrative Review Board & another Exparte Selex Sistemi Integrati [2008]
[13]Civil Appeal No. Eo12 of 2022

III. Civil Appeal No. E598 of 2021

The appellant in this case 'ADK Technologies Ltd in Consortium with Computer Technologies Ltd' was an unsuccessful bidder for tender for provision of Outside Support for IFMIS E-Procurement and Independent Integrated Financial Management System for Semi-autonomous Government Agency floated by the National Treasury. The appellant was aggrieved by the National Treasury decision not to award it the tender and applied to the Public Procurement Administrative Review Board to review the decision on 8th February 2021[14].

On 1st March 2021, the Public Procurement Administrative Review Board struck out the appellant's request for review. The appellant further was aggrieved and commenced judicial review proceedings in the High Court for an order of certiorari to quash the decision of the Public Procurement Administrative Review Board, an order of prohibition to stop the award of the tender and an award of the tender and an order of mandamus to compel the Public Procurement Administrative Review Board to hear its request for review[15].

A preliminary objection was taken by the 4th respondent, Kingsway Business System, who were the successful bidders, on the basis that the application was defective for want of authority to plead and lack verifying affidavit. After hearing the objection, the learned judge sustained the same and struck out the application in a judgement dated 9th April 2021, the subject of the appeal. From the record of the appellant lodged its notice of appeal on 13th April 2021, 2021, and the record on 17th October 2021, some 91 days from the date of the decision of the court. At the hearing of the appeal on 2nd March 2021, the Court requested the parties to address the question whether it has jurisdiction to hear the appeal in view of the provisions of Section 175 (4) and (5) of the Public Procurement and Disposal Act[16].

The fourth respondent Counsel submitted that the prescribed time for hearing the appeal had lapsed and that the Court did not have jurisdiction to entertain it. The Court took notice that the delay was occasioned by the appellant itself. It filed the appeal 191 days from the date of the decision of the High Court rather than within the seven days prescribed by the Public Procurement and Disposal Act. Thus, the court noted that it had no jurisdiction to hear and determine the appeal and struck it out with costs to the respondents[17].

Decoding the constitutional demand of access to Justice in Kenya

The term justice denotes what is right, fair, appropriate or deserved in social relations. Typically, the need to determine what is right, fair, appropriate or deserved arises in the context of competition for nature's scarce resources. In the absence of mechanisms to determine what is justly due to one human being in relation to another human being relative to a given resource, it can be expected that 'the natural lawlessness of human beings will lead to the strong trampling over the weak. This is the basic reason why human beings need the institution of law. As an instrument of social control, law establishes principles and procedures that, by facilitating the equal treatment of human beings, will hopefully ensure that the scarce resources of nature are shared fairly and legitimately, thereby enabling social stability. Where law leads to fair and legitimate outcomes in this manner, a claim can then be made that law has delivered justice[18].

Access to justice is quintessential to the realisation of the rule of law ideal[19]. According to UNDP[20], access to justice encompasses more than improving an individual's access to courts or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable. Furthermore, it must encompass the ability of people - especially those from disadvantaged groups - to prevent and overcome human poverty by seeking and obtaining a remedy, through the justice system, for grievances in accordance with human rights principles and standards[21]." [22]Article 48 of the Constitution enumerates explicitly on access to justice.

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[14]Civil Appeal No. E598 of 2021
[15]Civil Appeal No. E598 of 2021
[16]Ibid
[17]Supra
[18]Patricia Kameri Mbote and Migai Akech, Kenya; Justice Sector and the Rule of Law (The Open Society Initiative for Eastern Africa, March 2011)
[19]Ibid
[20]UNDP, 2004: Access to Justice Practice Note, 9/3/2004, p6.
[21]Ramaswamy Sudarshan, 2003; Rule of Law and Access to Justice: Perspectives from UNDP Experience - Paper presented to the European Commission Expert Seminal on Rule of Law and the Administration of Justice as part of Good Governance, 3-4 July 2003, Brussels.
[22]Article 48 of the Constitution of Kenya

The constitution provides that it is a fundamental right of every citizen to access justice through the courts[23]. It also establishes the judiciary, as an independent organ tasked with the interpretation and dispensation of justice. The courts have to interpret the laws in a manner that gives life to the constitutional provisions and promotes its values[24]. *It is therefore a seemingly blatant breach of the constitution and statutory provisions for the court to overlook these provisions or otherwise to interpret the same in a manner that is retrogressive, and which fails to honour the new constitutional philosophy*[25].

[26]Pravin Bowry argues that Article 48 and Article 159 (2) (d) of the Constitution of Kenya 2010 are meaningful developments in Kenyan jurisprudence. In their scope, they counter the crippling impact that technicalities have had in dispensation of justice. The overreliance by the Court of Appeal on procedural law is mindboggling. Both the procedural law and substantive justice should go hand in hand. Lifting one above the other definitely means alludes to injustice. The next section delves on this at depth.

Court of appeal flawed approach to statutory interpretation: some reflections

The Court of Appeal is the second highest court of the land in Kenya. Legally, the court has the jurisdiction to hear[27] appeals from the High Court and any other Court or tribunal as prescribe by an act of Parliament[28]. The same jurisdiction of the Court is as well enumerated in Appellate Jurisdiction Act[29]. The aforementioned cases found their way to the Court of Appeal rightly in line with the jurisdiction of the court. A keen observer will note that the major tussle in the Court of Appeal skewed interpretation has to do with procedural law and substantive justice. The big question is which one should be applied at all costs. Rather should the two components of justice be applied equally so that justice is realized and the Constitutional provisions on matters justice are adhered to.

Substantive law establishes the rights and obligations that govern people and organizations; it includes all laws of general and specific applicability while on the other hand procedural law establishes the legal rules by which substantive law is created, applied and enforced, particularly in a court of law[30].

Pravin Bowry demystifies Procedural rules and Substantive justice he notes:

> *When used in the legal context, technicalities refer to strict rules of procedure, points of law or a small set of rules as contrasted with intent or purpose of substantive law. The bridge between substantive law and procedural law is that whereas the former defines the rights and duties of the people, the later lays down the rules by which these rights and duties are enforced and realised*[31].

He observes further as follows:

> *Prior to enactment and promulgation of the Constitution of Kenya 2010, which in good conscience of the law has given technicalities in the law a "by-pass kick", many innocent Kenyans were denied justice by having their cases dismissed. For example, in the years gone by, the former Court of Appeal dismissed hundreds of merited appeals – apparently to give statistical support to appeals disposed merely because the Decree was not certified by the Registrar.*
>
> *The procedural law in matters of civil cases is provided for under the Civil Procedure Act and Rules. In 2009, important amendments were made to the Civil Procedure Act, inserting section 1A which sets out under subsection (1) the objective of the Act thus: "The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act."*
>
> *The courts in executing their functions must ensure that they give interpretation to the law that effects the overriding objective as stated in the Act. It is not only the duty of the Court but also that of parties to civil proceedings and their advocates to ensure this is done. The courts have given various interpretations regarding the overriding objective which has come to be known as the oxygen principle provided for under the civil procedure Act and its intent.*

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[23]Ibid

[24]Article 259 of the Constitution of Kenya 2010

[25]Walter Khobe: 'The Court of Appeal is failing to give effect to Constitutional Aspirations.' The Platform Legal Magazine (2016).

[26]Pravin Bowry, Technicalities in law hindering justice (24th December 2014) Retrieved from https://www.standardmedia.co.ke/pravin-bowry/article/2000145753/technicalities-in-law-hindering-justice Accessed on 23rd March 2022

[27]Article 164 (3) (a) of the Constitution of Kenya 2010

[28]Article 164 (3) (b) of the Constitution of Kenya 2010

See also, Court of Appeal. Available at https://www.judiciary.go.ke/courts/court-of-appeal/ Accessed on 23rd March 2022

[29]3. Jurisdiction of Court of Appeal

(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law.

(2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.

(3) In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court.

[30]Ballot Pedia, The Administrative State. Available at https://ballotpedia.org/Substantive_law_and_procedural_law Accessed on 23rd March 2022

[31]Ibid

In the case of Abdirahman Abdi versus Safi Petroleum Products Ltd and six others Civil Application number, 173 of 2010, the court held that "The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice.

Even before the inclusion of the oxygen principle in statute the courts have time and again held that although the rules of procedure are of great importance in the administration of justice, the court should take into account the economic reality in Kenya that majority of people cannot engage advocates to represent them, and they should not be disadvantaged on that score.

Procedural rules are intended to serve as the hand maidens of justice, not to defeat it. The courts must strive to decide cases on their merit. *On the issue of application of the overriding objectives and technicalities, the Supreme Court in Raila Odinga and five others versus the Independent Electoral and Boundaries Commission and others, stated that, "It may be argued that the Supreme Court ought to apply the principle of substantial justice, rather than technicalities, particularly in a petition relating to Presidential election, which is a matter of great national interest and public importance.*

"However, each case must be considered within the context of its peculiar circumstances. Also, the exercise of such discretion must be made sparingly, as the law and Rules relating to the Constitution, implemented by the Supreme Court, must be taken with seriousness and the appropriate solemnity. The rules and timelines established are made with special and unique considerations." The highest Court in the country appears to condone reliance on technicalities and its pronouncement borders on double standards. Lower courts may well be tempted to rely on this precedent binding on lower courts and say technicalities have the absolute force of law.[32]

Key to note, Pravin vouches for substantive justice for in the past that is before the promulgation of the Constitution of Kenya 2010 procedural technicalities were used to deny litigants justice. Thus, the provision of Article 159 was meant to remedy that wrong. It was meant to transform how disputes in court are resolved. [33]Situma Wanjala commenting on the period before the promulgation of the 2010 Constitution states:

For many years, technicalities were given prominence by our courts. This made it very hard for the applicants in particular and the public in general to access justice. Access to justice was merely an appendage to the repealed constitution. The courts were reluctant to administer justice due to absence of the rules of procedure. Therefore, many litigants were driven away from the seat of justice before their cases could see the light of the day.
The period prior to 2010, when the overriding objective principle and the constitution were promulgated, striking out of pleadings for reasons that were purely technical was the rule rather than the exception. In many instances, cases were struck out of the record of the court for trivial failure on the part of the applicant to file submissions on time or serve the respondent with the applications.

This resulted in untold suffering to the people to the extent that they lost faith in our court systems. The courts were obsessed with technically sound decisions, which according to Justice Mutunga, lead to the emergence of mechanical jurisprudence. The judiciary had been heavily criticized for its perceived failure to uphold the rule of law. This resulted in lack of confidence in the judiciary. The consequences of lack of confidence in the judiciary were evident during the 2007 Post Election Violence.

Thus, the provision of Article 159 was meant to remedy that wrong. In Alexander Khamasi Mulimi v Independent Electoral and Boundaries Commission & 2 others[34] the advocates for the appellant submitted that Article 159(2)(d) of the constitution calls for courts to strive to sustain

[32]Supra
[33]Situma Wanjala, Substantive justice over procedural law in Kenya; gains under the 2010 constitutional dispensantion (LLB Thesis, Strathmore University) 2017. Available at https://su-plus.strathmore.edu/bitstream/handle/11071/5263/Substantive%20justice%20over%20procedural%20law%20in%20Kenya%20gains%20under%20the%202010%20constitutional%20dispensation.pdf?sequence=1&isAllowed=y Accessed on 23rd March 2022
[34]Alexander Khamasi Mulimi v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR

rather than strike out pleadings purely on technical grounds. They further argued that the rules are subservient to the constitution and statutes hence the primary objective should be substantive justice as opposed to undue regard to procedural technicalities[35].

The Court on the issue of substantive justice versus rules of procedure noted as follows:

> *17. It is to be recognised that election petitions are special disputes that are governed by the provisions of the constitution, the Elections Act, 2011 and Elections Petition Rules, 2017. Compliance with the provisions of the Act and the rules is of utmost importance. The question that the courts have grappled with in recent years is whether the election rules are mandatory and whether non-compliance with the rules should lead to a petition being struck out.*
>
> *18. There has been two schools of thought on the issue. One school of thought has been that the provisions of the election rules are mandatory, and that non- compliance should lead to a petition being struck out. This view was held in such High Court decisions as in Amina Hassan Ahmed Vs Returning Officer Mandera County & two Others(2013) eKLR, Jimmy Mkala Kazungu Vs Independent Electoral and Boundaries Commission & two others(2017) eKLR, Mbaraka Issa Kombo V Independent Electoral Commission and 3 Others (2017) eKLR and Martha Wangari Karua Vs Independent Electoral and Boundaries Commission & 3 others (2017) eKLR where the courts struck out the petitions as being incurably defective for non-compliance with Rule 8(1) (c) of the Elections Rules and held that the rules of procedure in electoral disputes are not mere technical procedural requirements but go to the root and substance of the matters prescribed thereupon.*
>
> *19. On the other hand there are some High Court decisions that have held the view that failure to comply with the election rules is not fatal to the petition and that a court can excuse the infraction. Examples are High Court decisions in Caroline Mwelu Mwandiku Vs Patrick Mweru Musimba & 2 Others(2013) eKLR, Washington Jakoyo Midiwo Vs Independent Electoral and Boundaries Commission and 2 Others(2017) eKLR, Shukra Hussein Gure Vs Independent Electoral and Boundaries Commission & 2 Others(2017) eKLR and Samuel Kazungu Kambi V Independent Electoral & Boundaries Commission and 3 Others (2017) eKLR where the respective High Court judges declined to strike out the petitions for failure to comply with the provisions of the elections rules and held the view that the petitions ought to be determined on merits.*

Samuel Kazungu Kambi

> *20. The issue of rules of procedure versus substantive justice has been addressed by the Court of Appeal in several cases. In Boy Juma Boy and 2 Others V Mwamlole Tchapu Mbwana and Another (2014) eKLR where a notice of appeal was not served in accordance with the Court of Appeal rules, the court stated that the rules were mandatory, and that the respondent was obligated to comply with them. The court consequently struck out the appeal for failure to serve the notice of appeal within the stipulated time.*
>
> *21. In the case of Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission and 6 Others (Supra) where the appellant in the case had not served the notice of appeal on the respondents within 7 days as required by the Court of Appeal Rules Ouko, JA was of a contrary view and in a majority judgment held that:*
>
> > *The power to strike out pleadings, and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then, only in the clearest of cases ....*
> >
> > *Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or to the root of the dispute or which do not on all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and*

[35]Ibid

Martha Wangari Karua

technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.......................
I reiterate what the court said in Githere V Kimungu (1976-1985) E.A 101, that: -

".... the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the court should not be too far bound and tied by the rules, which are intended as general rules of practice, as to be compelled to do that which will cause injustice in a particular case".

Essentially the rules remain subservient to the Constitution and statutes. Article 159(2) (d) of the constitution, Section 14(6) of the Supreme Court Act, Section 3A and 3B of the Appellate Jurisdiction Act, Section 1A and 1B of the Civil Procedure Act and Section 80(1) (d) of the Elections Act place heavy premium on substantive justice as opposed to undue regard to procedural technicalities. A look at recent judicial pronouncements from all the three levels of court structure leaves no doubt that the courts today abhor technicalities in the dispensation of justice.

It ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why the constitution and other statues that promote substantive justice deliberately use the phrase that justice be done without "undue regard" to procedural technicalities".

22. More recently the issue has been addressed by the Court of Appeal in Hon. Martha Wangari Karua Vs the Independent Electoral and Boundaries Commission & 3 Others (2018) eKLR where court reviewed the conflicting decisions from the High Court on interpretation of rules of procedure in respect to rule 8(1) of the Elections Rules. The court agreed with the sentiments expressed by Ouko JA in the Nicholas Salat case and endorsed the view that summary dismissal of petitions could only be exercised as a last resort where the petition is demonstrated to be hopeless or disclosing no reasonable cause of action or where the procedural infraction goes to the root of the dispute. Further that courts should endeavour to sustain a petition so that the issues in dispute are determined on merits. The court rendered itself thus: -

There is a positivist school of thought on the issue. One of the leading judgement in this school of thought was rendered by Koril J in the case of Samwel Kazungu Kambi & Another Vs Independent Electoral and Boundaries Commission and 3 Others(2017) eKLR who held the view that whereas there is need for strict compliance with the laws and rules governing the resolution of election dispute, the court ought to be mindful that the current constitution dispensation requires substantive justice to be done and that unless an election petition is so hopelessly defective and cannot communicate all the complaints and prayers of the petitioner, the court shall ensure that the petition is heard and determined on merit.

As stated herein above, Maina J in Jakoyo Midiwo case was of similar view as that of Korir, J. On our part, we entirely agree and endorse the position taken by the two learned judges. We say so because our current constitutional dispensation leans towards determination of disputes on merit. Therefore, taking into consideration our historical background, which is replete with determination of disputes on technicalities, and now the legal underpinning

provisions of superiority of our constitution value system, we think that the route taken by the learned judges to dismiss petitions on technicalities that do not affect the jurisdiction is not a reflection or manifestation of our current jurisprudence and justice system.

Indeed, one could go so far to say the superiority of the constitutional value system is the central premise or foundation of our 2010 constitution. The elevation and prominence placed on substantive justice is so critical and pivotal to the extent that Article 159 of the constitution implies an approach leaning towards substantive determination of disputes upon hearing both sides on evidence.

The jurisprudence from our courts in interpretation of the constitution has been to avoid summary dismissal of petitions and that power could only be exercised as a last resort where the petition is demonstrated to be hopeless or disclosing no reasonable cause of action"

Essentially the rules remain subservient to the Constitution and statutes. Article 159(2) (d) of the constitution, Section 14(6) of the Supreme Court Act, Section 3A and 3B of the Appellate Jurisdiction Act, Section 1A and 1B of the Civil Procedure Act and Section 80(1) (d) of the Elections Act place heavy premium on substantive justice as opposed to undue regard to procedural technicalities. A look at recent judicial pronouncements from all the three levels of court structure leaves no doubt that the courts today abhor technicalities in the dispensation of justice.

23. While commenting on the equivalent of rule 8(1) (c) after the 2013 general elections, Kimondo J. in William Kinyanyi Onyango V Independent Electoral & Boundaries Commission & 2 Others (2013) eKLR stated that: -

"In my considered opinion, the petitions Rules 2013 were meant to be handmaidens, not mistresses of justice. Fundamentally, they remain subservient to the Elections Act 2011 and the constitution. Section 80(1) (d) of the Elections Act 2011 enjoins the court to determine all matters without undue regard to technicalities. Rules 4 and 5 of the Petition Rules 2013 have in turn imported the philosophy of the overriding objective of the court to do substantial justice. Certainly, Article 159 of the constitution would frown upon a narrow and strict interpretation of the rule that may occasion serious injustice. This is not to say that procedural rules will not apply in all cases, only that the court must guard against them trumping substantive justice..."

24. I think that the two Court of Appeal decisions in the

Nicholas Salat

Nicholas Salat case and Martha Karua case have, in my view, stated the correct law as regards procedural law viz a viz substantive justice. The principles which emerge from the written and case law are that: -

(1) It is of utmost importance for parties in an election petition to comply with election rules.
(2) The provisions of the constitution and the Elections Act override those of the election rules.
(3) where there is non-conformity with the election rules, an election court has discretion to excuse the infraction.
(4) The court could only dismiss a case for non-conformity with the rules when the infraction complained of has caused prejudice to the other party.
(5) In that case it must be demonstrated that the infraction complained of goes to the root of the dispute that is before the court.
(6) The court can dismiss a case for non-conformity with the election rules in a proper case.
(7) The court should place substantive justice over procedural considerations especially where the infraction is curable.
(8) Striking out an election petition is a draconian measure that should be employed sparingly and as a last resort.

Justice Njagi in his wisdom observed that:

*28. I have perused the appeal. The same raises serious issues. I find that this is not a proper case for striking out based on failure to comply with the provisions of the Elections Rules. The failure to do so is a procedural technicality that does not go to the merits of the appeal. There are no serious defects in the appeal that call for its striking out. As noted above, striking out of a case should only be done as a last resort and only in the clearest of the cases. I**t is the dictate of our constitution that***

rules of procedure should not be elevated above the requirement of doing substantive justice to parties who come before our courts. *The respondents in the appeal will not suffer any prejudice by the matter proceedings to full hearing.* ***The appellant on the other hand will suffer untold prejudice if the matter is struck out on a technicality in that the issues, he complains of will remain unheard. The court has to bear in mind that the objective of the election petition rules is to facilitate the just and expeditious resolution of election disputes. It is not just and proportionate for the petition to be struck out for failure to comply with minor rules of procedure****. In the facts of the case the court is called upon to accord precedence to substance over form to save the appeal so that it can be determined on merits.* ***After all, rules are handmaidens and not mistresses of justice.***

From the analysis above it is certain that the Constitution envisages that both the procedural law and substantive justice to go hand in hand. The Court of the Appeal in adjudicating Public Procurement Disputes has been keen on embracing handmaiden of justice. The reasoning by Court of Appeal may make one think that procedural laws have primacy over the Constitutional text. The Court of Appeal has been keen on the issue of intent of the Parliament.

In TSK Electronica case the court agreed with the reasoning in the Aprim Case and stated thus:

'Our appreciation of Section 175 (4) is that a person aggrieved by a decision of the High Court arising from a judicial review decision in a procurement matter under this Act and who desires to prefer an appeal to this court must do so within a period of 7 days from the decision of the High Court. Thereafter, this court must hear and make a determination of the appeal within 45 days from the date of its filing. These timelines are cast in stone and cannot be varied. The strict time frames under this section underscore the intention of Parliament to ensure that disputes relating to public Procurements and Assets Disposal are disposed of expeditiously[36].

Joshua Malidzo Commenting on the Aprim Consultants case posited as follows:

The Court of Appeal in Aprim Consultants decision in finding that the High Court judgement was a nullity for the judgement was made after the mandatory 45 days reveals how the Court of Appeal is into strict interpretation of statutory provisions. By so holding, the Court of Appeal reduced themselves to mere slot-machines whose only resort is the adoption of a formal technical or mechanistic reasoning rather than substantive or purposive reasoning. By holding that the decision of the High Court was a nullity merely because it was rendered outside the 45 days, the Court restrained

[36]TSK Electronica Case

their role to mechanists whose only roles was to recite the statutory provisions as a poem and do nothing more. By choosing not to consider the statutory provision alongside the aspirations of the Constitution, the Court of Appeal chose to render a decision that fits John Dugard's description of being inert, imagination less and generally craven[37].

Before the 2010 Constitution the judges and magistrates would come up with rulings and judgements by noting that they are giving effect to the 'intention of the legislature. Joshua Malidzo observes that '*the leitmotif of the Constitution prohibits any form of interpretation that only seeks to give effect to the intention of the legislature. The Constitution demands that judges engage in an activity that seeks to discover a deeper constitutional logic than the crude absolute of statutory omnipotence. Judges are therefore duty bound to avoid a mechanical or phonographic view of judicial function. This is because, when judges consider statutory interpretation to mean an activity that only involves giving effect to the intention of the legislature and a value-neutral discovery devoid of realising the constitutional aspirations, they commit unforgivable judicial sin*[38].'

The primary duty of a judge in the new constitutional dispensation is to check whether the statutory provisions are in harmony with the aspiration of the Constitution. Horn considers this obligation in his '*Interpreting the Interpreters*' and affirms that a transformative constitutionalism embraces judicial interpretation to uphold the spirit of constitutional values[39]. Du Plessis as well asserts as follows:

> **Constitutional supremacy as both a constitutional fact and a value has dealt the dominance of the literalist-cum-internationalist theory of interpretation-in the areas of statutory and constitutional interpretation at least a decided blow. Nowadays a statutory provision is first and most importantly to be understood not as the legislature supposedly intended it, but in conformity with the Constitution[40].**

Thus, the judges in the current dispensation should make their first port of call as the Constitution. Judges should get to fathom that they have a duty to make sure that they

promote, protect and uphold the Constitutional objectives and aspirations. Statutory provisions should be sieved to ensure that they[41] prefer a meaning compatible with the Constitution.

The Constitution in sum loathes an interpretation that doesn't give effect to the Constitution. *The minimalist approach that was in the pre-2010 era (the mechanical and phonographic) is therefore not in line with the demands of our constitution. By dint of Article 10, judges are not subordinate to the legislature and are not merely programmed to pronounce the law like music lyrics. Judges are not automation machines*[42].

The procedural laws as contained in Section 175 of Public Procurement and Assets Disposal Act are meant to be guiding guide to achieving justice in the long run. The fact that the Court of Appeal has used the provision to deny litigants justice makes the Court of Appeal to be a court of injustice. The Court of Appeal has also disregarded the constitutional provisions. This is not the first time. The Court of Appeal has been rampant at disregarding the Constitution. There is need for Court of Appeal to embrace[43] liberal approach to interpretation of the law. Today, the Court of Appeal vouching for[44] legal formalism must be the greatest mockery of our time. The Court of Appeal should as well come to terms with the Constitutional provision that justice should be administered without undue regard to procedural technicalities[45].

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[37]Supra
[38]Supra
[39]Nico Horn, *Interpreting the Interpreters: A critical Analysis of the Interaction Between Formalism and Transformative Adjudication in Namibian Constitutional Jurisprudence 1990-2204 (2016)*
[40]Du Plessis, '*Position and Strategic Leitmotivs in Constitutional Interpretation in South Africa, (2015)*Supra
[41]Supra
[42]Supra
[43]The constitution at article 22 and 159 embraced a shift towards a liberal & informal approach to pleadings.
[44]Muthomi Thiankolu, 'Landmarks from Elmann to the Saitoti Ruling; Searching a Philosophy of Constitutional
Interpretation in Kenya', January 2007 Nairobi, Kenya. The paper provides an overview of the approach taken by our court in interpretation. It establishes a progressive move from the strict and literal interpretation to a more purposive
interpretation
[45]Article 159 (2) (d) of the Constitution of Kenya 2010

Conclusion

As a basic right, access to justice requires us to look beyond the dry letters of the law. It acts as a reaction to and protect against legal formalism and dogmatism[46]. It has two dimensions; procedural access which entails fair hearing before an impartial tribunal and substantive access which is about fair and just remedy for a violation of one's rights[47]. Rules of procedure exist to provide a formal channel where justice can be attained fairly and without delay. Making technicalities the alpha and omega ensures strict adherence to the letter of the law and may prevent the spirit, intent or purpose of substantive law from being enforced.[48]

The Court of Appeal Judges need to do away with the legal maxim '*dura lex sed lex*' and perhaps they need to embrace another legal principle when adjudicating any dispute before them. The legal maxim they should adopt is ([49]*lex injusta non est lex*) which means 'An unjust law is no law at all'. The interpretation of Constitution and the various statutes by the Court of Appeal has been the bane of many a legal scholar, jurisprudence enthusiasts, High Court Judges and Public Law Commentators.

Sorry to say, the kind of decisions by the Court of Appeal would be very relevant Pre 2010 Constitution dispensation. Court of Appeal has been steadfast in mutilating, murdering and trampling on the Constitution imperatives any time they get a chance to do so. There are few instances when Court of Appeal gets the law right and when that happens it is by accident. Notable advocates, scholars, legal luminaries and law students such as Mwalimu Walter Khobe[50], Joshua Malidzo (Infant Jurist), Ochiel Dudley, [51]Miracle Mudeyi, Valentine Kasidhi and Nelson Havi have condemned the Court of Appeal for embracing legal formalism and strict interpretation of laws without paying homage to Article 10 an Article 259 of the Constitution of Kenya. This paper only adds a voice in the whole discourse of decisions emanating from the Court of Appeal. It is high time the Court of Appeal come to terms with the demand of the Constitution that all laws including the statutes must conform to the Supreme law. Making procedural laws to be the alpha omega and leaving out substantive justice out of the picture is a mockery to the Constitution at its best. The Court of Appeal should do better and interpret the law as it should be. In the words of Pravin Bowry, 'In Kenya, justice and technicalities of law seem not to be on speaking terms.[52]'

The court ought to direct its attention to the service of justice and only let rules act as a guide towards the attainment of that goal.

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[46]Kenya Bus Service Ltd & another v minister for Transport & 2 others [2012] eKLR
Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission& 6 others [2013] eKLR. The court ought to be hesitant to strike out pleadings based on technicalities
[47]Supra
[48]Black's Law Dictionary 8th Edition, west publishing Company, USA (2004), 1234
[49]Bharat Petroleum Corporation Limited Vs. Maddula Ratnavali and Others
[50]See Walter Khobe, 'Erastus Githinji: the enemy of the constitution', (2018) 32 The Platform for Law, Justice & Society.
[51]Miracle Mudeyi and Valentine Kasidhi, 'The Court of Appeal in Kenya: The Graveyard of Progressive Jurisprudence? A call to Renaissance,' Available at https://theplatform.co.ke/issue-74-march-2022/ Accessed on 22nd March 2022
[52]Supra

William Ruto, the presidential candidate taking on Kenya's political dynasties

William Ruto

By Westen K Shilaho

The recent party nomination of deputy president William Samoei Ruto as a presidential candidate sets the stage for a tight race in Kenya's elections scheduled for early August. Ruto, 55, is leader of the United Democratic Alliance party, the newly formed and largest party in Kenya, under the Kwanza (Kenya First) coalition. His main rival is Raila Odinga, 77, who will run under the rival Azimio la Umoja (Unity Declaration) coalition. Against sustained pushback by the incumbent, Uhuru Kenyatta, Ruto is determined to succeed him. Kenyatta is instead backing his former archrival and longtime opposition leader Raila Odinga.

Kenyatta and Ruto are former allies: Ruto campaigned for Kenyatta during his first presidential attempt in 2002, which he lost. Both were indicted by the International Criminal Court (ICC) as the suspected masterminds of the mass atrocities that followed the disputed 2007 elections. They then teamed up to contest in 2013. They prevailed in 2017 as well, but not before the Supreme Court annulled the first round.

Ruto has characterised Kenyatta and Odinga as the embodiments of [dynastic politics] and entitlement. The two are sons of Jomo Kenyatta and Oginga Odinga, Kenya's first president and first vice president respectively.

In contrast, Ruto is of humble upbringing. He invariably invokes his background in hawking chicken by the roadside to affirm his appreciation of the dire circumstances of Kenya's downtrodden. As an outlier in Kenya's political power matrix, which is dominated by a tiny clique related by familial and economic ties and adept at manipulating tribalism, Ruto was elbowed out by the establishment. But he has somersaulted back by appealing directly to the masses.

Ruto versus status quo

For almost six decades, political and economic power has been confined within a group around Kenya's first two presidents – Kenyatta and Daniel arap Moi. Raila Odinga joined this group in the sunset years of Moi's tenure. The group has leverage over state agencies and the security apparatus. It exploits state power to advance commercial interests spread across the entire gamut of Kenya's economy.

Kenyatta's family, for instance, has vast business interests. The Mois are also fabulously wealthy. Ruto is also certainly a man of means. According to his opponents in the government he too has extensive business interests. It's for this reason that Ruto has been been accused of hypocrisy for championing the downtrodden, or ordinary Kenyans whom he refers to as "hustlers". Pivotal to Ruto's campaign is his bottom-up economic model. Its pillars are the dispersal of economic and political opportunities and dignifying the poor. It invokes equity, inclusivity, social justice and fair play. His "hustler movement" has been propelled by mass unemployment, poverty, inequalities and state excesses such as extrajudicial executions.

Ruto has reinvented himself as the agent of class consciousness hitherto absent in Kenya's political discourse and competition. By rebranding himself as the antithesis of the status quo and personification of the hopes of the poor, his messaging has resonated with a cross spectrum of the marginalised.

Based on recent polls, not all credible, he is in pole position with a few months to go. An insider running as an outsider, Ruto has a realistic chance of winning in August. If he does, he will have to overhaul Kenya's socioeconomic and political edifice to assuage the restless and disenchanted populace. If he doesn't, he risks becoming a casualty of his success.

The making of candidate Ruto

Following disputed elections in 2017, Kenyatta and his close allies embarked on a campaign of vilification against Ruto. He was soon edged out of the government and remained a Kenyatta's principal assistant in law only. Kenyatta transferred his official responsibilities as Deputy President to a loyal cabinet minister in an attempt to whittle down the office and clip Ruto's political wings.

The aim was to delegitimise and frustrate him into resigning, thus knocking him out of the succession race. In Kenya's media, including social media, Ruto is the villain; the bogeyman. Through newspaper headlines, hashtags, prime time news and talk shows, he is depicted as the skunk of Kenya's politics solely associated with vices such

as corruption, land grabs, impunity, unbridled ambition, insolence, warlord politics, and ethnic cleansing. These vices, however, pervade Kenya's political landscape.

Ruto cut his political teeth under the mentorship of the long-serving autocrat Daniel arap Moi in the early 1990s. Facing presidential opponents for the first time in 1992, Moi mobilised the youth vote with the help of young politicians, under an outfit known as Youth for KANU '92. Ruto was one of the youthful politicians who crafted the successful – but equally infamous – re-election strategy in 1992. This involved Moi sanctioning the printing of money used to bribe voters, among other things.

Ruto's entry into parliament in 1997 was in defiance of his mentor. Moi, a fellow Kalenjin from the Rift Valley, had tried to prevail on Ruto not to run. Moi exited in 2002 and Ruto astutely won over the Kalenjin voting bloc and used it as a launching pad into national politics. Moi had wanted to bequeath it to his son, Gideon. Hence the fallout between Moi and Ruto.

The Kenyatta-Moi-Odinga axis, which Ruto has propped up in the past, has turned against him, fearful that he would end their economic and political stranglehold. They perceive Ruto – relatively young, astute, ambitious, prescient and gallant – as a threat to their dubious privileges.

In 2010, Ruto stood out from this coterie and mobilised against the passage of the current constitution. He recently defended his stand on the grounds that he did not approve of some parts of the new constitution – but embraced it once it was passed.

He faulted Kenyatta for violating the same constitution through blatant defiance of numerous court orders and weaponising oversight bodies and state agencies. Ruto also accused Kenyatta and Odinga of a conspiracy to illegally amend the constitution to consolidate their power through the Building Bridges Initiative. Though quashed as unconstitutional by the high court and appeals court, an attempt to revive the initiative is now before the supreme court.

Political traction

Ruto frequently quotes the Bible and attends church services regularly, during which he donates generously or pledges future funding. These acts of generosity may endear him to some in the dominant Christian population. But this seemingly ecclesiastical bent masks a consummate political strategist.

On the stump, Ruto constantly castigates hoarding of state power and economic opportunities by an insular elite. He avers that empowering the masses will enhance social cohesion and reduce political instability.

Despite the rhetoric, Ruto is a creature of Kenya's political culture, notorious for a lack of scruples. Its elite is anglophile in outlook, and disdainful of the poor. It is also mired in impunity and tribalism.

Ruto's political legitimacy, like that of Kenyatta and Odinga, is derived from visceral tribalism. His is constantly campaigning in Kikuyu regions, like Odinga and Kenyatta. What is significant is that Ruto's reframing of the political discourse into hustlers versus dynasties has accorded him traction and set the tempo of this election despite the government's abysmal scorecard. He has made this election about the rule of law, constitutionalism, equalisation of economic opportunities and competitive plural politics.

This contrasts with Odinga, who has publicly defined himself as the status quo candidate, an extension of Kenyatta tenure and therefore out to preserve the exclusive political and economic arrangement that dates to colonialism. The stakes are high for Kenyans. A Ruto victory could end the dynastic dominance of Kenya's politics and economy. Peripheral actors could rise. As to whether Ruto would prise open the economy for the benefit of all, that remains an open question.

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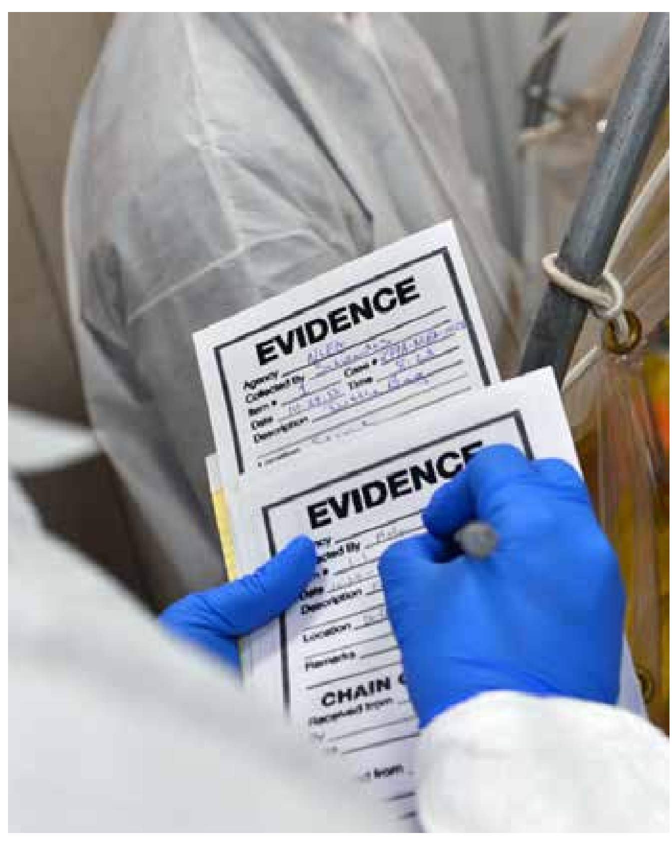
An examination of courts discretion to exclude illegally or improperly obtained evidence, and emerging implications in the criminal justice system

By Opande Hemstone Omondi



Introduction

Evidence, in as much as it is relevant, may be excluded as a matter of law or exercise of judicial discretion on the grounds that it was obtained illegally or improperly. Evidence obtained illegally include evidence obtained by a crime, tort and breach of contract or in violation of statutory provisions governing duties of police mandated to investigate crimes. Improperly obtained evidence include evidence obtained unfairly through bribes, deception, trickery, threats or inducements. Involuntary confessions have also been included in the category of illegally obtained evidence.[1] The Evidence Act (Cap 80 Laws of Kenya) lacks express provisions on illegally obtained evidence and does not define illegally obtained evidence. The Act however provides for involuntarily obtained confessions.

Section 25 of the Evidence Act defines confession to include words or conduct, or a combination of both words and conduct, out of which relied on or corroborated; it may be reasonable to draw an inference that the maker has committed a crime.[2] In other words, confessions refer to statements an accused person makes out of court to a person in authority admitting to have had a hand in the commission of an offence, and may be produced in court as evidence of his guilt, either alone or in conjunction with other facts proved.[3] Such confessions must however be proved reliable and voluntarily made to be admitted as evidence, free from threats, inducement or oppression. The dilemma in our courts is however on what exactly need to be done with evidence obtained through illegal or improper means. This article seeks to examine the place of relevant evidence obtained through illegal or improper means, constitutional imperative and emerging implications through case laws vis a vis the place of public policy on relevant, but illegally or improperly obtained evidence, as to whether they should be excluded or admitted as evidence in trial.

Constitutional imperative, public policy and exercise of judicial discretion in admitting or excluding relevant illegally or improperly obtained evidence

The Constitution of Kenya, 2010 states that:

> *"Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice".* [4]

[1] R v Warickshall [1783] 1 Leach 263, 168 ER 234
[2] The Evidence Act 1963[Rev. 2014], s.25(1)
[3] The Evidence Act 1963[Rev. 2014], s.25A
[4] Article 50(4), Constitution of Kenya, 2010

Section 118 of the Criminal Procedure Code provides the magistrate with power to issue search warrants and states that:

> *"Where it is proved on oath to a court or a magistrate that anything upon which or in respect of which an offence has been committed, or anything which is necessary for conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or magistrate shall by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law".* [5]

Section 60 (1) of the National Police Act which appears to be more lenient in procedure compared to Section 118 of the Criminal Procedure Code, gives the police discretion to go ahead and obtain evidence without a search warrant, provided s/he leaves behind written reasons therewith for the urgency. It states that:

> *"When an officer in charge of a police station or a police officer investigating an alleged offence has reasonable grounds to believe that something necessary for purposes of such investigation is likely to be found in any place and that the delay occasioned by obtaining a search warrant under section 118 of the CPC will in his opinion substantially prejudice such investigations, he may after recording in writing the grounds for his belief and such description as is available to him of the warrant as aforesaid, enter any premises in search or cause search to be made for and take possession of such thing provided that ... or his property or the entry by others on his premises."*[6]

Article 50(4) of the Constitution constructively implies that the admissibility of evidence is not affected by how it was obtained nor does the use of illegal or improper means to obtain evidence generally make otherwise relevant and so admissible evidence inadmissible, unless the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice. Article 31,[7] however provides for the right to privacy including right not to have property of persons searched, their possessions seized as well as privacy of their communications infringed. On the other hand, Article 35 underpins the right of every citizen to access information;[8] including information held by the state; and information held by another person and required for the exercise or protection of any right or fundamental freedom.

Courts therefore continue to grapple with public policy issues in deciding whether to admit or exclude relevant evidence regardless of the means by which it was obtained. At one extreme end are citizens who believe and want to see those who violate other people's rights brought to book and convicted. This category takes the view that evidence that is relevant and otherwise admissible should not be excluded, simply on grounds that the means by which they were obtained were illegal or improper, as excluding such evidence would sometimes result in injustice including the acquittal of the guilty.[9] All the evidence that is necessary to achieve justice should be admitted. D. Ally also argues that this inclusionary approach is necessary for social costs characterised by setting free the guilty.[10] Those who hold this view contend that society pays an excessive price when an accused is acquitted for the reason that relevant evidence crucial for conviction of the accused has been excluded for illegality or improper means of procurement.[11] On the other hand, there is competing public policy consisting of fundamental rights advocates who frown upon a conviction of an accused person resulting from evidence obtained by police through conduct encroaching into the accused person's constitutional rights, such as right to privacy and privilege of silence. Proponents of this view

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[5]Section 118, Criminal Procedure Code (Chapter 75, Laws of Kenya)
[6]Section 60(1), National Police Act (Chapter 84, Laws of Kenya)
[7]Constitution of Kenya, 2010
[8]Constitution of Kenya, 2010
[9]Adrian Keane & Paul McKeowl, The Modern Law of Evidence (9th edn, Oxford University Press, 2011) pg.121
[10]D. Ally, Determining the Effect (The Social Costs) of Exclusion Under The South African Exclusionary Rule: Should Factual Guilt Tilt The Scales in Favour of The Admission of Unconstitutionally Obtained Evidence?
[11]ibid

contend that to admit illegally or improperly obtained evidence, even though relevant to secure conviction of the accused, would fuel the obtaining of evidence through such means, risking bringing the administration of justice into disrepute.[12] Judges, therefore if they were to consider public policy, strictly speaking, would have to scuffle with either securing conviction of an accused person or maintaining the reputation of the criminal justice system, in order to ameliorate and strike a balance between the two opposing public interests and in the interest of delivering justice.

The first public policy replicates the traditional common law approach of mandatory inclusion of all evidence relevant to the issue, regardless of the manner in which it was obtained, as propounded by Justice Crompton in ***R v Leatham***,[13] *"it matters not how you get it, if you steal it even, it would be admissible in evidence."* This decision has been followed by common law legal systems, including Kenya in several instances when faced with the question whether to admit or exclude illegally obtained evidence. The court in ***Nicholas Randa Owano Ombija v Judges and Magistrates Vetting Board,***[14] in dissecting whether to admit or exclude illegally obtained evidence quoted the English case of ***Karuma s/o Kaniu v The Queen [1955]***, an appeal to the Privy Council based on illegally obtained evidence. The Privy Council held that;

> *"The test to be applied both in civil and in criminal cases in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it was obtained."*

The court went ahead to conclude that common law principles show that evidence, if relevant, is admissible even if it has been illegally procured. Justice Wasilwa also in ***John Muriithi & 8 Others v Registered Trustees of Sisters of Mercy (Kenya) "The Mater Misericordiae Hospital" & another***[15], also in adopting the common law position on illegally obtained evidence and making reference to the provisions of Article 50 (4) of the Constitution of Kenya went ahead to note that even though the courts have a primary duty to do justice, if justice will be done using available documents and evidence not obtained in breach of the constitution and the law, then courts would admit such evidence to enable determination of the issues in a just manner. This position by Justice Wasilwa implies that in the event that evidence relevant to an issue subject to a proceeding is obtained in a manner in contravention of any provisions of the Constitution, then such evidence, despite being relevant to secure a conviction of an accused person, courts will exercise their discretion to exclude such

Justice Wasilwa

evidence. This contention of mandatory inclusion of illegally obtained evidence, as long as it is relevant so admissible was rejected in ***United Airlines Limited v Kenya Commercial Bank Limited***[16], arguing that the Constitution of Kenya 2010 had changed the common law position, and that by dint of Article 50(4), illegally obtained evidence is no longer *prima facie* admissible, provided it is relevant. This holding would mean that Kurume case (supra) is no longer good law.

The court in United Airlines Case however contended that Article 50(4) of the Constitution of Kenya, 2010 applies only to criminal cases, and not civil cases, as it refers to "trial" and not "trial and suit" to encompass both criminal and civil cases, and that the rights also relate to accused persons. This interpretation is however simplistic, problematic and a powder keg. Article 50(4) has never been an issue as to whether it applies to criminal cases alone or an extension to civil cases too, but by this it becomes a contentious issue. Article 50 generally makes provisions for "fair hearing". Article 50 (1) applies to "every person". Article 50(2) narrows down to "every accused person". In my view regarding Article 50 (4), in the event that a court is faced with admission of evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights and would be detrimental to the administration of justice, civil or criminal, the court can exercise its discretion to admit or exclude such evidence. The Supreme Court judgment in ***Njonjo Mue & Another v Chairperson of Independent Electoral and Boundaries Commission & 3 Others***, also in recognizing the right of access by the public

[12]Adrian Kean & Paul McKeown, The Modern Law of Evidence (9th edn, Oxford University Press 2011) pg 121
[13][1861] 8 Cox CCC 498
[14][2015] eKLR
[15][2018] eKLR
[16][2017] eKLR

to any information held by the state or state organs, unless for very exceptional circumstances, and noting that there are procedures provided for under the law, that persons who seek information should follow; went ahead regardless to hold that such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue regard to access of any such needed information. The court stated that right to access information held by the state, and right to privacy is a two way channel and the rights have to be balanced with the obligation to follow the process. Access of documents in this case without following the requisite procedure, in violation of right to privacy and protection of property guaranteed to the Respondent in both the Constitution and Section 27 of the IEBC Act, as read with limitations expounded in Article 50(4) of the constitution rendered such documents inadmissible besides impacting on their probative value. M.K. Koome J (as she then was), S. Gatembu Kairu and J. Mohammed, in the Court of Appeal case of ***Okiya Omtatah Okoiti & 2 Others v Attorney General & 4 Others***[17], held that by dint of Article 50(4) of the Constitution, the adage, *"it matters not how you get it if you steal it even, it would be admissible in evidence"* is not representative of the state of the law in our legal system, irrespective of whether the issue is of criminal or civil nature.

Case laws have also shown that evidence obtained through entrapment by state or agent provocateurs is illegal and so inadmissible in criminal cases. Justice Warsame in determining a petition relying on evidence obtained through entrapment in criminal case, ***Mohamed Koriow Nur v Attorney-General [2011]***, said that entrapment is a form of lawlessness by law enforcement officers and is a norm rationalized through the notion and theory that the end justifies the means, legal or not. Justice Warsame observed that by allowing the state to prosecute and convict an accused person for committing a crime which he only committed by instigation from a state agent, the criminal justice system would be brought into disrepute.

The Position in Kenya

Kyalo Mbobu argues that the position in Kenya is that illegally obtained evidence is admissible so long as it is relevant and not prejudicial to the accused.[18] He argues that illegally obtained evidence is admissible, but subject to the discretion of the judge or magistrate to admit or exclude, the balancing act being where the public interest in the proper administration of justice outweighed the public interest in the ascertainment of the truth through admission of improperly obtained evidence as was the case in ***Distributors v Video Exchange Limited and Others;***

> *"The public interest in the ascertainment of the truth in litigation which was the reason for the rule allowing secondary evidence of privileged documents to be adduced even though improperly obtained, was outweighed by the public interest in the proper administration of justice in regard to a litigant being able to bring his documents into court without fear that his opponent would filch them by stealth or a trick… "*

[17][2020]eKLR

[18]Kyalo Mbobu, *The Law and Practice of Evidence in Kenya*, (2nd edn, Law Africa) 2016

Professor Jeffrey Pinsler, SC[19] puts it that "*... the court must try to give effect to two conflicting public interests: the need for the court to have access to the evidence in the interest of fair and just adjudication and the avoidance of misconduct in the manner of securing evidence. The outcome of the balancing operation depends on the circumstances"*

The balancing and discretion to either admit or exclude evidence however lies with the trial court. Section 27 of the Evidence Act (Cap 80, Laws of Kenya) affirms the discretion of the judges to admit or exclude evidence. It states that:

> *"The improper admission or rejection of evidence shall not of itself be ground for a new trial or for reversal of any decision in a case if it shall appear to the court before which the objection is taken that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received it ought not to have varied the decision."*

These views however seem to rationalize judges' use of public policy in justifying admissibility of relevant but illegally or improperly obtained evidence. The question however revolves around whether our public policy as a country supports exclusion or inclusion of relevant evidence notwithstanding the manner in which such evidence is obtained. Article 31 however provides that every person has a right to privacy,[20] *including right not to have their persons, home or property searched; their possessions seized; information relating to their family or private affairs unnecessarily acquired or revealed; and the privacy of their communications infringed.* Article 35 also provides for right to access information. These two provisions when read with Article 50(4) of the Constitution reveals that admissibility of illegally obtained evidence may no longer spring from grounds of public policy. The emerging implications from case laws in our courts also reflect a departure from public policy controls to protection of fundamental rights and freedoms of the accused person in the Bill of Rights, and need to observe due process and rule of law.

Conclusion

In as much as judges may take cognizance of the essence of public policy in informing their ultimate decisions, balancing the two public interests in deciding whether to admit or exclude relevant evidence procured through illegal or improper means has proved problematic and inconsistent from our courts. Judges must however be slow to getting marred in public policy considerations in determining whether to admit or exclude relevant but illegally or improperly obtained evidence, at least as espoused by Articles 31 and 35, as read with the provisions in Article 50(4) of the Constitution of Kenya 2010, and in the interests of justice.

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[19]Professor Jeffrey Pinsler, SC, The Courts Discretion to Exclude Evidence in Civil Case and Emerging Implications in the Criminal Sphere (2016) 28 SAcLJ
[20]Constitution of Kenya 2010

Comparing the aggravating and mitigating factors in criminal sentencing in Kenya and other jurisdictions

By Amelia S. Kendi

Aggravating factors are those factors which judges consider when making sentencing decisions in criminal cases and which might lead them to impose harsher sentences. Mitigating factors on the other hand are the opposite of the aggravating factors and they include factors which might lead to reduced sentences. In Kenya, crimes, offenses and their punishments are outlined in the Penal Code which was enacted in the year 1930.[1] Despite the existence of laid out punishments to each crime and offence, sometimes there arises situations that have not been stipulated in the law and it lies on the judge's discretion to make the best decision. These situations are caused by various factors, which can aggravate or mitigate the situation, and which will be discussed in this paper.

When it comes to both the aggravating and mitigating factors, two things come into play; the way a crime was carried out and the criminal history of the defendant.

1. Aggravating Factors
Criminal History
When giving out sentences, the criminal past of an accused person is put into consideration. A person with a high record of crimes is seen as one who is likely to commit crimes in the future. In the case of *Graham v Florida*,[2] the petitioner, a 16-year old male, had been involved in a robbery attempt and armed robbery with assault. In the state of Florida, the discretion lies on the prosecutor on whether to charge 16- and 17-year-olds as adults or as juveniles. The prosecutor decided to charge Graham as an adult. During the trial, Graham wrote a convincing letter to the court expressing utter remorse for his actions. This was so convincing to the court that it granted him a 3-year probation. However, in less than two years, he was present at court having been charged with home invasion robbery, possession of a firearm and associating with persons engaging in criminal activity. Graham denied the charges and due to violating the probation order, he was sentenced for the earlier charges of armed burglary and attempted robbery,

given a life imprisonment and 15 years in prison for both crimes respectively. The District Court of Appeal of Florida affirmed that the violent offences committed by Graham were not committed by a pre-teen but by a 17-year-old who ultimately committed another series of crimes at 19 years old, proving he would likely commit the offenses if he was acquitted again.

In Kenya, an individual's record of criminal history is rarely considered when the accused is presented in court. Being a country that is tightly clutched by corruption and faced with underfunded systems, keeping tabs on accused persons, whether petty or dangerous criminals, is not a priority. Moreover, unlike the developed nations where there exist probation officers to assist in the rehabilitation programs, convicted people, are seen as outcasts and are just left to be. Their involvement in subsequent crimes is almost predicted and if they do not end up in prisons again or move to other places due to stigmatization by the society, they most likely end up dead in the hands of angry and tired mobs. Criminal records are crucial in helping court set bail and make decisions regarding an accused person as their propensity to being a danger to the community is considered. Moreover, prison officers are able to have adequate knowledge about a convict and whether other prisoners are safe around them.

[1] The Penal Code Cap. 63
[2] *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

2. Intent
Merriam-Webster dictionary describes intent as an aim or purpose. Intent comprises one of the main elements of a crime which is *mens rea* and which stands for culpable mind. With intent, a person has the crime carefully thought-out and planned and goes ahead to commit the actual crime. However, unlike other elements of *mens rea* which include recklessness, negligence and knowledge,[3] intent is quite subjective and can be challenging to prove.[4] H.L.A Hart opines that an individual who acts with intent, fully and freely employs knowledge, control and choice.[5] Antony Duff, on the other hand, describes an individual who acts with intention as one who has the predisposition to identify themselves with an action, hence making themselves responsible for the said action. It has been argued that the best way to define intent is to use common sense or put oneself in the shoes of an 'ordinary person'. In the definition of intent, there are two types; direct intent and oblique intent. A direct intent is the prediction of a certain consequence from carrying out a certain act while oblique intent occurs when a natural event occurs as a result of a voluntary and foreseeable act done by an individual.

In *R v Kawalram* [1922], a South African case, the accused set fire on a building with the intent to destroy property and injure the owner of the property. The Appellate Division held that there was no need to prove intent through words or direct actions but the reckless nature in which the stock in the building was set on fire was enough to show that the accused had intention to cause harm to the owner of the property. This is an example of oblique intent.

In Kenya, intent is crucial in determining whether an accused person is charged for murder or manslaughter. In manslaughter, the malice aforethought which encompasses intent, as is evident in S.206 of the Penal Code Cap 63, is normally absent. In the Court Appeal case of *Titus Ngamau Musila Katitu v The Republic*,[6] the appellant's appeal was rejected on conviction that he had committed murder as there was a presence of malice aforethought since he did not take the necessary steps of using non-violent means to apprehend a suspect before resulting to violent ones if the non-violent ones were ineffective.

Vulnerability of the Victim
In certain jurisdictions, courts tend to impose harsher sentences on accused persons if their crimes were as a result of them taking advantage of a victim's trust, especially if the victim does not have legal capacity to make certain decisions. This could mean that the victim is a minor, an elderly person or mentally incapacitated.

In the Kenyan Penal Code Cap 63,[7] the punishments outlined for defilement of younger children are harsher. In the United Kingdom, fraudsters who target vulnerable victims, such as the elderly and the mentally challenged, get tougher sentences handed to them. This, according to Sentencing Council Chairman Lord Justice, is because victims lose more than money, especially if they are in a vulnerable position. He termed their loss as more than just financial. This is a bid to protect those who are not able to properly decipher things fast enough from being taken advantage of.

Section 3A1.1 of the Federal Sentencing Guidelines of the United States establish a sentencing enhancement for individuals who victimize unusually vulnerable victims.[8]

Despite the Penal Code of Kenya outlining harsher sentences for crimes of defilement on younger children, other crimes get standard sentences despite the age of the victims. Moreover, there is no law stating explicitly that vulnerability of victims is a factor that would be put into consideration when handing out sentences to accused persons.

2.Mitigating Factors
Age
In recent years, judges and juries have put more consideration on the accused persons' age when handing out sentences for crimes. Minor individuals and the elderly are given lighter sentences since they are not considered to

[3]Sayre, F.B., 1932. Mens rea. *Harvard Law Review*, 45(6), pp.974-1026.
[4]Wasserstrom, R.A., 1967. HLA Hart and the Doctrines of Mens Rea and Criminal Responsibility. *The University of Chicago Law Review*, 35(1), pp.92-126.
[5]Gardner, J. and Jung, H., 1991. Making sense of mens rea: Antony Duff's account.
[6]Kenyalaw.org Criminal Case No. 78 of 2014
[7]The Penal Code Cap.63
[8]Breyer, S., 1988. The federal sentencing guidelines and the key compromises upon which they rest. *Hofstra L. Rev., 17*, p.1.

have a normal adult's capacity to make decisions.[9] The Black Law Dictionary provides that a young offender is eligible for special programs that are not available for offenders that are over 18 years of age. These special programs include community supervision which would lead to the erasure of the minor's criminal record upon completion. This has been illustrated in the case of *Graham v Florida*,[10] illustrated earlier on in this paper. Section 190 of the Children's Act No. 8 of 2001 states that no child shall be imprisoned or sent to detention camp, sentenced to death or sent to a rehabilitation home if they are under the age of ten.[11]

Section 191 of the same Act further goes on to state that;

In spite of the provisions of any other law and subject to this act, where a child is tried for an offence, and the court is satisfied to his guilt, the court may deal with the case in one or more of the following ways.

a) By discharging the offender under section 35 (1) of the Penal Code.
b) By discharging the offender on his entering into a recognisance, with or without sureties.
c) By making a probation order against the offender under the provisions of the Probation of Offenders Act.
d) By committing the offender to the care of a fit person, whether a relative or not, or a charitable children institution willing to undertake his care.
e) If the offender is above ten years and under fifteen years of age, by ordering him to be sent into a rehabilitation school suitable to his needs and attainment.
f) By ordering the offender to pay a fine, compensation or costs, or any or all of them.
g) In the case of a child who has attained the age of sixteen years dealing with him, in accordance with any act which provides for the establishment and regulation of borstal institutions.
h) By placing the offender under the care of a qualified counsellor.
i) By ordering him to be placed in an educational institution or a vocational training program.
j) By ordering him to be placed in a probation hostel under the provisions of the Probation of Offenders Act.
k) By making a community service orders or in any other lawful manner.

Moreover, in Kenya, the Children's Court is forbidden from using the words 'conviction' and 'offender' when referring to child offenders. The rights of children are highly upheld in Kenya and in most countries, mostly as a result of the ratification of the United Convention on the Rights of the Child (UNCRC) which is an international legal agreement that outlines the social, civil, cultural, economic and political rights of children from all over the world.[12] This agreement has been ratified by all countries with the exception of the United States.

The United States has over 10,000 individuals serving prison sentences for crimes committed as children, with a quarter of these individuals serving harsher sentences like life without the possibility of parole. A landmark case of children being sentenced without the possibility of parole is that of *Navaorath v. State*. In this case, the appellant, a thirteen-year-old, had killed a thirty-eight-year-old man who had been bound on a wheelchair. The minor alleged that the deceased had been sexually abusing him for a while and he reacted as a result of the abuse. Moreover, he alleged that he had initially pled guilty as he had not received clear communication on the charges he was facing due to language barriers. He further stated that the decision was disproportionate to his offense, was cruel and the punishment was unusual. The Appellate Court however, affirmed the decision of the district court on the grounds that the community needed to be protected from the appellant, despite them being a minor.

Victim Culpability

Victimology,[13] the mental attitude of a victim of an event and their psychological effects, was developed by lawyer

[9]Black, H.C., Garner, B.A., McDaniel, B.R., Schultz, D.W. and West Publishing Company, 1999. *Black's law dictionary* (Vol. 196). St. Paul, MN: West Group.
[10]*Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).
[11]Children's Act No. 8 of 2001
[12]Freeman, M., 2009. Children's rights as human rights: Reading the UNCRC. In *The Palgrave handbook of childhood studies* (pp. 377-393). Palgrave Macmillan, London.
[13]Karmen, A., 2015. Crime victims: *An introduction to victimology*. Cengage Learning.

Benjamin Mendelsohn.[14] One of the factors he discussed was the role a victim played in their victimization. This is where victim culpability comes into play. Victim culpability is a mitigating factor when sentencing accused individuals for crimes committed and it avers that the victim played a crucial role in the happening of the crime.

Victim culpability can be seen in cases of murder where the accused person acts out of provocation or self-defence. Victim culpability is not applicable to sexual offences. Victimology, when used to mitigate criminal sentencing, is divided into three types; victim precipitation, victim facilitation and victim provocation. In victim precipitation, there is the acknowledgement that in a crime, there are two parties involved; the offender and the victim. It recognizes that both the offender and the victim are acting and reacting before, during and after the commission of the act, hence some victims are responsible for their own victimization. Victim facilitation acknowledges the victim to be a catalyst in the occurrence of a crime by making it easier for the offender to commit the crime. An example of victim facilitation is where a homeowner does not lock their door at night or put up any other security measure, making it easier for burglars to access the property. Victim provocation occurs when a victim instigates the offender to carry out an illegal act, hinting at the blame being solely on the victim, making them more guilty than the offender.

Provocation has been used in Kenyan courts and in Peter King'ori Mwangi & 2 others v Republic [2014] eKLR, provocation is required to meet two conditions to be used as a sufficient defence.[15] These two conditions include;

a) The subjective condition which states that the accused was actually provoked resulting in the loss of their self-control.
b) The objective condition which states that any reasonable man would have been equally provoked when faced with similar circumstances.

Section 209(1) of the Penal Code defines "provocation" to mean and include '… .except hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered...' [16]

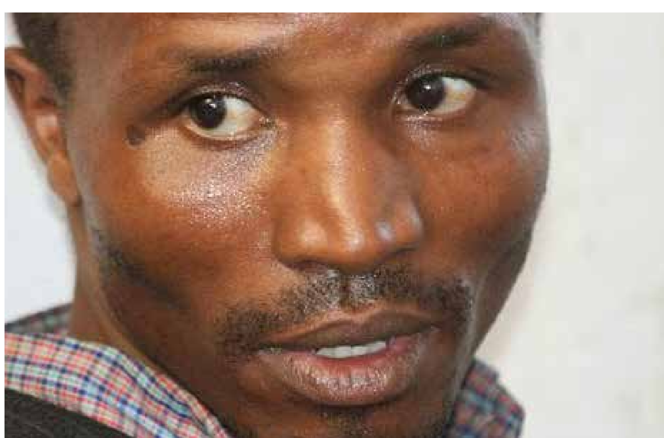
[14]Sengstock, M.C., 1976. The Culpable Victim in Mendelsohn's Typology.
[15]Kenyalaw.org
[16]The Penal Code Cap 63

The proof of provocation however lies within the court's discretion as stated in *Republic v Elizabeth Kemunto Ooga* where learned judge A.C Mrima stated that, "whether the accused was provoked to lose his self-control is a question of fact which the trial court has to determine based on the evidence presented."[17]

Difficult Personal History

Many a times, the history of an accused is considered when handing out sentence. This is normally done in order to get an idea of what could have led to the accused committing a certain crime. Some of the things considered include the accused person's childhood, from their family life, school life and teenage years. Their psychological state is also considered to make sure they were in their right mind when committing the crime, and not faced by mental illnesses which could have led to them engaging in the act.

When sentencing criminals, there is always interest to learn about their personal lives and especially their relationship with their families. In the Kenyan case of *Republic v Philip Ondara Onyancha*,[18] a renowned serial killer in the country, a doctor's report confirmed that the accused person was suffering from Narcissistic Personality Disorder, a disorder which elevates an individual's sense of importance, making them seek excessive attention while being unempathetic towards other people.[19] Furthermore, the accused admitted that he had been sexually abused by his nanny as a child. Despite this not helping the accused's case in court, it gave a different perspective to the crimes committed. However, most criminals in Kenya, despite growing up in very tough conditions and battling serious mental illnesses, are rarely let off the hook or given lighter sentences as a result of their personal history. This is mostly due to the fact that in Kenya, an accused person's crime overshadows their personal self, almost erasing their individuality and humanity.



Philip Ondara Onyancha

In other jurisdictions however, an individual's history is highly considered when handing out criminal sentences, most at times even leading to lesser punishments. Insanity is a defence that is used in many criminal cases, especially in those of murder and which results in the accused being acquitted or found to be unfit to take a plea and instead referred to a mental institution. Insanity at the time of crime falls in this category too and despite an accused person's mental state having gotten better, they might still get acquitted or face punishments that are less harsh.

In the case of *US v Arenburg*,[20] the defendant had committed a murder of a sports caster and Hockey player in Ontario, Canada. He was found not criminally responsible for the murder since he was diagnosed as a paranoid schizophrenic which led to him being admitted in a mental health facility.

In Kenya, criminal case No. 16 of 2014 in Republic v. G K N,[21] the accused was charged with the murder of his father but was proved to be of unsound mind. The Honourable judge directed that he be sent to Mathare National Hospital since he could not be released on bond as he was not safe with his family.

In conclusion, looking deeply into factors that aggravate or mitigate a crime is crucial in helping a judge or jury hand out sentences in a fair manner. Moreover, with this, more measures can be put in place to help rehabilitate accused persons and create awareness in the society about crime and how to avoid taking part in it.

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[17]Kenyalaw.org Criminal Case No. 20 of 2015
[18]Kenyalaw.org Criminal Case No. 38 of 2010
[19]Salman, A. and Thomson, A., 1982. Overview: Narcissistic personality disorder. *The American journal of psychiatry, 139*(1), pp.12-20.
[20]*US v. Arenburg*, 605 F.3d 164 (2d Cir. 2010).
[21]Kenyalw.org Criminal Case No. 16 of 2014

Between agency and compulsion: on the Karnataka High Court's hijab judgment

By Gautam Bhatia

It is an old adage that the manner in which you choose to frame a question will decide the answer that you will choose to give yourself. In today's judgment by the Karnataka High Court upholding a ban on the wearing of the hijab within classrooms, that giveaway can be seen at page 39 of the judgment, where the Full Bench frames four questions for consideration. The second question reads: "Whether prescription of school uniform is not legally permissible, as being violative of petitioners Fundamental Rights inter alia guaranteed under Articles, 19(1)(a), (i.e., freedom of expression) and 21, (i.e., privacy) of the Constitution?"

It is notable that the Court asks itself a question that nobody else had asked, and indeed, nobody could ask, given how absurd it is: whether a school uniform is itself unconstitutional. But that framing allows the Court to elide the fundamental argument before it – i.e., that the wearing of the hijab alongside a school uniform is consistent with the broader goals of constitutionalism and education – with the sanctity of the uniform itself. A close reading of the judgment reveals how the uniform haunts the Court's imagination on every page, topped off by the extraordinary remark on page 88, where the Court says that "no reasonable mind can imagine a school without a uniform." The unarticulated premise of the judgment is that the claim to wearing the hijab is a claim against the very idea of a school uniform, and that allowing the former would destroy the latter. Respectfully, this elision leads the Court into misconstruing and misapplying a range of settled constitutional principles, and for those reasons, the judgment ought to be overturned on appeal.

Introduction

First, a quick summary: the Court's decision to uphold the ban on the hijab rests upon three constitutional grounds. The first is that the wearing of the hijab does not constitute an "essential religious practice" under Islam, and is therefor not insulated from the regulatory power of the State (pp. 53 – 79, pp. 85 – 87); secondly, that to the extent that wearing the hijab is an aspect of the freedom of expression, or the right to privacy, the ban is reasonable restriction upon the exercise of those rights (pp. 88 – 112); and thirdly, as the Government Order under challenge is facially neutral and non-sectarian (i.e., does not single out the hijab), there is no unconstitutional discrimination against Muslim women students (pg. 96).

Essential Religious Practices

I do not want to spend too much time on the first argument. I have written before why framing the argument in terms of the essential religious practices test is unsatisfactory, both in general, but also specifically in this case, not least because it strips Muslim women of any agency in the matter, and essentially argues that the wearing of the hijab is not a matter of choice (no matter how situated, complex, or otherwise messy the context of that choice may be), but is objectively compelled by the tenets of Islam. Additionally, there is nothing particularly noteworthy about the Court's analysis of this point, either way: surveying the sources (in particular,

the Qur'an), the Court finds that the Petitioners have failed to prove that wearing the hijab is essential to Islam – i.e., that is is mandatory, non-optional, and that Islam would lose its identity if women did not wear the hijab. Under the essential religious practices doctrine, these are broadly the parametres of the analysis (leave aside the fact – as most people have pointed out – that neither the Court, nor external commentators, are particularly well-placed to conduct this analysis). Having established this, the Court is therefore able to hold that, as a matter of religious freedom, the right to wear the hijab is not insulated from State regulation.

There is, of course, a problem with the analysis in that it effectively denies to the Muslim women the ability to frame their argument as one of religious choice, and requires, instead, for them to argue in the language of religious compulsion. This is particularly ironic when we think of the right as the "right to religious freedom"; the blame there, however, lies squarely with the essential religious practices test, as it has evolved over the last seventy years, and it is clear that there is no way out of this hall of mirrors until that test is overruled.

Freedom of Expression and Privacy

Let us now come to the argument where, in my respectful submission, the Court's analysis is mistaken. Previously, on this blog, it has been argued that the freedom of expression and the right to privacy are important rights implicated by this case. To sum up the argument in brief: as held by the Supreme Court in NALSA v Union of India, dress can, on certain occasions, and depending upon the context, be a form of "symbolic expression" that is protected by Article 19(1)(a) of the Constitution (why it should be treated as such in this case has been argued in the linked posts). The application of the right to privacy – in terms of decisional autonomy – is also evident. Note that the freedom of expression and privacy arguments are not cleanly separable from the religious freedom arguments: indeed, it could well be – in certain cases – that the very reason why wearing the hijab is a form of symbolic expression is because it is worn as a defence of a beleaguered identity.

Once the rights to freedom of expression and privacy are triggered, the analysis moves to restrictions, where the test of proportionality applies. Proportionality requires, among other things, that the State adopt the least restrictive method in order to achieve its goals. Thus, where something less than a ban would suffice, a ban is disproportionate. The proportionality framework provides the broad intellectual scaffolding within which multiple jurisdictions across the world, as well as India in the NALSA judgment, when dealing with cases involving dress codes and uniforms, have adopted the test of reasonable accommodation. Reasonable accommodation requires the Court to ask whether, in a setting where a certain default exists, a particular claim for departing from that default, founded in constitutional rights, can be reasonably accommodated by the State (or private party), without the activity in question losing its character.

In case of the hijab, the claim for reasonable accommodation is straightforward: that the wearing of the hijab (especially hijab that is the same colour as the uniform and is simply draped, like a shawl, over the head) can be reasonably accommodated alongside the uniform, without damaging or in other ways vitiating the overall public goal of education.

How does the Court respond to the argument? The reasoning is somewhat scattered in different parts of the judgment, but drawing it all together, this is how the Court's argument goes:

Dress is not at the "core" of free expression and privacy rights, but is a "derivative" right, and therefore weaker (page 99).

The classroom is a "quasi-public space", where the operation of rights is weaker (page 100).

Given (1) and (2), and given the overriding salience of the uniform in a classroom, the proscription of the hijab is reasonable.

With respect, this analysis is flawed. It is true that in US jurisprudence – such as the O'Brien judgment – visible manifestations of expression (such as clothing) can be regulated by the State; however, that is in the context of the American First Amendment, which in cases of State restriction upon speech, is more or less "absolute". O'Brien only says that where you move from speech to visible manifestation, that "absolute" protection goes. However, in a proportionality-focused jurisdiction such as ours, whether speech is verbal or a visible manifestation, the test remains the same. This flows from the Naveen Jindal case, where the flying of the Indian flag was held to be protected under Article 19(1)(a) of the Constitution.

Secondly, it is unclear what exactly the concept of a "quasi-public space is", since the Court does not undertake a genealogy of the phrase. At one point, it lists "schools, courts, war rooms, and defence camps" (page 104) as examples of quasi-public spaces, and you really have to wonder what on earth unites a classroom and a defence camp; but in my view, it is in any event a misreading of the NALSA judgment to argue that the salience of symbolic expression diminishes in a "quasi-public space". Indeed, whether it is the public sphere or the quasi-public sphere, the whole purpose of recognising a right to symbolic expression – as manifested through dress – is to recognise that our "public" is diverse and plural, and that diversity and plurality (as long as it does not violate anyone else's rights) is to be affirmed and not censored.

But it is the final part of the analysis where, in my view, the main error lies. The Court's response to the reasonable accommodation claim is that the hijab cannot be accommodated because it would deprive the uniform of its uniformity. At page 107, it notes that:

The object of prescribing uniform will be defeated if there is non-uniformity in the matter of uniforms.

But that is patently circular: by definition, the doctrine of reasonable accommodation assumes the existence of a default uniformity, and argues that the default is insufficiently accommodating of a diverse and plural society; what the reasonable accommodation (and proportionality) analysis requires of the Court is to ask whether accommodation is such that it would undermine or otherwise destroy the purpose for which the default rule exists in the first place: which, in this case, is the purpose of education. The crucial error the Court makes is that it sanctifies the uniform instead of sanctifying education; instead of looking at the uniform as instrumental to achieving the goal of an inclusive and egalitarian right to education (and which would, therefore, require accommodation where accommodation would better serve that goal), it treats the uniform (and its associated values of sameness, homogeneity etc) as the goal itself. Thus, by mixing up levels of analysis, the Court's proportionality and reasonable accommodation analysis is constitutionally incorrect. And the root of this error – as I have pointed out above – is the Court's assumption that education is uniform – that "no reasonable mind can imagine a school without a uniform."

Where the Court does attempt to move the analysis to education itself, its conclusions are suspect. For example, on page 96, it notes that by creating "one homogenous class", the uniform "serves constitutional secularism." But this is inconsistent with the Court's own analysis in a previous part of its judgment, where it notes that the Indian concept of "positive secularism" does not require the proverbial "wall of separation" between religion and State, but is much more accommodating towards religious pluralism within the overarching public sphere. On page 97, the Court holds that the Petitioners' argument that "the goal of education is to promote plurality … is thoroughly misconceived." But the Court provides no citation or source that the goal of education – note, not the goal of a uniform, but the goal of education – is uniformity at the cost of pluralism. On page 101, the Court quotes this argument again, and this time – regrettably – chooses to ridicule it instead of engaging with it, noting that it is "hollow rhetoric" and redolent of the "oft quoted platitude" of "unity in diversity". Ironically, after ridiculing this as a platitude, the Court immediately afterwards cites the Supreme Court judgment in Re Kerala Education Bill that uses the exact same phrase!

Even more ironically, in the same paragraph, the Court then cites the UK House of Lords judgment in Regina v Governors of Denbigh High School, where, in paragraph 97 of her speech, Lady Hale notes that "a uniform dress code can play its role in smoothing over ethnic, religious, and social divisions." Unfortunately, however, the Court omits to cite what Lady Hale goes on to note in paragraph 98, which is this:

It seems to me that that was exactly what this school was trying to do when it devised the school uniform policy to suit the social conditions in that school, in that town, and at that time. Its requirements are clearly set out by my noble and learned friend, Lord Scott of Foscote, in para 76 of his opinion. Social cohesion is promoted by the uniform elements of shirt, tie and jumper, and the requirement that all outer garments be in the school colour. But cultural and religious diversity is respected by allowing girls to wear either a skirt, trousers, or the shalwar kameez, and by allowing those who wished to do so to wear the hijab. This was indeed a thoughtful and proportionate response to reconciling the complexities of the situation.

The judgment of the UK House of Lords in Denbigh High School, indeed, is a model of exactly the kind of analysis that the Karnataka high Court steadfastly sets its face against in its hijab judgment: Denbigh involves an extensive discussion about how schools in plural and diverse societies should accommodate difference instead of insisting upon uniformity; and the correct question to ask – which is always a contextual question – is at what point does reasonable accommodation tip over into a demand that is inconsistent with the goals of education (in Denbigh, it was the wearing of the jilbab). It is therefore somewhat extraordinary that the Court cited the judgment in support of its ruling, when the very next paragraph after the paragraph it cited explicitly noted that the wearing of the hijab in a school was a good example of reasonable accommodation!

In fact, the Denbigh judgment is an excellent example of why the fear that really seems to be animating the Court's judgment is no fear at all. On page 105, the Court notes:

An extreme argument that the students should be free to choose their attire in the school individually, if countenanced, would only breed indiscipline that may eventually degenerate into chaos in the campus and later, in the society at large.

But nobody – nobody – ever really advanced this "extreme argument." Denbigh in fact shows that it is actually fairly straightforward – and well within the domain of judicial competence – to examine cases on an individual basis, and draw principled lines based on context. Trotting out a hypothetical parade of horribles to deny a constitutional right is not good judicial practice.

Indeed, the fact that the Court is itself fully capable of drawing these distinctions when it wants to is made abundantly clear by the next case that it discusses: the South African judgment in MEC for Education, Kwa-Zulu Natal (discussed in previous blog posts), where the controversy involved the wearing of a nose-stud by a Hindu student. The Court distinguishes the case on the basis that "the said case involved a nose stud, which is ocularly insignificantly (sic), apparently being as small as can be." (p. 108) Now in my respectful view this distinction is quite bogus (more on

this below), but that is not the point I want to make here: the point I want to make is that the "extreme argument" that the Court articulates – where everyone would ask to choose their own attire, and there would be general chaos – is an argument that it doesn't even seem to believe in itself, given how easily – almost facilely – it distinguishes between the hijab and the nose-stud.

Non-Discrimination

Earlier on this blog, detailed arguments were made about how the hijab ban violates the constitutional guarantee of non-discrimination. The Court addresses this argument very briefly, noting only that the proscription – based on the Government Order – was facially neutral and non-sectarian (pg. 96). Unfortunately, while this argument applies to direct discrimination, it does not apply to indirect discrimination, where facially neutral rules and regulations have a disproportionate impact on different people. The doctrine of indirect discrimination has long been accepted by the Supreme Court, and is therefore part of Indian jurisprudence.

In fact, it is the Court's own analysis – in particular, its distinguishing of the South African case – that shows how indirect discrimination is squarely applicable to the present case. The Court's distinction between the "ocularly insignificant" and (presumably) the "ocularly significant" is a classic example, in discrimination law jurisprudence, of a "facially neutral rule" (which, in the Court's reading, would allow "ocularly insignificant" adornments to a uniform, but not others) that has a disproportionate impact, in this case, grounded at the intersection of religion and burden. In my respectful view, the Court's failure to consider this ground at all provides another compelling reason for why this judgment should be set aside on appeal.

Addendum: A Case of Conscience

From pages 80 to 88, the Court undertakes a brief analysis of that forgotten cousin of the freedom of religion – the freedom of conscience. The main judgment, of course, is the iconic Bijoe Emmanuel case, where the right of the Jehovah's Witnesses not to participate in the singing of the national anthem was upheld. The Court distinguishes Bijoe Emmanuel on two grounds. First, it argues that "conscience is by its very nature subjective. Whether the petitioners had the conscience of the kind and how they developed it are not averred in the petition with material particulars." This is not entirely unreasonable, and perhaps offers valuable guidance to future cases (and indeed, this case on appeal). If indeed one is making a claim based on the freedom of conscience, then it needs to be specifically pleaded, with the acknowledgment – of course – that conscience is subjective. For example, an anti-war activist can refuse conscription by arguing that war conflicts with their pacifist beliefs – but they do have to spell that out in specific terms. In this case, perhaps, it may be necessary for the petitioners to spell out, perhaps in more concrete terms, the (subjective) reasons for wearing the hijab as a case of conscience – an argument that, of course, overlaps with the argument from symbolic expression.

What is less convincing is the Court's attempt to show that Bijoe Emmanuel was not a case of conscience at all, but one of religious freedom, despite the fact that Bijoe Emmanuel specifically uses the phrase "matters of conscience." It is important to note that conscience might flow from religious convictions (for example, I may be a pacifist because I am religious), but it need not do so. In that way, the clean-cut separation that the Court attempts between conscience and religious freedom is, in my respectful view, unsustainable – and might materially have altered the outcome of this case.

Conclusion

There are two important things to note, by way of conclusion.

The first is that the Court is explicit that its judgment applies to classrooms (i.e., not even school premises, but classrooms). It notes this specifically on page 124, after some rather (in my view) unfortunate remarks about how banning the headgear is emancipatory "for women in general, and Muslim women in particular": it notes that:

It hardly needs to be stated that this does not rob off the autonomy of women or their right to education inasmuch as they can wear any apparel of their choice outside the classroom. The scope, thus, is limited to classrooms.

Secondly, for the reasons advanced above, I believe that the judgment is incorrect, and should be overturned on appeal. It is incorrect for the following reasons: first, it mistakenly holds that the rights to freedom of expression and to privacy are diminished, or derivative, in this case; secondly, it misapplies the reasonable accommodation test, and does not show how allowing the hijab for those who choose to wear it, as a uniform accessory, is incompatible with the goal of education; thirdly, it fails to consider that the ban amounts to indirect discrimination against Muslim women; and fourthly, it wrongly elides freedom of conscience and religious freedom. This creates an overarching framework of reasoning where the sanctity of the uniform is placed above both the goals of education, and the exercise of constitutional rights. I submit that a correct calibration calls upon us to recognise that educational spaces in a plural and diverse society ought to reflect its plurality and diversity, and facilitating the freedom of choice and expression is one crucial way to achieve that. Such an approach is more consistent with our Constitution.

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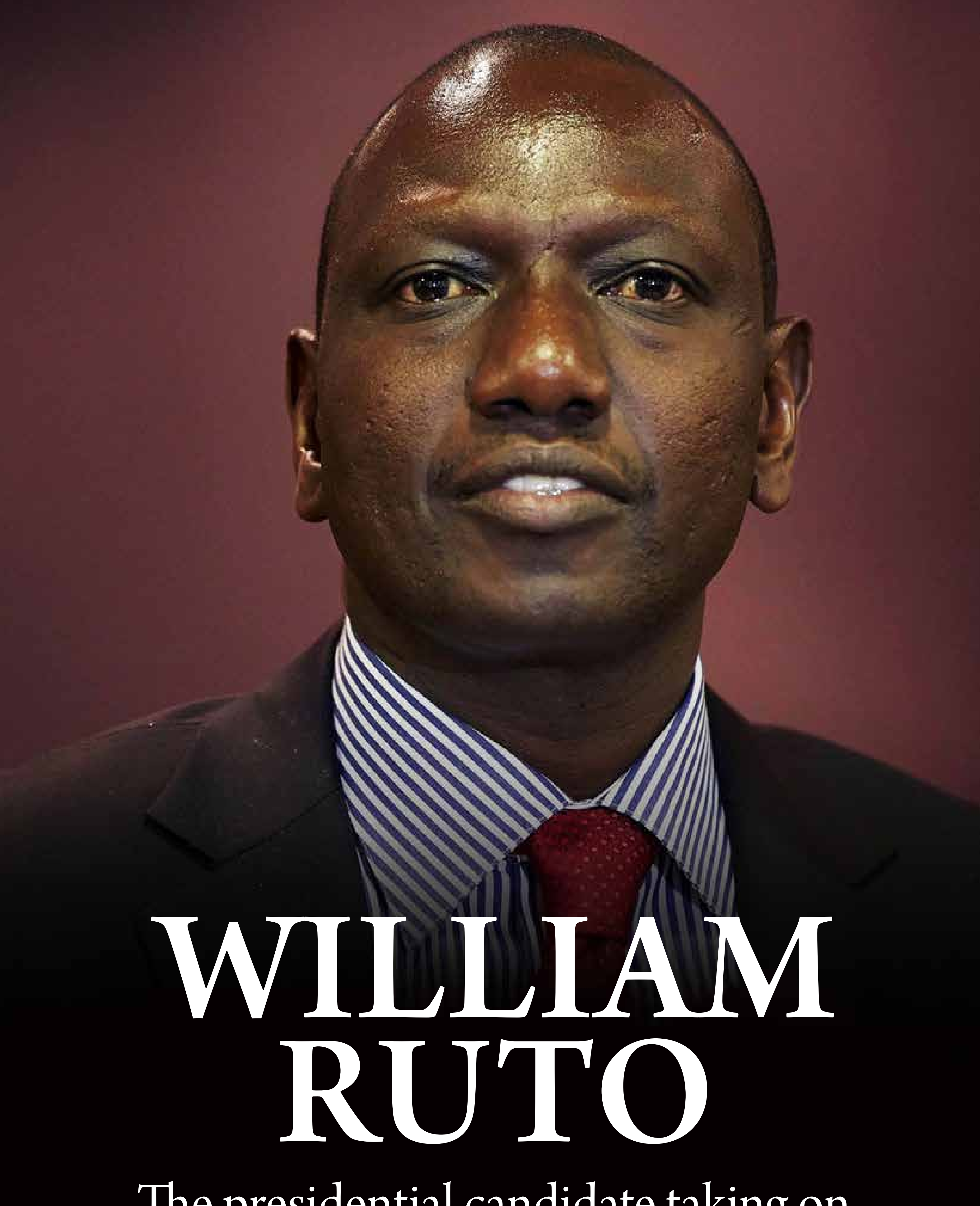

WILLIAM RUTO

The presidential candidate taking on Kenya's political dynasties

By Aditi Malik and Philip Onguny

As Kenya heads towards elections, concerns about the outbreak of electoral violence tend to rise. Existing research has offered several explanations for the violence. These include weak political parties, perceptions that elections are high stakes for different communities, and land grievances.

The evidence for these explanations is compelling. For example, the weakness of parties has meant that political patronage has usually trumped policy proposals in Kenya. In a related vein, grievances over the distribution of land have provided politicians with a powerful means to organise violence.

But researchers are yet to fully understand how, when and why political elites succeed in encouraging ordinary citizens to engage in violent conflict. To better examine this issue, we conducted interviews with vernacular radio listeners in the Central, Nyanza and Rift Valley regions. We also interviewed political elites in Nairobi, Coast province and the Rift Valley. Our work helped us to uncover three important narratives disseminated via vernacular radio. These informed participation in violence during Kenya's 2007-2008 post-election crisis. These were:

Political marginalisation: This narrative emphasised economic deprivation and political alienation of some groups. (An example is the Luo.)

Victimisation: This exploited deep-rooted land grievances to cast some communities (the Kikuyu, for example) as the primary beneficiaries of policies after independence.

Foreign occupation: This narrative capitalised on fragile inter-community relations in areas such as Rift Valley. It cast Kikuyus as "foreign occupiers" of Kalenjin and Maasai ancestral lands.

Drawing on this work, we suggest that the media – newspaper, television, radio, and online platforms – can inform perceptions of what's at stake in elections. Media narratives, in

other words, can offer an early sign of the risk of violence.

August 2022 elections

In August, Kenyans will vote in presidential, legislative, and county-level elections. These contests will be the third since the country got a new constitution in 2010.

In the era of multi-party politics, several Kenyan contests – especially presidential ones – have given way to violence. As the Kenyan writer Patrick Gathara has observed, presidential contests in which the incumbent is seeking re-election have been particularly prone to conflict. Constitutional changes implemented since 2010 were partly designed to weaken the presidency and reduce the stakes of national contests. But recent research has found that the political logic of Kenyan elections remains largely unchanged. Scholars have also shown that elites' incentives to foment violence are strong in many parts of the country.

The latest changes in elite-level groupings and alliances are now generating concerns that electoral violence could return to Kenya in 2022.

This is primarily because President Kenyatta and Deputy President Ruto have turned into adversaries. The former allies were leaders of an unlikely electoral coalition which won national elections in 2013. A related worry is that many citizens are reporting low levels of trust in the Independent Electoral and Boundaries Commission.

Traditional media's role

We focused on studying radio messaging in our work because radio is the primary form of mass media. It is a dominant source of social and political information in Kenya. In studying the 2007-2008 post-election crisis, we found that vernacular radio stations played an important role in spreading messages of hatred and division in the country.

We found that narratives of marginalisation, victimisation and foreign occupation informed the stakes of the election. This was true for Luo, Maasai and Kalenjin voters. Their interests were cast as opposed to those of Kikuyus.

The country's political environment has evolved since 2007-2008. Even so, the media still play a part in shaping perceptions of electoral stakes. We argue that some of the frameworks discussed above could re-emerge in the coming months.

To begin with, Ruto is no longer Kenyatta's apparent successor. Narratives about victimisation (and betrayal) could become prominent. In meeting with constituents, the deputy president has already used such language to describe the president's actions.
Beyond victimisation, we observe that three newer narratives are gaining some traction in electoral politics. They are also appearing in the media's coverage of the upcoming elections.

First, the deputy president has cast the polls in populist terms as a "dynasties versus hustlers" contest. Here, Kenyatta and former prime minister Raila Odinga are cast in the dynasty category and Ruto as a hustler.

Second, the deputy president's right-hand man and the former majority leader in the National Assembly, Aden Duale, has portrayed Odinga as a "state project". This frame suggests that members of the ruling Jubilee Party and other influential actors are grooming the former prime minister for the presidency.

Such representations have not gone down well in Odinga's camp. As a counter-narrative, the Kenyatta-Odinga "handshake" team and the newly formed "Azimio la Umoja" (Unity Declaration) movement have cast Ruto as a thief who cannot be trusted with public coffers.

Third, the rift over constitutional amendments through the Building Bridges Initiative is emerging as a relevant element in the August elections. The thwarted initiative has increased political intolerance between rival political elites and their potential voters.

We caution that these newer narratives, combined with prior frames about marginalisation, victimisation and foreign occupation, could inflame tensions.

Social media's role

The rapid proliferation of social media platforms in competitive electoral settings such as Kenya also comes with some risks. There is limited policy related to online content regulation. This makes it difficult to contain messages of political intolerance in these spaces.

There is already evidence to suggest that many of the conversations conducted over WhatsApp in Kenya are inflammatory.

Different forms of media will need to balance the polarising narratives that are emerging from the major electoral camps to keep violence at bay.

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Examining the place of cohabitees in the Kenyan legal system

By Julius Wandolo

Traditionally, some people ascribed to the belief that one did not have to go through the rigorous formalities of marriage in order to make one. Such believers deemed it fit for a couple to be considered married simply by staying together for a long period and holding themselves as husband and wife. Verily, such beliefs, having emanated from the application of common law and enshrined under Section 3(1)(c) of the Judicature Act have resisted complete erosion and have thus found their ways into modern-day Kenya even after the enactment of the Marriage Act, 2014. Such a presumption of marriage is termed as cohabitation.

Complete marriages have been diminishing at a high rate in Kenya. As a result, most people are opting for cohabitation or single lifestyles. People have argued that such institutions have been caused by the empowerment of women who no longer depend on men as they used to, the effect of the Western family lifestyles that do not promote marriage, the fear of responsibilities associated with marriage, the distaste of long-term commitments, etc. Other reasons for cohabitation can be attributed to the assertion that;

> *"some cannot marry because one of them is in the process of obtaining a divorce (or is unable to do so). Some wish to avoid the financial responsibilities attached to marriage. Others wish to postpone the assumption of the legal incidents of marriage and regard cohabitation as a form of trial marriage or merely `a pre-marital experience`. Some regard marriage as irrelevant and many cohabit because they reject `the traditional marriage contract and the assumption of the roles which necessarily seem to go with it.[1]"*

What amounts to a presumption of marriage?
This is a question that has long troubled the laypeople and deep in the courtrooms. Would any relationship between a man and a woman suffice to be presumed as a marriage? How about a romantic relationship that goes for between the nose and the mouth? The courts have set the requisites for the validation of the presumption of marriage through cohabitation. In **Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & Another NRB CA Civil Appeal No. 313 of 2001 [2009] eKLR** the court stated that:

> *"Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed."*

The first component set out in this case was the existence of a long cohabitation. This raises a question of how long should long cohabitation be? With the development of case law in Kenya, it is right to say that there is no standard period for a long cohabitation. In cases such as **Kisoto Charles v Rosemary Moraa** the court had presumed a marriage after a cohabitation for four years. While in other cases the courts have failed to presume a marriage even after over ten years of cohabitation. That being the case, the courts have sought to consider other factors such as repute,[2] and whether the cohabitation gave rise to the birth of children.

SWG v HMK (2010) eKLR did set out the other grounds for the proof of a presumption of marriage. These included

[1] Nigel Lowe and others, *Bromley`s Family Law* (12th edn, Oxford University Press 2021)
[2] WM v Murigi (2008)eKLR

cohabitation and repute, provision of shelter and sustenance, the evidence of a romantic relationship, the perception of one as a spouse by the family members, the perception of the cohabitees as husband and wife by the neighbors, siring of children together, manner of description as a spouse in legal documents such as insurance, and the way the cohabitees introduce themselves to people. Such requirements clearly exclude a short romantic relationship and side chicks or concubines from claiming to be one`s cohabitee. There has to be a form of connection between the cohabitees even in the absence of customary rights or marriage registration.

Besides the abovementioned factors, it is critical to note who is eligible to cohabit. It goes without saying that one has to be in a capacity to marry or get married in order to cohabitate, thus, one cannot be said to have cohabitated with a minor. Further, a woman who is already married to another man cannot be said to have cohabitated with another man. However, a married man may cohabitate with another woman who is not his wife. This is attributed to the fact that the Marriage Act, 2014 recognizes polygamous marriage under customary laws but does not allow for the marriage of a woman by two men[3].

Case law development on the presumption of marriage
Hotensiah Wanjiku Yaweh v Public Trustee (Civil Appeal 13 of 1976) is among the oldest cases that formed the grounds for the presumption of marriage. This case delved on the veracity of the principle of presumption of marriage. The court stated that, `the presumption does not depend on the law or a system of marriage. The presumption is just an assumption based on a very long cohabitation and repute that the parties are husband and wife.'

While other people also conform to the customary forms of marriages, some prefer not to undertake the rigor of the ceremonies involved thus opt for cohabitation to tie their knots. Even for the proof of cohabitation, customary rites are not mandatory since the principle is based on an assumption, as was stated in **Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & Another NRB CA Civil Appeal No. 313 of 2001 [2009] eKLR.**

Initially the courts had been keener on the intricacies of the realities of life. It is a common practice for a man and a woman to stay together for a long period as husband and wife without solemnizing the relationship. This practice has been more prevalent especially on the group of people who do not conform to the civil kind of marriages. Thus, in **Joseph Gitau Githongo v Victoria Mwihaki (2014) eKLR** the court stated that:

> *"It (presumption of marriage) is a concept born from an appreciation of the needs of the realities of life when a man and a woman cohabit for a long period without solemnizing that union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by cast away by the "husband", or otherwise he dies, occurrence which do happen, the law subject to the requisite proof, bestows the status of "wife" upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased "husband".*

Most recently in **CWN v DK [2021]eKLR** the Honourable Judge Ngaah Jairus stated that;

> *"And back home, though it does not out rightly outlaw it, the Marriage Act, 2014 does not recognise this kind of marriage. Section 2 of that Act defines the word cohabit, in its technical term, as follows: "cohabit" means to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage." Three things that stand out of this definition are, one, regardless of what the intentions of a cohabiting couple may be, they do not acquire any other status than that of being unmarried and, two, perhaps to drive the point home, the relationship of the cohabiting couple only 'resembles' a marriage; in other words, it is not a marriage. The third aspect of this definition is, regardless of how long the couple lives together, the status of its legal relationship will not change. When this section is read alongside sections 6 and 59 of the Marriage Act, it is reasonable to conclude that presumption of marriage by cohabitation no longer stands on a solid foundation in our marriage law infrastructure."*

In this case the Judge held the view that cohabitation is outdated and at the verge of completely eroding. He referred to the law in Scotland that abolishes marriage by

[3]Anastacia Otieno, `Cohabitation as a valid marriage in Kenya` (June 9, 2020) <https://medium.com/@aotieno_46099/cohabitation-as-marriage-as-a-valid-marriage-in-kenya-80d6366211db> Accessed February 1, 2022

cohabitation with habit and repute commenced after the enactment of the Family Law (Scotland) Act, 2006. He also observed that only about nine states in the United States still recognize cohabitation.

Property acquisition and ownership in cohabitation

In Kenya, married couples enjoy an array of property rights that unmarried couples do not. For instance, a cohabitee may not rightfully claim over property acquired jointly during the cohabitation period in the event of separation. However, this only applies to matrimonial property. Since there is no marriage, there cannot be matrimonial property, thus the principle of law applied is *nihil fit ex nihilo* (out of nothing comes nothing). The Matrimonial Property Act[4] well protects the rights to property of spouses. The Act makes bold recognition of monetary and non-monetary contributions that give rise to beneficial interests in matrimonial property. In connection, the Marriage Act[5] defines a spouse as a husband or wife. Therefore, the two statutes disbar cohabitees from the property rights available to married couples.

The courts do not recognize romantic relationships that do not constitute a legally recognized marriage. Such relationships were traditionally referred to as extramarital affairs but have soon been baptized as having `come we stay`. The law seeks to form a concrete protection of people`s rights and the administration of justice. Justice dictates fairness in conjunction with reasonableness. In regard to this, is it fair and just to deny a cohabitant rights over property acquired jointly despite the absence of marriage? A person does not wake up one day, fall in love and tie the knot in a legally recognized form of marriage. I believe marriage is a journey that could well begin by cohabitation. Just like any other journey, people may not always reach the desired destinations and so is the separation during cohabitation before marriage.

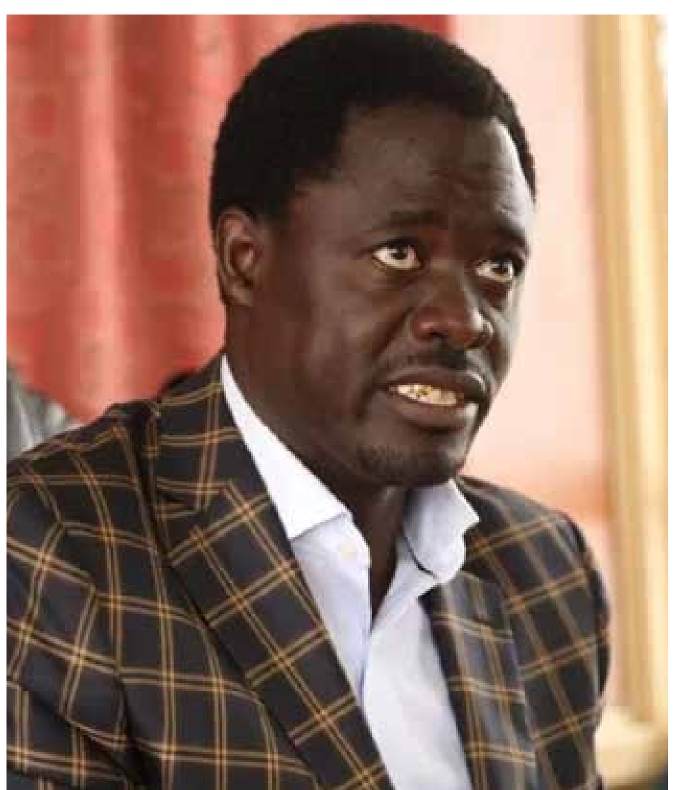
Being that the property cannot be divided as per the Matrimonial Property Act, the Kenyan courts have thus relied on Lord Denning`s developments. As Elizabeth Kingdom states, "Most discussions of the legal implication of cohabitation draw attention to the confused ambivalent and occasionally contradictory state of the law's response. The comment is often linked, in the English context to two very different problems, the first is the difficulty of defining cohabitation and the second is the influence of Lord Denning."[6] Lord Denning recognized the creation of beneficial interests when a married woman developed the property of a married man while also appreciating that it

would be remarkable for an un-married woman to develop the property of another cohabitee.[7] This shows that Lord Denning recognized the existence of cohabitation and the joint acquisition of property during the subsistence of the cohabitation. He thus developed the principle of resulting trust in cases of property disputes. According to him, a constructive trust could arise without the parties` intention thus the inference of rights through the comparison with the married state and subsequently assimilating the cohabitants to the state of marriage.[8] Therefore, In Kenya, in the event of separation or death, the courts divide the disputed property among the cohabitants by imputation of constructive trusts per the Civil Procedure Act and not the Matrimonial Property Act. [9]

This seems to be a forum that would offer relief to cohabitants who stand to lose their property upon a separation. However, this may present a number of shortcomings due to the lack of a legal framework on the cohabitants` rights as to property. For instance, what criteria would the courts use to transfer property or award damages on a successful application? The reliance on the law on trusts could also present many procedural technicalities that may lead to a delay in the administration of justice.

In contrast, Scotland has a rich legal framework on cohabitation. However, the law limits its application to cohabitation commenced before the enactment of the Act,[10] whether ended or continuing. It also limits it application to the cohabitants who are domiciled in Scotland or to a person cohabiting with another who is domiciled in Scotland. For instance, the law in Scotland provides that in the event of separation or the death of one of the cohabitants, a presumption that each party has equal

[4]Matrimonial Property Act, 2013
[5]Marriage Act, 2014
[6]Kingdom E, What`s *Wrong with Rights? Problems for Feminist Politic of Law* (Edinburgh University Press, 1991)
[7]Eve v Eve (1975) 3 ALLER 697
[8]Christopher Nderi Gathambo & Samuel Muthui Munene v Samuel Muthui Munene [2003]eKLR
[9]TMW v FMC (2018)EKLR
[10]Section 3, Family Law (Scotland) Act, 2006



Homa Bay MP Peter Kaluma

rights to the household items arises with an exclusion of gifts or inherited property[11]. Further, it provides that each cohabitant is entitled to an equal share in the money made by the cohabitants from allowances for joint expenses, or property bought using such money.[12] However, the same section emphasizes that such 'property' does not mean matrimonial property.

Would it be prudent for Kenya to borrow from such jurisdictions? It is my view that it would help if Kenya borrowed from such jurisdictions though not wholesomely. The legislators would have to consider the social, legal, economic and the general state of affairs in such jurisdictions to ensure that they conform to those in Kenya before importing some of these laws. Such imports may be used as a point of reference in formulating legislation in cohabitation in Kenya.

The place of cohabitees in succession

Cohabitation is a presumption of marriage and not a type of marriage known or rather legalized in Kenya. As a result, cohabitants in Kenya are mere lovers and not spouses. This state of matters raises a question of whether a cohabitant may qualify as a dependant to inherit from the deceased partner. The response to this fundamental question would depend on whether the deceased left a valid will or not.

Under such circumstances where the deceased partner named the other cohabitant as a beneficiary in the will, the case becomes effortless except where the will is contested. The named cohabitant rightfully acquires such share, interests or property as stated in the will per the Law of Succession Act[13].

What happens for intestate cases? Intestacy refers to a situation where a person dies without a will. Suppose one of the cohabitants, preferably the male cohabitant dies intestate, what is the legal position of the other cohabitant in Kenya? A lot of disputes have been witnessed in such circumstances with a majority claiming that the remaining cohabitants cannot inherit due to the lack of a valid marriage. This is because in an intestate succession, people with a direct blood link are prioritized and thus the cohabitees may not stand a chance. Similarly, in intestate succession, the courts divide the property owned by the deceased and not the jointly acquired and owned property.

On 18 November 2021, His Excellency the President, Uhuru Kenyatta, assented to the Succession (Amendment) Bill[14] that prevented non-spouses, or rather the 'side chicks' from inheriting from their partners in the event of death. The Bill, sponsored by Homa Bay MP Peter Kaluma redefines the scope of dependants entitled to inherit property to the legal spouse and children of the deceased only, whether they were maintained by the deceased or not.[15] Further, this law brings an end to the culture of cohabitants or secret lovers storming funerals for recognition as wives and demanding a share of the deceased`s property.

Does the new law seek to sideline the cohabitants from property inheritance to its entirety? From a legal point of view, the question would be answered affirmatively. The subscribers to this new law argue that it will help remedy the chaos and confusions that have since been witnessed especially during funerals, prevent the non-spouses from quarrying into other people`s pockets and taking advantage of the legally recognized dependants. However, according to Rahim Dawood, North Imenti MP, the law does not prohibit helping someone out of goodwill. The legally recognized dependants of the deceased may find peace in their hearts to help the side chick together with their children if any. However, such help do not guarantee an automatic position as a relative to the dependants. Evidently, most of the secret lovers have long tended to abuse such a privilege, a case that we hope not to witness anymore. What then is the fate of such cohabitants? It appears that their hopes of inheritance are at the mercy of the other cohabitant to name them in their wills, or the legal dependants of the deceased partner

[11]Section 26, Family Law (Scotland) Act 2006
[12]Section 27, Family Law (Scotland) Act 2006
[13]The Law of Succession Act, Chapter 160 Laws of Kenya
[14]The Law of Succession (Amendment) Act, 2021
[15]Section 3, The Law of Succession (Amendment) Act 2021

to give them a share of the inheritance being that Kenya has no legal framework on succession by cohabitants.

Once again, I would like to make a reflection to the law in Scotland. The Law in Scotland makes a provision allowing the surviving cohabitants to apply to the court for a share in the deceased party`s estate, where the deceased died intestate. However, such application cannot go beyond the amount legally recognized by the statute suppose the survivor had been the spouse.[16] Upon a successful application, the court may award the applicant a capital sum or a transfer of the estate depending on the size of the said estate, the nature and extent of other claims. However, such application must be made within six months after the death of the other partner[17].

Joint tenancy in cohabitation

Since the cohabitees have been barred from claiming shares or beneficial interests in matrimonial property as well as inheriting from the deceased partner, most of them have opted for joint tenancy to secure their property rights. This is because under joint tenancy, each tenant has equal rights to the jointly owned property.[18] The principle of survivorship has helped cohabitees to acquire property upon the death of their partners as co-owners. This principle operates regardless of the provisions of the will or the absence of a will thereof. Similarly, the principle of survivorship distinguishes jointly owned property from matrimonial property thus saving the cohabitees from the limitations in the Matrimonial Property Act and the Law of Succession Act.

The Law of Succession Act provides for the presumption of survivorship where the deaths happen simultaneously. It provides that under such circumstances, it would be presumed that the younger party survived the older party.

This avenue appears to be the better option for cohabitees to acquire property during the subsistence of the cohabitation and inherit property upon the death of one partner. Since the institution of joint tenancy alienates itself from the Matrimonial Property Act which deals with property rights of married couples, it becomes better due to the lack of clashes with the named statute above.

Cohabitation agreements

Statsky states that these are contractual agreements, made orally or in writing between people in an intimate relationship (non-married) intending to cohabit indefinitely.[19] The agreements make provisions for financial relationships and other issues during the cohabitation and upon death or separation. Such agreements are precise and succinctly provides for the parties' intentions. They are meant to strengthen the relationship between the parties and not to bring any form of resentment.[20] Being a form of contracts, cohabitation agreements must meet all the components of a valid contract such as capacity, intention to create legal relations, consideration, etc. Similarly,

[16]Section 29, Family Law (Scotland) Act 2006

[17]Ibid

[18]Slater Gordon Lawyers, Cohabitation, 2013 Available at https://www.slatergordon.co.uk/media/388153/cohabitation.pdf Accessed 15 February 2022

[19]Statsky W, ' Premarital, Postnuptial and Cohabitation Agreements', Family Law, 6th Ed, Delmar Cengage Learning, Clifton Park New York, 2013, 133

[20]Cochrane M, `Do We Need a Cohabitation Agreement: Understanding How a Legal Contract Can Strengthen Your Life Together,` J Willey & Sons, Toronto Canada, 2010, 143

cohabitation agreements could be expressly stated either by the parties or implied-in-law, implied-in fact or implied in trust. The concept of implying contractual relationships in cohabitation agreements is to cover for instances where the parties do not out rightly discuss the terms but have a mutual understanding of being bound to the contract. Whereas the agreements could be oral, legal personnel advice on having written agreements. This is because a written agreement appears to be absolute and indicates the intentions of the parties succinctly. The fact that the agreement is written does not mean that the terms cannot be varied. It may happen that the parties have changed their intentions; such changes may be recognized and put in writing per the contractual rules.

The institution of contracts has a rich legal framework in Kenya and thus becomes efficient in providing guidelines on the division of property between the cohabitees in the event of separation or death. This is because a breach of contractual terms is legally enforceable. Similarly, the agreements would help minimize or avoid court trials between the de facto unions. This would not only save the parties from the thorns of litigation but also reduce the backlog of cases in courts while saving resources at the same time. Further, a cohabitation agreement outlines the parties` rights and obligations concerning separate and jointly owned property.

Kenya lacks legal framework governing cohabitation agreements. As a result, such agreements would rely on The Law of Contracts Act, Chapter 32 Laws of Kenya as the parent statute. However, it would be better if our jurisdiction had a separate legislation for the same. Having a separate legislation would provide a solid and standard way of dealing with the cohabitation agreements such as validating such agreements. Kenya could borrow from Australian jurisdiction that has rich law on cohabitation agreements. For instance, Section 44 of the De Facto Relationships Act of Australia provides for the guidelines on cohabitation and separation agreements.

Final thoughts

It is my view that the marriage institution in Kenya is already broken and it would not suffice to claim that cohabitation would break it. It is evident in Kenya that most people do not prefer the long-term or life commitment that comes with a complete marriage. Other factors such as the lack of financial freedom, different perceptions of the purpose of marriage, etc also lead to the breakage of marriage institutions. However, these factors do encourage cohabitation or contractual forms of intimate relationships.

In my opinion, cohabitation itself is not the problem. The problem is lack of a rich legal framework governing cohabitation. The Constitution of Kenya 2010 provides everyone with the right to property; this is inclusive of cohabitees. Whether the cohabitees acquire property separately or jointly, there needs to be a forum that grants them the rights and interests in such property. Similarly, the law in Kenya only recognizes the issues of cohabitees to inherit but not the female partners due to the absence of marriage. This may lead to social injustice.

Finally, cohabitation is not a form of marriage and should not be assumed to be one. However, it would not be right and reasonable to do away with it due to the current state of affairs in Kenya.

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The Sexual Offences Act, 2006: absurdities, inconsistencies and criticisms in enforcing the provisions on the law of defilement twelve years down the line – a call for reforms

By Adams Llayton Okoth

By Emma Ella Katiba

1. Introduction

In a bid to curb the growing number of sexual crimes in the country, the Sexual Offences Act, 2006 was passed by Parliament. Its interpretation and application have however been met with various controversies. Key among them is the application of section 8 of the Act which provides for the offence of defilement. Under the section, it has been provided that a person who commits an act which causes penetration with a child is guilty of an offence termed defilement. The constitution defines a child as an individual who has not attained the age of eighteen years.[1] The Act further provides for the minimum sentences to be meted on the perpetrators of the act of defilement which ranges from fifteen years to life imprisonment.[2]

While it is rationally acceptable to punish offenders who are adults, the Act has not provided guidelines on how non-coercive and non-exploitative sexual conduct among adolescents is to be treated which has led to miscarriages of justice where young offenders are strictly exposed to the same criminal sanctions as adults. Additionally, the application of the provisions of sections 8(5) and 8(6) which provides for a defence where the child acted as an adult has always left the male in jeopardy since Kenyan law although regarded as neutral, always treats the men as the offending parties.[3]

This article therefore seeks to analyze the Sexual Offences Act and in particular, the impugned sections. Our point of departure is that the stiff criminal sanctions imposed on minors and; adults who had believed that the child was above eighteen are uncalled for and a relook at the Act is inevitable. Similarly, consensual sex among adolescent minors should be treated differently from the legal-centric view that has been in frame since the enactment of the legislation.

We argue that punishing the male minor alone is discriminatory and further recommends that a reform on the current legal regime on sexual offences should be actualized in order to cope up with the ever-evolving society.

2. Why eighteen years – what the law says

The legal age of sexual consent varies across jurisdictions worldwide. In South Africa, for example, it stands at seventeen years, eleven in Nigeria and twenty-one in Bahrain. In Kenya however, the legal age of sexual consent is eighteen years. The law dictates that a person consents if he or she agrees by choice and has the freedom and capacity to make that choice.[4] It is therefore assumed at law that a person below the age of eighteen years is rendered incapable of giving sexual consent as they are incapable of appreciating the nature of the act hence the harsh criminal sanctions.

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[1]Art 260.

[2]Section 8(2);(3);(4).

[3]Henry Okwatch, *The Problematic Jurisprudence on the Law of Defilement of adolescents in Kenya*

[4]Section 42, Sexual Offences Act, 2006.

3. Criticisms and inconsistencies with the enforcement of the Act

3.1 The definition

As highlighted above, the offence of defilement is enshrined under section 8(1) of the Act. It provides that a person commits the offence of defilement if they cause penetration with a child. While the definition aims to achieve gender neutrality and not portray a given gender as the perpetrator on the one hand, it is in its true sense ambiguous, on the other hand due to its shyness to explicitly state whether this penetration is vouched for by the male or the female.

In as much as that definition is acceptable in Kenya, it portrays the female gender as the victim of defilement. From the definition of the word penetration under the sexual offences Act 2006, which means the partial or complete insertion of the genital organs of a person into the organs of another person,[5] it is only the male who have genital organs capable of penetrating. It is therefore wrong for one to assume that a female genital organ is capable of penetrating that of the male which in real sense is impossible. Due to this background, a woman offender has a greater chance of being acquitted than the male counterpart. Noteworthy, the background for the enactment of the Act was catalyzed by the very fact that men were always the perpetrators.[6] The debate itself was carried out in Parliament as if there was a war between men and women.[7]

If you walk along the corridors of justice, you will realize that most of the complainants are females. Notwithstanding the societal conception of men and women where women are always regarded as the predators of sex, the current law regime also has a major share due to the role which it plays in the victimization of women.

To do away with this ambiguous definition which has always placed men on the chopping board, the Act should be amended and a more radical definition of the term defilement which appreciates the role of both the male and the female in this sexual offence to be placed forth. This can however not be done in isolation. It calls for a candid and honest national dialogue involving stakeholders from different sectors of the country.

3.2 Mutual defilement by adolescents

What happens when two consenting adolescents engage in sexual activity? Who should be considered the perpetrator and who should be considered the victim? Should the adolescent perpetrator be subjected to the same criminal sanctions meted on adults? Well, that has been the law. Usually, the Act has sought to punish males at the detriment of females while in real sense the "experimental" sex occurs between two consenting adolescents.

In the case of ***CKW v Attorney General and Another [2014] eKLR***, the petitioner, a minor of sixteen years at that material time through his lawyers challenged the constitutionality of sections 8(1) and 8(2) to the extent that they criminalize consensual sexual relationships between adolescents. He claimed that the Act was discriminatory. It's worthy to note that the background for bringing this case before the High Court was due to the fact that the petitioner was charged, tried and convicted for the offence of defilement with a girl who was the same age as he was; sixteen years. He claimed that the petition discriminated against him as he was the only one charged while the girl was not while in real sense the girl consented to the act and was in fact his girlfriend!

Another case that demonstrates the discriminatory nature of the application of the Act is the case of ***POO (A Minor) v Director of Public Prosecution and Another [2017] eKLR***. The petitioner who was a minor appealed, inter alia, the decision of the DPP to charge him alone. He contended that in as much as the male genitalia are the ones that can penetrate female genitalia, it was discriminatory to charge him and leave the female minor in the instance where there was no claim to have been forced to have sex. The court, in holding that the appellant was discriminated against on the basis of sex for being charged alone while in reality they both needed protection against sexual activities, cited section 4 of the ODPP Act which requires the Director of Public Prosecutions to charge its mandate in guidance by the principles of impartiality and gender equity.

[5]Section 2(1).
[6]Kiarie Waweru, 'The Sexual Offences Act: Ommissions and Ambiguities' (Kenya Law) <https://kenyalaw.org/kl/index.php?id=1894 > accessed on 12 March 2022.
[7]Ibid

These two cases just demonstrate the discriminatory nature of the Sexual Offences Act by purporting to prosecute the male child only in the case of consensual sexual conduct. This discriminatory nature was underscored by the Chief Justice Emeritus David Maraga in 2016 when he categorically stated that "*there is an obvious injustice of filling up the jails with teenage offenders who get intimate with fellow teenagers as they experiment in their adolescence.*"[8] Maraga faulted the criminal justice system and the manner in which the bill to decriminalize teenage sex was handled in Parliament.[9] He however lauded the Court of Appeal for setting the precedent where it held that it is unconstitutional to decriminalize sexual acts among teenagers.

This discrimination should be viewed in the lens of Article 27 of the constitution which provides that every person is equal before the law and has the right to equal protection and equal benefit of law[10]. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.[11] It further states that the state shall not discriminate directly or indirectly against any person on any ground, including, among others, sex[12]. What this article seeks to achieve is the equality of all before the law.

Persuaded by the argument that these adolescent sexual activities are consensual, the courts have been quick to quash the convictions meted on the young children. Kiarie Waweru J, in quashing the conviction of the appellant in **SKM v Republic [2020] eKLR**, pronounced himself as follows:

> *"Having found that the sexual liaison between the appellant and the complainant was consensual and having made a finding that both were minors at the time, the conviction of the appellant herein was erroneous. The "offence" which was committed when the appellant was a minor ought not to have been a conviction but a finding of guilt. Secondly, he wronged the complainant in equal measure as he was wronged. I therefore quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held."*

In the instant appeal, the appellant had been charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the Act. He was tried, convicted and sentenced to fifteen years imprisonment.

In order to avoid these claims of discrimination, it is our argument that if the minors/adolescents must be prosecuted, then both of them should be held accountable for the act of defilement in cases where it is proved that the sexual activity was consensual. We however agree with the courts which in some instances have treated the minors not as offenders but both as victims of the crime who needs state protection through counselling and peer education. Where some form of coercion, deceit or malice is held to have been used, the indicted adolescent should be punished regardless of whether they are male or female.

It is important to remember that sexual feelings are a natural part of growth and development of a person,[13] and especially for adolescents.[14] Adolescence begins at the onset of puberty which is a landmark in the development of sexuality.[15]

During this phase, adolescents will want to explore their sexuality and therefore decriminalizing such acts will be a hindrance to their development and growth. It is also during this phase of development that adolescents experience intense sexual urges that are sometimes difficult to simply ignore. It is the authors contention that the criminalization of acts associated with the natural development of a human being seems inappropriate in that regard.

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[8]Nation Africa, Kenya's Sexual offences law unjust to boys, Chief Justice says' The East African (Nairobi, 17 May 2019) < https://www.theeastafrican.co.ke/tea/news/east-africa/kenya-s-sexual-offences-law-unjust-to-boys-chief-justice-says-1418146> accessed on 17 March 2022.
[9]Ibid.
[10]Art. 27(1).
[11]Art. 27(2).
[12]Art. 27(4)
[13]World Health Organization, 'Defining sexual health: Report of a technical consultation on Sexual Health', 2006, 5 as cited in Henry Okwatch, '*The Problematic Jurisprudence on the Law of Defilement of Adolescents in Kenya.*
[14]Papathanasiou I, 'Adolescence, sexuality and sexual education' 1 *Health Science Journal*, (2014), 4 as cited in Henry Okwatch, '*The Problematic Jurisprudence on the Law of Defilement of Adolescents in Kenya.*
[15]Kar, Sujita Kumar et al., *Understanding normal development of adolescent sexuality: A bumpy ride*, 70 journal of human reproductive sciences 4 (2015).

Justice Chitembwe

3.3 Mutual consent- adult/minor question in light of sections 8(5) and 8(6) of the Act

How has the law addressed the instances where one party is a minor while the other an adult? The basic, obvious and expected answer would be that the adult is answerable and has to suffer the consequences. But should that always be the inference made out of such cases? That for as long as the complainant is a minor the accused is guilty of defilement? The interpretation and application of the Sexual Offences Act has been construed in such a way that it does not look at the social aspect of the law, that is to say, it does not look at the circumstances of the case. Rather it tends to majorly focus on the age of the complainant and the age alone. Despite the fact that the law finds anybody who defiles someone below the age of eighteen years guilty, there has to be consideration of the practicality of the issue.[16] In the famous Judgment in *Martin Charo v Republic*, which has received worldwide criticism as being the worst ever judgment, Justice Chitembwe propounded this idea when he stated;

> *The offence of defilement should not be limited to age and penetration. If those were to be taken as conclusive proof of defilement, then young girls would freely engage in sex and then opt to report to the police whenever they disagree with their boyfriends. The conduct of the complainant plays a fundamental role in a defilement case. One can easily conclude that the complainant was defiled after hearing her evidence. Several issues come into focus. Did the complainant report the defilement immediately after the incident? Was she threatened after the incident? How long did it take for her to report? Was there threat on her life? How long was the relationship? Were the parents aware of the relationship. All these issues lead to the circumstances of the case as envisaged under Section 8(5) of the Sexual Offences Act.*[17]

The idea that such circumstances ought to be considered would sound ridiculous on the face of it and a counter argument would be that anybody under the age of eighteen is incapable of having sexual knowledge and therefore cannot give consent to sex (as the law provides). Notwithstanding, in this day and age, adolescents as young as twelve years have basic knowledge of what entails sexual relationships. A study has shown that by the age of eight or nine, children become aware that sexual arousal is a specific type of erotic sensation and will seek these pleasurable experiences through various sights, self-touches, and fantasy.[18]

In view of the foregoing, it is true that under the Sexual Offences Act, a child below eighteen years old cannot give consent to sexual intercourse. However, where the child behaves like an adult and willingly sneaks into men's houses for purposes of having sex, the court ought to treat such a child as a grown-up who knows what she is doing.[19] Below we discuss a case study with similar circumstances as the foregoing.

3.3.1 Case study- A teacher/student question

This study focuses on a school in Kakamega County in the Republic of Kenya where teen pregnancy is a major public health challenge in the county. The rates vary from sub-county to sub-county; Malava, Butere, and Matungu having the highest. On average about one in five (19%) of girls aged 15-19 years in Kakamega County have begun childbearing.[20]

In a certain secondary school *[particulars withheld]*, in the said county, a 17-year-old girl in form three apparently had a crush on her Biology teacher. Having been too obsessed with the said teacher, the girl saw it best to make advances to the teacher. It is important to note at this point that at the material times relevant to this case the girl was residing in school. During one school holiday, knowing very well where the teacher resided (on rental houses not far from the school), the girl willingly and enthusiastically went to pay a visit to the said teacher.

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[16]Citizen Tv News, where Justice Chitembwe argued that Defilement that the offence of defilement should not be limited to age and penetration <https://www.youtube.com/watch?v=tkk2Vc7e9BI> Accessed on 19th March 2022.
[17]Martin Charo v Republic [2016] eKLR.
[18]Reinisch, June (1991). *The Kinsey Institute new report on sex: what you must know to be sexually literate*. New York: St. Martin's Press. ISBN 9780312063863.
[19]Martin Charo v Republic [n17].
[20]KAKAMEGA COUNTY POLICY BRIEF 2020 Teen pregnancy in Kakamega: A ticking time bomb? <https://yactmovement.org/wp-content/uploads/2021/03/kakamega-policy-brief-edited.pdf> Accessed on 20th March 2022

Upon arrival at the teacher's residence, the girl demanded that the teacher have sexual intercourse with her and upon refusal; she threated to scream and say that he was attempting to rape her. Now here is a teacher in a dilemma in which both of the options he had were grave anyway. That is, to either have sex with the girl on one hand or let her scream and accuse him of attempted rape on the other. Which was the lesser devil? One would argue that letting her scream was the lesser devil as he would say that was not his intention, but in the society today, where mob justice is our cup of justice served, he probably would have been beaten to death before an attempt to hear his side of the story was made. But that is only speculation….

Back to the facts of the case at hand; there is the teacher facing a totally self-stripped naked girl before him, and carried by the heat of passion and arousal, he dares have sex with the girl. All said and done, and all parties satisfied, there is absolutely nothing to regret.

However, this phase of 'no regrets' is cut short when schools resume and it is realized that the said girl is pregnant. The obvious questions start streaming in; who is responsible? How and when did this happen? And the ignored questions…? Did you consent to it? Were you fully aware of what you were signing up for? Were you forced into it? Do you regret it? From the girl's statements and sentiments on cross-examination, she appeared to be so happy about carrying the teacher's child (now deceased). She did not point any fingers at the teacher; neither did she claim that she was apparently forced into it. Bear in mind that is a 17-year-old girl who, legally speaking, she has no capacity to consent, but ideologically speaking, her actions were that of a mature person who has full knowledge of what's going on. The question then is, do the circumstances of the case paint a picture of someone who was defiled? Can we say that the teacher took advantage of a young girl and defiled her? The circumstances clearly show that it is the girl who went to the teacher's house to have sex and then go home.

Section 22 of the Code of Ethics for Teachers, 2015 provides inter alia that;

> *(1) A teacher shall not— Sexual relation's (4) engage in any sexual activity whatsoever with a learner, with learners. regardless of whether the learner consents;*[21]

Pursuant to the above-stated provisions, the provisions of section 140(a)(i) and 141(a)(i) of the Teachers Service Commission Code of Regulations for Teachers,[22] and the fact that the teacher allowed the student to enter his house, which is prohibited, the Teachers' Service Commission heard the case, interdicted the teacher for sexual

involvement with a learner, and later on not only dismissed the teacher but also deregistered him permanently such that he cannot work under the commission ever again. Justice served right? On the other hand, the learner continued with her studies, though she lost the baby, a few months after birth, she completed high school and is now pursuing higher education.

From our point of view, the verdict appeared to be somehow unjust as every other factor in the case was ignored, and that which was put into consideration is that this was a learner, and a minor for that matter, whether or not their actions were seemingly that of a mature person was immaterial. Going back to the infamous **Martin Charo case** where Justice Chitembwe freed the man of twenty-three years in prison over a case with almost similar set of facts as the one herein, the learned Judge held;

> *It is important to distinguish between law and morals. It is the law that a child below the age of 18 years cannot consent to sex. Section 8 (5) qualifies the provisions of Section 8 (1) to 8 (4) which penalizes defilement. It can easily be concluded that it is immoral for one to have sex with a child under the age of 18 years. However, where the same child under 18 years who is protected by the law opts to go into men's houses for sex and then goes home, why should the court conclude that such a person was defiled. In my view that cannot be defilement. The complainant normally does not complain but is made to be the complainant because she is under 18 years. My view is that such a behaviour is that of an adult and not of a child. Children are not meant to enjoy sexual intercourse. Whenever they do, then that becomes the behaviour of an adult. Although the public will frown upon an adult who engages in sex with such a child, we should not forget that circumstances have changed. Young*

[21]Code of Ethics for Teachers, Citation. 2015.
[22]The Teachers Service Commission Code of Regulations for Teachers, 2015.

> *children engage in sex at very young age. This is not out of defilement. Conviction of a defiler should be based on actual circumstances and proof that the complainant was indeed defiled. This is more so when one considers the lengthy sentences imposed by the law for such an offence. It is unfair to send someone to 20 years imprisonment yet the complainant was enjoying the relationship.*[23]

In as much as the impugned judgment was awarded the Golden Bludgeon in Spain by Women's Link Worldwide, beating 18 other cases to emerge the world's worst ruling for women's rights in 2016,[24] the reasoning in it is upright and one which aims at refraining minors from engaging in sexual activities as much as they want to and later on impose the blame on their partner with whom they enjoyed the affair. It further appears to be a progressive, liberal judgment which portrays the interpretation of the law as not being too rigid but rather, the law that puts into consideration all facts in issue and the law that deals with issues contemporarily, in accordance with developing times and changing circumstances. This opinion however does not sit right with Women's rights Advocates; notwithstanding, it is high time that this line of reasoning be adopted, not with the intention of punishing the alleged complainant (alleged victim of defilement), but in a bid to inculcate responsibility and accountability among young girls who engage in sexual activities and when they are caught, they now put the blame on their sexual partner. In furtherance of that, this aims at protecting the accused persons from serving long sentences or dire consequences (as the teacher/learner case above) when in fact they were made to believe that the victim was of age and their acts were in such a way as to portray willingness to engage in sex without any regret of it.

In ***Eliud Waweru Wambui v Republic [2019] eKLR*** which is an appeal from the High Court in which the appellant challenged his conviction. The judge introduced the ruling by saying that:

> *"This appeal epitomizes for the umpteenth time the unfair consequences that are inherent in a critical enforcement of the* ***Sexual Offences Act, No. 3 of 2006 (the Act)*** *and the unquestioning imposition of some of its penal provisions which could easily lead to a statute-backed purveyance of harm, prejudice and injustice, quite apart from the noble intentions of the legislation. The case poses one more time whether it is proper for courts to enforce with mindless zeal that which offends all notions of rationality and proportionality."*

The judgement calls for a candid national conversation on this matter. It argues that the prisons are teeming with young men serving long sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years.

A public opinion on the same goes as follows;

> *Just a reminder. A very punitive law in place and not much awareness created. You will only learn the hard way. Courts are not very lenient on defilement cases among underage relationships. Kids are getting several years jail term as per the sexual offenses act provisions. No concerned body is even minding to create awareness*

[23]Martin Charo v Republic [n15]
[24]Kenyan judge 'wins prize' for worst ruling in the world, < https://nairobinews.nation.africa/kenyan-judge-worst-ruling/ > Accessed on 19th March 2022.

about it even in schools. So sad for our children in relationships, the boychild is in trouble. #SO #Act #Provisions"[25]

We further add that each defilement case should be treated according to its peculiar circumstances. The judges should not confine their interpretation to the strict letter of the law as that would be an affront to justice as we have highlighted above.

3.4 The minimum sentences

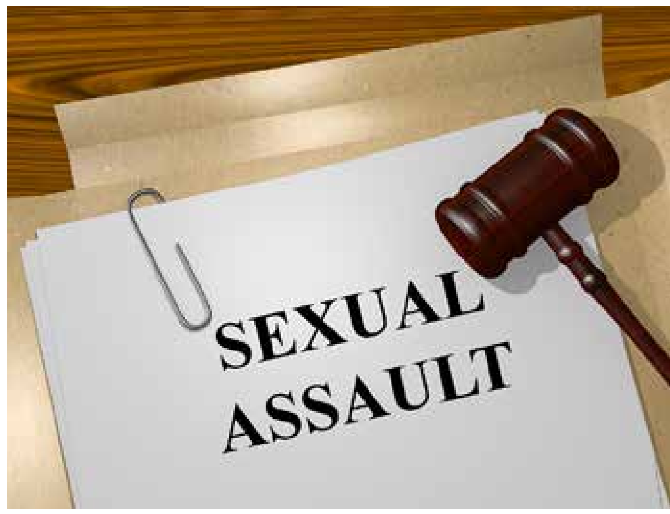
Section 8 of the Act provides for minimum mandatory sentences for sexual offenders. Punishment is based on the age of the victim. Persons who are found guilty of defilement of a child aged less than eleven years are sentenced to life imprisonment.[26] If the victim is between the age of twelve and fifteen years, the accused is sentenced to a term of not less than twenty years[27] and if the victim is aged between sixteen and eighteen years of age, the accused is sentenced to a term of imprisonment of not less than fifteen years.[28]

It is worthy to note that defilement occurs in different contexts, as in the context of two adolescents having consensual sexual intercourse, thus the provision for mandatory stiff punishments for all sexual relations with adolescents would perhaps be inappropriate.

We root for an amendment of the Act which will see the removal of the strict minimum criminal sanctions and a replacement of maximum criminal sanctions. This will in turn give the judges a wider discretion in deciding the sentences to be imposed on sexual criminal offenders while taking the circumstances of each case into consideration as we have seen above. If the hands of the judicial officers are tied, a substantial injustice is likely to and has occurred in the enforcement of the provisions of this Act. Perhaps, it is time to reconsider the mandatory custodial sentences for persons found guilty of defilement depending on the circumstances of the case.

The issue of mandatory sentences was dealt with in the case of *Francis Karioko Muruatetu & 2 Others v Republic* [2017] eKLR. This case challenged the constitutionality of the mandatory death penalty for the offence of murder in the Kenyan Penal Code. The court noted that the right to a fair trial process does not end after conviction but proceeds up to the sentencing. Further, the court noted that the right to a fair trial is a non-derogable right under the CoK.[29]

This clearly speaks as to the volume of how imposing the mandatory minimum sentences violates one's right to fair trial as provided for in the Constitution. An accused should



be given the opportunity to go through a fair process of trial, his case heard and the defences raised taken into consideration. That would allow the courts to all the factors into consideration and impose a sentence that is fair.

Concluding thoughts

Our discussion above ranges from the provisions of the Sexual Offences Act, the interpretation and application of them and the critics thereof. Even so, this article does not seek to defend defilers or to exonerate them from liability from their criminal actions or to even justify their actions. On the contrary, the article seeks to analyze the inconsistencies, ambiguities and application of the Sexual Offences Act and the detriments these have caused thereof. A good example would be the fixed minimum sentence for convicts of defilement. Under this, judges are scraped off of the discretion to determine the most appropriate sentence on a case-by-case basis considering all the circumstances therein, because then it goes without saying that the cases of alleged defilement do not always have the same set of facts. In one it may be proven at first instance that indeed this is defilement, but in another, the alleged victim appeared willing and aware of their actions. Therefore, it is our proposition that the Sexual Offences Act be looked at a new, putting into consideration the issues raised herein and the public outcry that has been witnessed over the years.

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[25] Unjust Sexual Offences Act, TV47 Kenya, <https://web.facebook.com/watch/?v=1307573106274498> , from the Comment Section. Accessed 19th March 2022.
[26] Section 8(2).
[27] Section 8(3).
[28] Section 8(4).
[29] Article 25 of the Constitution.

Russia's invasion of Ukraine is illegal under international law: suggesting it's not is dangerous

The destroyed main building of a school in Zhytomyr, Ukraine.

By Cathleen Powell

While the world is largely united against the invasion of Ukraine by Russia, South African public figures, including the government, have attempted to downplay that it is, in fact, an invasion. And their frequent calls for negotiation tend to present the conflict as one in which both sides should be prepared to make concessions.

President Cyril Ramaphosa has even reported that Russian president Vladimir Putin appreciates his 'balanced approach' to the conflict. So what does international law say about one country sending armed troops across a border and shelling another's towns? The answer calls for some historical background.

After World War II ended in 1945, the United Nations was established. Its first stated purpose was to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind. To this end, it emphasised that the global order was based on the sovereignty of states) (article 2(1)) and outlawed the use of force by one state against another (article 2(4)).

There are only two, narrowly defined exceptions in the United Nations Charter, the world body's founding document, to the prohibition on the use of force. These are met when states act either in self defence or under the authorisation of the UN Security Council. Russia's invasion of Ukraine can, therefore, be legal only if it falls within one of those exceptions.

It is completely uncontroversial that sending armed forces across the border of a state, without its consent, is a use of force. This happened when Russia sent tanks and infantry across the internationally recognised borders of Ukraine. President Putin's recognition of two breakaway regions in southeast Ukraine before this move does not affect their status as Ukrainian territory under international law. Indeed, it violates a separate rule protecting state sovereignty: that states may not interfere in each other's internal affairs.

Ukrainian soldiers and rescue officers search for bodies in the debris at a military school in Mykolaiv.

Apologists for the invasion have focused on the West's 'provocation' of Russia, particularly through its expansion of NATO to include Eastern European states such as Croatia, Estonia and Poland.

But focusing on the reasons why Russia feels threatened by the West confuses causation with justification. In addition, by referring only to the reasons why Russia supposedly feels threatened, and failing to address the legal position at all, the South African government, the governing African National Congress – and other apologists – undermine the most cardinal rule of our international legal order. It is a rule on which the South Africa's own survival as a state depends.

The legal analysis

As we have established that Russia has used force against Ukraine, the next step is to analyse whether Russia can call on any of the exceptions justifying force. Before we do so, we must dispose of one possible objection to a legal argument based on the UN Charter. At the time the UN was established, many states, including most African states, were still colonised. They could, therefore, not participate in the creation of the charter.

Although they voluntarily acceded to the UN after acquiring statehood, they played no role in formulating the text of the charter. Such decolonised states have occasionally rejected rules that were drawn up without their consent. But they have never resisted the underlying principle of the sovereignty of states, nor the rule that states may not use force against one another.

Indeed, as the Kenyan representative to the United Nations, Martin Kimani, recently emphasised, decolonised African states even prioritised the norms of territorial integrity and state sovereignty over any right they might have had to reclaim territory they had due to the arbitrary map-making of their former colonial powers. As Kenya has pointed out, African states accepted the borders that the colonial powers had imposed on them in order to preserve peace and foster cooperation.

So does Russia meet the exceptions to art 2(4) of the UN Charter?

There are only two in the charter itself: when force is authorised by the UN Security Council (article 42), or when a state is acting in self-defence (art 51).

A third exception has also been suggested by scholars and commentators, based not on the charter but on moral considerations and (limited) state practice: humanitarian intervention, or, in its most widely accepted formulation, the duty to protect. In the form in which this has been accepted by the UN General Assembly, this exception would not allow Russia to use force without Security Council authorisation. The Security Council has not authorised Russia to use force against Ukraine.

Russia's only remaining justification is, therefore, self defence, which is set out in Article 51. That says that states have the right to self defence "if an armed attack occurs against a member of the United Nations".

An armed attack is, therefore, an essential prerequisite to a legal use of force, and it is one that is strictly interpreted.

This legal requirement is supplemented by customary international law. The formulation here is that the necessity of self-defence must be instant, overwhelming, leaving no choice of means, and no moment of deliberation … and that the {defending} force, even supposing the necessity of the moment authorised {it} to enter the territories of the {attacking state} at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.

There must, therefore, be an armed attack, that has already begun or is imminent, and the force used in self-defence must be the only way of averting or repelling it.

Russia has not suffered an armed attack from Ukraine, or, indeed, any state. Neither NATO's presence in Ukraine nor any of the other justifications offered by Russia and its apologists reach the threshold of an armed attack. This includes a range of allegations. These cover the alleged mistreatment by Ukraine of Russian speakers in that state, alleged links between the West and the far-right in Ukraine, and the alleged presence of sophisticated weapons in the state.

There are other channels of resolution for these kinds of grievances. And even if these channels don't work, and Russia is left with a situation in which it 'feels' threatened, it does not have the right to use force. Whether the requirements of self defence are met is a question of fact, not feeling. Russia's invasion of Ukraine is, therefore, illegal.

Residents flee heavy fighting via a destroyed bridge.

A Ukrainian soldier in the trench.

The dangers

There are two significant dangers that follow from any attempt to disguise or distort the illegality of the invasion, which South Africa's foreign affairs department's recent pronouncements illustrate only too well.

The department's call to "all sides to uphold international law, humanitarian law, human rights, and the principles of the UN Charter, and to respect each other's sovereignty and territorial integrity" misrepresents the facts. That's because it creates the impression that Ukrainian troops are occupying Russian territory or shelling its towns.

The moral equivalence that this creates between the opposing states is then underscored by the department's call for negotiation for resolution of the current 'situation'. This is the second, and more dangerous, threat, in South Africa's defence of Russia. We dare not ignore that it is a shocking proposal that Ukraine should have to negotiate to secure the withdrawal of Russian troops. It is shocking because it transfers responsibility for the invasion to Ukraine itself. In fact, Ukraine should not have to do anything at all to get Russia to obey one of the most cardinal rules of international law.

No state, whether Ukraine or anyone else in the global community, should have to earn Russia's compliance with the law. If the rule of law is not respected, the entire global community becomes as vulnerable as Ukraine is now.

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