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LEGACY OF THE OUTGOING PRESIDENT

UHURU KENYATTA

THE GOOD, THE BAD AND THE UGLY

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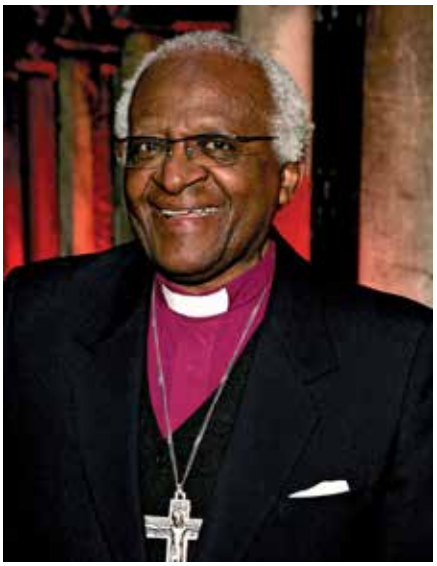


THE PLATFORM
FOR LAW, JUSTICE & SOCIETY

OUR OPINION

Elections 2022: eyes on the Independent Electoral and Boundaries Commission and the Judiciary

Professors Nic Cheesman and Brian Klass in their text, *How to Rig Elections*, identify the problems fraught with electoral processes from a comparative perspective. Cheesman and Klaas paint a grim picture of the mockery the process of elections has been transformed into and it is no accident that Kenya earns its place in this text, mentioned alongside Belarus, Madagascar, Nigeria, Thailand, Tunisia, Uganda, Zimbabwe and the United States as countries that have witnessed electoral manipulation in some form (Nic Cheesman and Brian Klass, *How to Rig Elections* p.5).
The accusations of electoral impropriety are not new. Indeed, the Supreme Court of Kenya in the case of **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others** [2017] **eKLR identified concerns that had to be improved on by the responsible authorities**, the Independent Electoral and Boundaries Commission (IEBC) being singled out as a key player in the envisaged reform measures.

Kenya, it is said, has a history of bungled elections and that the only credible elections that can be spoken of is the 2002 election contest. The result of such blemished electoral processes has been the endless post-election violence episodes that have been the norm, rather than the exception. The spotlight firmly is on the IEBC this time around and the earnest hope held by all Kenyans is that it adheres to the constitutional test on elections: a free, fair, simple and verifiable process. The greatest paradox of all is that Kenya regularly holds elections, which have become quite costly over the years, yet the democratic pedigree of the elections has not inspired confidence in the eyes of many an observer, let alone a majority of citizens. We must not forget that elections play a very important role in a democracy and they cannot be staged for make appearance purposes. Elections must count quantitatively and qualitatively.

Klaas and Cheesman offer prescriptive advice, which counsel we reiterate for the benefit of the IEBC and all actors involved in the election process .In their text, they highlight ten points necessary to save democracy especially in the context of elections: Promotion of digital literacy, make election observation independent, fund election observation, strengthen social media, strengthen democratic groups, protect technology, avoid electronic voting, support fact checking, leadership by example and judging by quality not outcome. Judging quality not outcome stands out for further elaboration, since it emphasizes that practices and procedures must be scrutinized and that the means must justify the end. The qualitative credentials of elections were emphasized in **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (Supra).** The Judiciary and in particular, the Supreme Court of Kenya will also be subject of focus. Will the Courts maintain the envisaged constitutional image as a pristine, bastion of independence as an arbiter? Or will it be the case of wailing and gnashing of teeth, the Kenyan public moaning in the aftermath of botched elections and being stabbed in the back by public institutions? During the last election season, the violence that ensued in the aftermath saw the death of a 6-month old child, baby Samantha Pendo, one of the victims of police brutality. Kenya sank to its lowest and the death of this infant was the nadir of our public consciousness.

The tragic loss of life every other election season can only be a thing of the past if public bodies conduct themselves properly and constitutionally such as to inspire confidence. With greater confidence enjoyed by the IEBC, trust in the IEBC and the judiciary serves as valuable currency in ensuring free, fair, verifiable and credible elections. The role played by these institutions is solemn and must be taken seriously. It is our hope that the actors in the election process will not betray the trust placed on them by the Kenyan public.

President Uhuru Kenyatta's legacy: the good, the bad and the ugly

"My brother (Hon Raila Odinga) and I are focused on leaving a legacy where young people have steady jobs, and are able to access basics needs and become a country where all citizens are proud to be Kenyans. Kenya is about all of us. Kenya cannot succeed without all of us. It needs all of us. This is to me the spirit of handshake. If it was about two individuals, we would not have reached where we are. It is not about two people rather it is about bringing the country back on track. It is about bringing the people of a nation to feel once again that they are part and parcel of a home. It is to remove the issue of people feeling marginalized, isolated, left out and to encourage a feeling that existed in this country. We want to go back where all citizens will feel proud to be Kenyans".[1]

By Odhiambo Jerameel Kevins Owuor

Introduction

In the world among the many things that are for sure, one is that the sun will rise and at the end of the day it will set. The rising of the sun denotes daybreak and day light in equal measure. Sun rise alludes to an array of things depending on each and every person. Rama Kant observed that: 'there can be nothing more pleasant to the senses than the sunrise. At this time, nature is at its best. The golden rays of the sun give a bright color to the clouds and meadows, mountains and valleys. The sunrise marks the journey of the sun in the sky. At first, there appears a small ball of light in the sky. It then goes on increasing in size and shine. The golden disc seems to be rising and rising. Birds sing to its shine. Men and women who go out for morning walk enjoy its reddening beauty. It is the time when the day casts away the cloak of night. The lovers of morning walk stop on their way to look at the sunrise. The first rays of the sun are cool and bracing to the eyes. At a hill station, the beauty of sunrise is beyond description. The hill-tops and the valley below seem to be bathed in yellow light. All of sudden, the golden ball shining in the sky grows big in size. As the sun gets higher in the sky, the day's activity begins. Plants and trees feast on the rays of the sun. Late risers miss the beauty of sunrise. It is a rare joy to be awaken at sunrise.'

President Uhuru Kenyatta

We see countless sunrises, yet we are always startled by its beauty. At first there appears to be a tiny ball at the horizon. It slowly comes out of the shadow of clouds, increasing in size. You just look at it. The cooing and chirping of birds constitute the background score (unfortunately, my background has noise of us humans, still it's pleasant to ears when your eyes are spell bound). The waves of three seas kiss the land gently and you want to be kissed too. You proceed further into the sea and leave your senses to the

[1]Presidential Strategic Communication Unit, I Want to Leave A Legacy Of A Strong, United Country, President Kenyatta Tells Nyanza Leader (28th May 2021) Available at https://www.president.go.ke/2021/05/28/i-want-to-leave-a-legacy-of-a-strong-united-country-president-kenyatta-tells-nyanza-leaders/ Accessed on 15th June 2022

nature and you concentrate on the sky. The fruit you are longing for is beginning to get ripe and turns into golden color. The warmth of the rays emitting from it makes your body go crazy. Goosebumps get on you and you forget everything for a moment. Absolute peace and then you see it all. your eyes can't take any more. The number of visuals you see are mind boggling. The vast expanse of sea in front of you filled with unknown depths and the land beneath you assuring you are safe, the cool breeze of air filled with pleasant notes and the sky filled with all the warmth of a mother. This is it. This is our mother saying everything is bright and it's just that we have to open our eyes to see it.

Sunrise symbolism is closely tied to new beginnings, which is why many people cherish it. Each dawn means a new opportunity to achieve greater things in life – it's full of mystery of what each new day may bring to your life. Every day is new and full of new events and opportunities to do what you want to do. Experiencing a sunrise can be exciting. It marks your chance to achieve something new and experience happiness in the coming day. With each sunrise comes a new beginning and thus a chance to experience new things.

It gives you the chance to start the day on a positive note and set the tone for the rest of the day. Many people choose to start their days early and experience the sunrise for themselves. It is said it can promote your well-being and inspire positive feelings about the upcoming day. It gives you the chance to start the day on a positive note and set the tone for the rest of the day. Many people choose to start their days early and experience the sunrise for themselves.

It is said it can promote your well-being and inspire positive feelings about the upcoming day.

When the sunrise occurs, it's full of surprises and mystery. We don't know exactly what the day ahead has to offer, but we're certainly inspired to make the most of it. We feel the opportunity to go on and achieve something great this day.

It is said that we learn something new every day, and each sunrise represents the chance to cover up our mistakes and improve. Opportunity is around every corner – it's just how we view it and how we make the most of it that counts.

Sunrise and sunset are commonly used together – they're the opposites, where the sunrise represents the birth and rebirth as it happens each day, while the sunset represents death and a conclusion to a chapter. Each day starts with a sunrise, which is symbolic of the act of rebirth. Jung called this act the change from unconsciousness into consciousness. It's practically an act of creation that we can also symbolize our transformation from being asleep and unconscious to being awake and fully conscious.

Sunrises are beautiful to observe. They remind us that every day is full of new opportunities and ways to improve our lives and thrive. But they're also there to remind us of the greatness of Nature and how uncontrollable and raw it is. In combination with the sunset, they represent the cyclical nature of things and how we're all born and die.

Thus, one hymnal writer stated that *...there is a wonder of sunset at evening, the wonder of sunrise I see*. That's the

Chairperson Isaac Hassan

marvelous depiction of sun rise; and just as it is that there is sun rise, sunset is a reality at the end of the day by all means. A sunset is a perfect conclusion. It's the silky, smooth collusion of sky burst reds and yellows into the calm of night. Sunset is the sigh of a late summer day and the dawn of a restful winter evening. A sunset is a symphony of color as it sings us all to sleep.

Sunset happens at the end of the day, so it's a conclusion to what's happened during the day. It's the end of the cycle that repeats itself every day, where the sunrise symbolizes the beginning of the day, while the sunset is its completion. There's a sense of completeness when the sunset comes in. After the sun has set, the day turns into night and light into darkness. It influences our mood and makes us feel like we've come to the end of an era. This cyclical nature of the earth's daily cycle can be symbolic of our lives, too.

No day is complete without a sunset. It's a repeating cycle that will continue as long as Earth stands as it is. When the cycle starts, it's represented by a sunrise; when it ends, it's symbolic of a sunset. Our lives are also cyclical. They begin with our birth and our childhood, represented by the sunrise. And they end with a sunset, which marks the end of this cycle. That's why the sun's motions are often used together to convey certain qualities that involve something that's cyclical – like our lives.

There's a sense of calmness during a sunset. This is inspired by the many colors that occur at this time of day. Sunsets can provide an excellent background for meditation and for relaxation, because of the calm atmosphere. Sunsets are special. Witnessing them can be relaxing, and even healing in many ways. We witness the day's end, allowing us to summarize how the day has gone for us. It allows us to look back on what we've achieved during the day and end it on a positive note.

Just like the sunrise symbolizes the start of the day and a new beginning, sunset symbolism indicates the completion of a cycle and an end to the proceedings. It's commonly present together with the sunrise symbolism because they form an entity, a cycle. They happen each day, and there's no changing that, which is typical of the force of Nature that they both are. In many ways, sunsets and sunrises represent our lives – how they begin with a sunrise, and how they end with a sunset, where the sunrise represents birth and rebirth, while the end of the day represents the end of a journey.

In the context of this article, President Uhuru Kenyatta Muigai experienced his sun rise when he was elected to be the fourth President of the Republic of Kenya. He was announced as the winner of the Presidential polls by the then Chairperson Isaac Hassan[2]. The opposition contested the results thus leading them to file a case in the Supreme Court regarding the same. Unluckily, the opposition weren't lucky in the Supreme Court. The Presidency of H.E Uhuru Kenyatta began on 9 April 2013 after being sworn in as 4th president of Kenya. He succeeded Mwai Kibaki.[3] During his inaugural speech Uhuru promised economic transformation by 2030, unity among all Kenyans, free maternal care and that he would serve all Kenyans. This was President Uhuru Kenyatta's sunrise.[4]

His sunrise came with a lot of expectations for he was going to be the first president to be elected after the promulgation and adoption of Constitution of Kenya 2010. Assuming the position also came with various wrongs that he was expected to correct that the past regime committed. By the virtue that he was elected under the Constitution of Kenya 2010 he was expected to guide the nation towards implementation of the Constitution and steer the nation unto a new realm that the country envisioned.

In this article, the author proceeds to assess the two terms of President Uhuru Kenyatta from 2013 to date. The author interrogates the first term of President Uhuru Kenyatta as well as the second term in equal measure, with a view

[2]DW, Uhuru Kenyatta sworn in as Kenyan president (10TH April 2013) Available at https://www.dw.com/en/uhuru-kenyatta-sworn-in-as-kenyan-president/a-16731159 Accessed on 15th June 2022

[3]France 24, Uhuru Kenyatta sworn in as Kenya's president (9th April 2013) Available at https://www.france24.com/en/20130409-kenya-kenyatta-inauguration-president-icc Accessed on 15th June 2022

[4]Hillary Olande, In 2013, President Uhuru used bible Mzee Kenyatta held in 1963 Available at https://www.standardmedia.co.ke/politics/article/2001261453/in-2013-president-uhuru-used-by-mzee-kenyatta-in-1963

of coming up with an informed opinion of the legacy of President Uhuru Kenyatta. 2013 is the sunrise of President Uhuru tenure and 2022 is his sunset. It is worth recording his legacy by the virtue of his office and the place it holds in the Kenyan republic. The author will lay out the success and the failures and then rank the President at the end of the paper.

The first term of President Uhuru Kenyatta's tenure: 2013-2017

When assuming office in 2013 this was the oath that President Uhuru Kenyatta;

> *I, Uhuru Kenyatta, in full realization of the high calling I assume as President of Kenya, do swear/solemnly affirm that I will be faithful and bear true allegiance to the Republic of Kenya; that I will obey, preserve, protect and defend this Constitution of Kenya, as by law established, and all other laws of the Republic; and that I will protect and uphold the sovereignty, integrity and dignity of the people of Kenya. (In the case of an oath- So help me God.*[5]

This paper will reveal that this oath[6] that President Uhuru Kenyatta took to him had no essence for ideally taking an oath involves making a solemn promise before an institutional authority or in a manner that invokes a divine being. It is more than just making a promise to yourself or to another person. A person is expected to comply with any oath they take regarding their future behavior. Oath-taking should be taken seriously. Depending on the nature of the oath, there may be significant penalties for failing to live up to or otherwise violating what was said in the oath.

Chief Justice Emeritus, Dr Willy Mutunga[7] would later remind him that 'Nothing in the oaths says, I will obey and protect only those aspects of the Constitution that I find convenient and self-fulfilling; so, help me God. The oath is comprehensive, total, and unqualified; and its administration is not an exercise in jest, but rather a very solemn commitment to conscience and to country; to self and to the public, in the performance of public duty held in trust for the Kenyan people. If any public officer does not like the powers the Constitution donates to them, or find the exercising of those powers annoyingly inconvenient, they have no business continuing to occupy those offices. Resignation and early voluntary retirement are readily available options that the Constitution merrily provides, in order to protect itself from individuals who may find further fidelity to its edicts a burdensome enterprise'.[8]

Former Chief Justice Willy Mutunga

During campaign period in the run up to the 2013 polls, Jubilee government under the able stewardship of President Uhuru Kenyatta made lofty promises to Kenyans. In 2013 amid pomp Jubilee launched an ambitious manifesto based on three pillars it called Umoja (Unity), Uchumi (Economy) and Uwazi (Openness). The pillars zeroed in on Youth Empowerment; Women's Empowerment Social Protection; National Cohesion; Security; Trade and Foreign Affairs; Sports and Culture; Healthcare and Education.

In the Arts, Sports and Culture front the Jubilee government in their manifesto came up with the following proposals; establish a National Lottery Scheme, boosted by National budget allocations to fund and support professionization of local sporting leagues across the major sporting disciplines; pursue tax incentives for individual and private sector investors in Sports, Arts and Entertainment sectors; provide both the national teams and the domestic leagues with all the support they require while respecting their autonomy; facilitate and encourage the better management of sports. Facilitate the professionalization of sports through introduction of professional coaches in schools; establish youth development centers in all counties that

[5]Third Schedule of the Constitution of Kenya 2010

[6]An oath is a solemn promise about your behavior or your actions. In some cases, you can get into serious trouble for taking an oath and then going back on your word or not living up to your promise. Often, when you take an oath, the promise invokes a divine being. For example, you might swear to God that something is true or swear on the Bible that something is true.

[7]Former Chief Justice of Kenya

[8]Willy Mutunga, Mr President, in the Name of the Constitution, Swear in the Judges (9th June 2021) Available at https://www.theelephant.info/op-eds/2021/06/09/mr-president-in-the-name-of-the-constitution-swear-in-the-judges/ Accessed on 15th June 2022

President Uhuru Kenyatta flags off the 2014 Safari Rally.

will house a fully equipped library, an ICT hub, five sports pitches (football, swimming, basketball, netball volleyball) and a social hall; build five new national sports stadia in Kisumu, Mombasa, Nakuru, Eldoret and Garissa, while upgrading existing sporting facilities at the County level to accommodate swimming, tennis, basketball and rugby; support the Kenya Motorsport Federation to ensure Kenya gets back the Safari Rally in the WRC (World Rally Championships) calendar; Roll out a network of National Academies for young people, each one specializing in a particular sports or branch of creative arts; establish a series of national youth competitions, such as a national youth soccer tournament, so as to identify suitably skilled entrants for the academies; bid to host the 2019 Africa Cup of Nations and the 2019 World Athletics Championships; establish a series of 'creative industry hubs' with full infrastructure facilities such as high-speed internet and design studios as low-cost incubators for new creative industry offshoots and artist. Fund cultural and sporting projects and facilities such as social halls in order to promote indoor sports such as boxing and to provide a place where people can meet and exchange ideas; promote indigenous Kenyan creative and production talent by establishing a Kenya Film School and increasing domestic Kenyan content on our television channels to 60% - half of which should be independently produced.; increase support for the Kenya Film Commission so that it can improve its facilities with a fully equipped National Film and Animation Studios to promote local talent and innovation; promote the performing arts by constructing an ultra-modern National Theatre with audio-visual live-links in Nairobi; consolidate the required licenses for artistes/ musicians to perform around the country on a single license. Tell me how many were achieved?

In terms of education the jubilee coalition promised laptop computers for every class one pupil every year. This promise was bashed as a misplaced priority several times by a number of citizens. Some began planning for the government and asking them to first retrofit the rundown schools and their respective classrooms, so that children can have a better environment for learning such that when these computers arrive, they have desks to place them on[9]. A major blotch on Jubilee's loftiest promise was the failure to provide laptops to all Class One pupils. In the pledge the party had obviously punched above its weight considering the complexities of identifying qualified suppliers, developing specialized software, loading in the curriculum, training teachers and provision of electrical power. But when it comes to the management of national exams, Jubilee takes the biscuit

[9]Raphael Masinde, Evaluating the 2013 Jubilee Promise (7th August 2017) Available at https://mtotonewsblog.wordpress.com/2017/07/08/evaluating-the-2013-jubilee-promise/ Accessed on 15th June 2022

Students at school in primary School

with the Ministry of education having cut exam cheating to negligible levels. Another notable achievement is the connection of almost all the 26,000 public primary schools to electrical power.

That is what President Uhuru Kenyatta regime managed to achieve. However, lets assess the same using the Jubilee Coalition Manifesto. Jubilee Coalition aimed to: increase the number of schools in disadvantaged areas and restrict class sizes to a maximum of 40; increase the student-teacher ratio to 1 teacher for every 40 students; encourage county Governments to boost central Government's funding of the education sector with additional local resources; Work with international partners to provide solar powered lap-top computers equipped with relevant content for every school age child in Kenya; Ensure that learning institutions adequately safeguard the rights of pupils with special needs; Invest heavily in disadvantaged counties by providing textbooks, teaching materials, stationery and teachers; Increase education funding by 1% each year so that by 2018 it reaches 32% of Government spending; Use equalization fund to introduce school feeding programmes in disadvantaged areas.

Provide free milk for every primary school going child which will be sourced from County-based dairy farmer saccos. Raise the transition rate from primary to secondary to 90% while improving transition rates from secondary to tertiary and university levels; Give tax incentives for companies offering apprenticeships to those who complete their secondary education; introduce a national scheme of Government funded scholarships so that the brightest primary school children enjoy free admission to the best secondary schools.

Make it obligatory that state secondary schools take a minimum 50% of their student intake from public primary schools; Increase the number of local secondary school places by encouraging private investment. As an incentive to 'eduprenuers', not tax the first Ksh 10 million of revenue from private secondary schools if they operate the Kenyan national curriculum & provide free bursaries for 20% of their overall intake; Increase the number of boarding schools in pastoralist areas. Expand the number of post-secondary places, the aim being to give fresh secondary school graduates tertiary qualifications. Establish a business bursary scheme and encourage private companies - through tax incentives to contribute to the scheme. Sponsor qualified students through university in return for a 1-year work commitment after graduation. Increase the school leaving age so that all children remain in either education or training until they are 18. Strengthen the Commission for University Education (CUE) and free public universities from statutory status and provide them with independent charters. This will enable CUE to effectively manage the quality of universities, teaching, research and products. Encourage universities to invest in research, technology & innovation. Reverse the current trend of turning middle-level colleges into universities and reinstate them; open a new vocational technical institute in each constituency.

In the health sector, this is what was noted in the Jubilee government manifesto;

> *Our hospital services must be improved, with better pay and conditions for healthcare professionals and a higher standard of care and treatment for patients being central to our health sector reform agenda. Easily preventable illnesses such as malaria, tuberculosis and HIV/AIDS still claim too many lives each year. Only1 in 10 Kenyans have health insurance and our public health facilities are stiffed by inadequate management, insufficient medical supplies and poor procurement procedures. A pitiful 12% of current Government spending on health goes to running services; the balance is eaten up by bureaucracy and corruption. The World Bank's imposed system of co-sharing has led to a bloated and corrupt National Health Insurance Fund. We are paying for a swollen bureaucracy that is not delivering the healthcare that Kenyans deserve. Besides, we cannot afford to waste huge investments in the training of health practitioners, especially, doctors who later leave the country and work abroad. Strategies must be developed to stem the brain drain to ensure the maximum possible utilization of the skills of Kenyan-trained doctors for the benefit of our own citizens.*
>
> *Every Kenyan should have access to high quality healthcare. The Coalition Government's first focus will be on preventive healthcare, as it is less expensive and easier to prevent illness than to cure it. Our preventative health strategy will be based on networks of village level community health workers and midwives, among others. We will roll out universal healthcare through*

local primary healthcare centers. We recognize the urgent and immediate need for more public health officers, provision of access to clean water, and protection of the environment to create a disease-free environment. The Coalition also aims to make Kenya an international medical hub with an increase in medical tourism by adopting the successful Indian mode[10].

The coalition government will; Achieve free primary healthcare for all Kenyans, starting with women, expectant and breast-feeding mothers and persons with disabilities by increasing health financing from 6% -15%. Increase the number of physical facilities at community level and increasing mobile health clinics services. Reform the NHIF to uproot corruption and bureaucracy, and to ensure accountability and efficiency, by transforming it into an independent outfit run by contributors with a board including Government, businesses and elected contributor representatives. Guarantee that every family has access to a fully equipped health center within 5 miles of their home, with a national network of local community health workers promoting preventive health based at the centers. Upgrade and equip previous provincial hospitals to referral hospitals, supported by a network of County referral facilities and community level public health centers. Encourage private sector investment in healthcare. Establish fully-fledged low-cost diagnostic centers and provide adequate screening and treatment facilities for persons with chronic or terminal conditions, including cancer, diabetes, and kidney failure, in every county.

Ensure improved pay packages for doctors and other health practitioners. Distribute free mosquito nets to all families who need them. Promoting better nutrition by encouraging exclusive breast-feeding, eating traditional foodstuffs and cultivation of kitchen gardens. Promote medical research, including indigenous medicine. Promote e-Health as a strategy to reach remote and marginalized areas with health services.

President Uhuru Kenyatta tried his level best in making sure that the various hospitals got the required equipment. In 2013, there were only 44 dialysis machines in public health institutions – including at the Kenyatta National Hospital and Eldoret Referral Hospital. By 2017 the figure was over 300. Ultrasound machines have increased tenfold to 100 from 10 in 2013 when Jubilee came into power. One of Jubilee's most touted achievements is the doubling of the number of mothers' access to affordable maternal healthcare to 1.2 million from up from 600,000 in 2013. It will be imperative to note that President Uhuru Kenyatta first regime ushered in devolution. Courtesy of national government delaying in disbursing funds to the counties, it led to doctors, nurses and clinical officers striking to the detriment of the masses who depend on them. This contradicts the provision of Article 43 of the Constitution in which the government has the responsibility to provide medical care to its citizens.

Regarding building an enterprise economy the coalition came up with some noble proposals such as to: Promote the creation of a Single East African Market (SEAM),

[10]Jubilee Coalition Manifesto

totally phasing out tariffs and barriers among East African Community member countries and moving towards the creation of a single regional currency; Target a 7-10 per cent growth rate in the first two years of the Jubilee Government in order to create 1 million new jobs for our youth. Cut waste and fight corruption so that public resources are spent wisely and properly. Reduce the public deficit so that the Government spends more money on services instead of paying off Kenya's debts. Keeping the exchange rate stable and control the flow of money into the economy in order to lower interest rates and keep inflation in check.

Expanding the economy and promoting industries so that jobs and business opportunities are created. We will transform the Youth Enterprise Development Fund and Kenya Industrial Estates into a new national enterprise agency – Bashara Kenya. This agency will catalyze further economic growth. Retaining a youth focus by placing representatives from the National Youth Sector Alliance on the new agency's board. Giving tax breaks/holidays to our young people to encourage them to initiate start-up businesses. To sustain this, the Coalition Government will introduce a policy of purchasing locally manufactured goods and services. Making the Public Procurement regime open, transparent and corruption-free in order to ensure that all deserving young entrepreneurs have the opportunity to secure Government tenders. Developing special Industrial Parks and clusters in the counties that will target young people and women who start small businesses and providing access to electricity, water, capital equipment and clean sanitary environments and improved access roads. This will boost growth at the county level and help to stem rural-urban migration, itself a significant strain on Kenya's major towns. Create a National Trust Fund from a significant portion of proceeds from Government sale of its shares and assets of parastatals. The fund will be appropriated in the name of every citizen in the nature of pension funds, CDS accounts, and other Social Security Funds. With immediate effect, activating the 30% procurement rule in Government procurement policy. In specific projects like water harvesting and renewable energy, women entrepreneurs will be given priority. We will also review the Women's Enterprise Fund to assist women entrepreneurs seeking large contracts and business. Equipping investment parks with major capital items required in operating small businesses such as motor mechanics, plumbing, artisans, leather and wood works, carpentry and similar trades. We will, for instance, provide tools for technicians and ICT-based enterprises. Providing training services and creating market for locally produced goods and services internally, regionally and internationally. We will promote brand-names of locally manufactured products to boost incomes for promising artisans. More specifically, we will create markets for Jua Kali products, male and female body care products, coffee houses and milk-bars. Building on the Economic Stimulus Program (ESP) by establishing local economic development agencies at a county level so that every county and constituency will have access to crucial facilities and services. Introducing

Kamariny Stadium

tax breaks for companies that establish apprenticeship programmes for young people equipping young people with necessary skills and technology, Encouraging the development of micro-financing schemes for new businesses and farmers along the lines of the renowned and successful Grameen Bank model.

On matters sports it is on record that Deputy President Doctor William Ruto stated that the Jubilee regime was to build stadiums. One of the most quoted stadiums they were to build was Kamariny Stadium which up to date it hasn't been completed yet Kenyans were promised that the stadium was to be complete in six months in 2013. Oh my! that is a dirt on President Uhuru Kenyatta administration. Moreover, in the first tenure of President Uhuru Kenyatta there was Rio Scandal. Several officials were implicated in the Sh88 million corruption scandal that rocked team Kenya in Brazil. Kenyan athletes who went to Brazil in the competition faced hard times in Rio, yet the officials embezzled and misappropriated funds that were meant to ensure that the welfare of the athletes is guaranteed. Luckily, last year the officials were found guilty were either fined or sent to the prison.

Perhaps the most tangible legacy of President Uhuru Kenyatta has to do with the infrastructural developments that were witnessed in his first term of office. During his first term he implemented the Standard Gauge Railway which was a brainchild of the Grand Coalition government. The Mombasa-Nairobi Standard Gauge Railway (SGR) is a 480 km-long line that connects the port city of Mombasa with the capital city of Nairobi, replacing the colonial meter gauge railway. Construction began in 2013, and the initial segment was completed in 2017 at a cost of approximately USD$3.8 billion. An additional USD$1.5 billion extension to the tourist hub of Naivasha was completed in 2019. While the railway operates passenger services, its primary raison d'être was to improve freight transportation to and from the Port

of Mombasa. It was planned as the first step toward an East African regional SGR network, reaching the Ugandan border, its capital city of Kampala, and Rwanda's capital of Kigali—with branches extending to South Sudan's capital of Juba.

The SGR has had some important successes. Trains run faster than the former railway or road traffic, and its passenger services are popular. The amount of freight carried by the SGR has risen significantly since commercial operations began, and it has helped to decongest port operations, speed freight transportation, and enhance cargo security. The Kenyatta administration considered the SGR to be a "vital component for the realization of the Kenya Vision 2030" development agenda.

However, the project was also controversial, given concerns about its cost and cost-effectiveness. The Export-Import Bank of China provided loans worth USD$3.2 billion for the construction of the initial section—enormously increasing Kenya's debt to China. Planners assumed that the SGR would generate enough revenue to cover operating costs and loan repayments, but this has not been the case. While revenues are up, the system is still running at a loss. The Kenyan government has struggled to get businesses to use the line. The cost of moving freight on the SGR is higher than the equivalent journey by truck, mostly because of last-mile costs. The SGR is primarily used for imports, meaning trains return to Mombasa largely empty. A promised uptick in Kenya's GDP growth has not materialized, and there are serious questions about whether the railroad has the physical capacity to pay for itself. There is also controversy in Kenya about the transparency of the loan agreement and contracting process. Since the Ex-Im Bank of China made its loan conditional on the selection of a Chinese contractor for construction and operation, the project was never put through a public tender—something the Kenyan Court of Appeals has ruled illegal. There is also controversy over the displacement of people during the railway's construction[11].

As well it has been revealed that although the Standard Gauge railway was envisioned to place Kenya on a higher pedestal it has negative effects especially on the citizens in the coast. It has been evident that the government has used mechanisms to ensure that the goods from the port are transported via SGR. This has led to unemployment at the coast for those working in the freight and transportation companies have been rendered jobless by the government move. Muslim for Human Rights Chairperson Khelef Khalifa revealed this on his social media to be specific Facebook. SGR was as well perceived that it will be profitable unfortunately that hasn't been the true fact on the ground. The SGR currently is making massive losses unfortunately. Jimmy Wanjigi[12] also revealed that the project was inflated for the original plan was to take less than 100 billion and would run from Mombasa to Malaba in Western region of Kenya[13]. According to Wanjigi[14] the project was

[11]Available at https://africaupclose.wilsoncenter.org/kenyas-standard-gauge-railway-the-promise-and-risks-of-rail-megaprojects/ Accessed on 16th June 2022
[12]Ian Omondi, Jimi Wanjigi Reveals How SGR Initial Cost Was Ksh.55B, But Ended Up At Over Ksh.300B (30th August 2021) Retrieved from https://www.citizen.digital/news/jimi-wanjigi-reveals-how-sgr-initial-cost-was-ksh-55b-but-ended-up-at-over-ksh-300b-13098222/ Accessed on 16th June 2022
See also, John Wanjohi, Jimmy Wanjigi Says Jubilee Gov't Inflated SGR Cost from Sh55 Billion to over Sh300 Billion (30th August 2021) Available at https://www.mwakilishi.com/article/kenya-news/2021-08-30/jimmy-wanjigi-says-jubilee-govt-inflated-sgr-cost-from-sh55-billion Accessed on 16th June 2022

inflated ten times and thus there was much of corruption that took place therein. The government to date as well has not divulged the contract that led to Chinese building SGR. The President sometime said that the content of the same will be revealed unfortunately to date that has not seen the light of day.

Following the lessons learnt from the SGR Project this is what Ian Gorecki[15] had to note:

> *Transportation infrastructure is critical for Africa's economic development. However, history has shown that megaprojects are incredibly complex and risky affairs. Since many other African countries are either currently investing or planning to invest in major rail projects—including Tanzania, Ethiopia, Nigeria, Zambia, Senegal, Morocco, and South Africa—it may be helpful to assess some policy considerations drawn from the SGR.*
>
> *Be wary of common megaproject obstacles. A report by McKinsey cites three main causes of megaproject failure: over-optimism and over-complexity; poor execution; and weakness in organizational design and capabilities. The first is possibly the most significant for the SGR. Designers and politicians were over-optimistic about the speed at which the project would boost Kenya's economy and the extent to which freight revenues would pay for the project. Most infrastructure projects end up going over budget and under-delivering. The McKinsey report notes that, on average, rail projects go over budget by 44.7 percent, and over-estimate demand by 51.4 percent. Political leaders should be skeptical of any rail megaproject that is promised to "pay for itself" in the short term and should have a back-up financing plan.*
>
> *Link up to existing networks. Rail infrastructure needs to be part of an integrated transportation system to be effective. The SGR is disconnected from the existing rail network, and its terminals and depots are often remote from city centers. While the East African SGR system—once fully completed—would provide needed connectivity, the project is being constructed piecemeal, without a clear funding plan to complete the link to Uganda. This poses a risk to its long-term viability. The importance of this interconnectivity is seen in policymakers' revised plans to link the SGR system to refurbished meter gauge railways.*
>
> *Be transparent. A lack of transparency has increased political tensions and prevented the Kenyan government from ensuring it was getting the best possible deal. A public investment on this scale should engage all stakeholders. Outside voices and independent analysis—including from local think tanks—should be engaged to assess risk and economic viability and ensure the country is getting a good return on its investment.*
>
> *Carefully balance needs and resources. While infrastructure is critical for development, governments should still carefully assess any investment to ensure maximum benefit for minimal cost—especially for megaprojects. It should be noted that earlier analysis by the World Bank found that a major refurbishment of the existing meter gauge railway network in the East African Community could have provided most of the benefits of the new SGR, at a fraction of the cost.*[16]

Jimmy Wanjigi

Corruption was the hallmark of President Uhuru first term. Siphoning of public coffers was rampant and it did even involve the Cabinet Secretaries and Senior Public Officials in the government. Uhuru's first term in office was tainted by the Ksh.791million scandal at the National Youth Service (NYS). At the time, the Devolution Ministry was headed by the then Cabinet Secretary Anne Waiguru, PS Peter Mangiti and Director General Nelson Githinji. In an attempt to demonstrate his resolve in fighting corruption, President Kenyatta presented a list of 375 suspects to Parliament and ordered that they step aside. However, after dramatic raids at their residences and a series of appearances at Integrity

[13]Peter Mburu, Kenya: SGR Cost Inflated 10 Times, Says Jimi Wanjigi (31st August 2021) Available at https://allafrica.com/stories/202108310511.html Accessed on 16th June 2022

[14]Jackson Otukho, William Ruto Dismisses Jimmy Wanjigi's Claims SGR Costs Were Inflated: "We Rejected His Designs" Available at https://www.msn.com/en-xl/africa/kenya/william-ruto-dismisses-jimmy-wanjigis-claims-sgr-costs-were-inflated-we-rejected-his-designs/ar-AAPE5Wx Accessed on 16th June 2022

[15]Ian Gorecki, Kenya's Standard Gauge Railway: The Promise and Risks of Rail Megaprojects (24th September 2020) Retrieved from https://africaupclose.wilsoncenter.org/kenyas-standard-gauge-railway-the-promise-and-risks-of-rail-megaprojects/

[16]Ibid

Nandi Hills MP Alfred Keter

Centre and before National Assembly committees, the country 'moved on'. I am aware some cases on this issue are still pending in court. However, that doesn't mean that the President Uhuru first term will be viewed in another lense. This is just one of the many cases of mega graft that President Uhuru Kenyatta administration made possible.

There was also National Cereals and Produce Board 1.9 billion scam. The Ksh1.9 Billion scam was brought to the limelight when NCPB MD Newton Terer resigned, five senior managers were suspended and 59 members of staff put under investigation. A well-connected cabal of traders, some of whom are not registered as farmers, were accused of supplying large quantities of cheap, imported maize at the expense of Kenyan farmers who were turned away at depots. The scandal did spark a furor with lawmakers such as Nandi Hills MP Alfred Keter alleging that the executive had installed puppets in parliamentary committees to hinder investigations into the case[17].

Youth Enterprise Development Fund was another center of corruption. Seven officials of YEDF were suspended after an internal audit flagged suspicious payments of more than Ksh10 Million to four youth groups. The Directorate of Criminal Investigations (DCI) launched investigations into the case unfortunately no arrest on the same issue was effected. It reveals a deep syndicate that involved those who have power. The Youth Fund had previously faced major corruption scandals including in 2016 when then Chief Executive Bruce Odhiambo was at the center of a Sh180 Million scam[18].

Jubilee government came up with a noble project of making the ten percent tree cover a reality. However, an ambitious national tree-planting program targeting primary schools turned into a Sh2 Billion cash cow. Launched by President Kenyatta, pupils were supposed to receive conservation training, nurseries were to be introduced in schools and 10 percent of all primary school land was to be converted to forest land. Environment CS Keriako Tobiko revealed that he had forwarded a report on the same including the suspects' names to the Ethics and Anti-Corruption Commission (EACC).

A Sh647 million scandal at KPC saw the homes of several Kenya Pipeline Company officials raided. They were allegedly involved in the flawed procurement of aircraft fueling gadgets. The then EACC chief executive Halakhe Waqo stated that the file would be forwarded to the DPP once investigations were complete. So far nobody knows the progress of the said cases if at all the DPP filed the cases in court.

Nairobi based political commentator, Tee Ngugi[19] had this to say regarding corruption in the first term of President Uhuru Kenyatta;

> *Oh dear! When will this nightmare of epic-scale theft end? This exasperation is at the revelation that four Cabinet secretaries are linked to the theft of billions of shillings. Just how deeply entrenched in the state is corruption? President Uhuru Kenyatta in recent times has come across as being totally determined to eradicate corruption in his second term. In his first term, he himself acknowledged that corruption existed everywhere and particularly in the Office of the President. But he was reduced to wringing his hands, because moving against corruption then would have occasioned a major political fallout that would have jeopardized his re-election.*
>
> *No one is more knowledgeable about corruption kingpins' ability to hold a leader to ransom than Rwandan President Paul Kagame. In an interview I had with him some two years ago, he recalled being asked by a journalist if he risked losing critical political support because of his uncompromising stance against corruption. He conceded that could happen, but he told the journalist that he had decided that it would have*

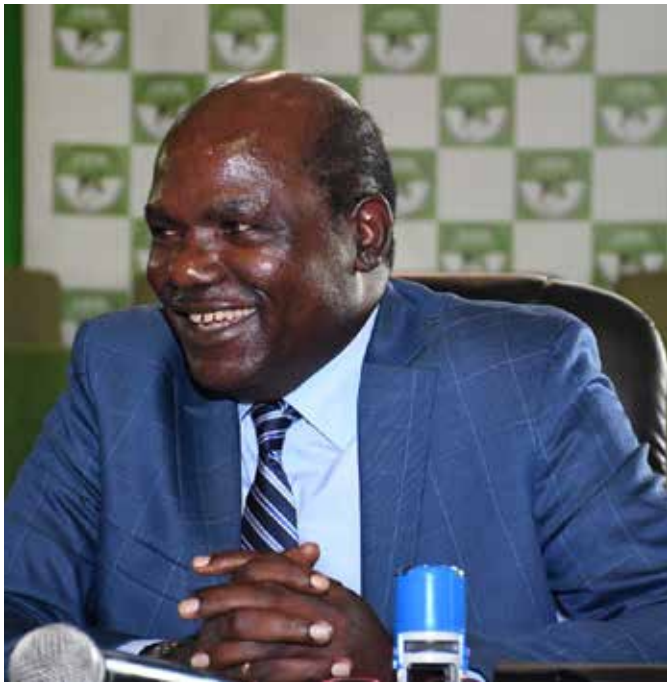
[17]Martin Siele, Corruption Scandals That Have Rocked President Uhuru's Government in 2018 (28th March 2018) Available at https://www.kenyans.co.ke/news/29804-5-corruption-scandals-have-rocked-president-uhurus-government-2018 Accessed on 16th June 2022
[18]Ibid
[19]Tee Ngugi, Retrieved from https://www.theeastafrican.co.ke/tea/oped/comment/everything-is-rotten-in-the-state-of-kenya-uhuru-must-move-to-sack-the-whole-govt-1413456 Accessed on 16th June 2022

been totally pointless to have fought so hard to just come and do exactly what previous governments had done. His government, he had vowed to himself, would mark a complete paradigm shift in governance philosophy and practice no matter the consequences. The culture of corruption, he said in the interview, is nurtured, facilitated and maintained by those at the top. At the top, therefore, is where the fight should start.

Our experience with corruption since Independence bears out Kagame's observations. It would have been impossible to execute a Goldenberg or Anglo-Leasing type of scam without the abetting and facilitation of officials at the highest levels of government. Despite robust denials, the NYS 1 and 2 scams too would have been impossible to carry out without the participation, or facilitation – actively or by pretending to look the other way – of the most senior officials.

An editorial in Daily Nation hinted that action against the four Cabinet secretaries was slow or non-existent because of the risk of a political fallout. Uhuru himself has said in the past that he knows that his stance against corruption will cost him many friends, but that he was willing to pay that price. Will he follow Kagame's lead and refuse to give into this apparent blackmail? Those of us who rush to support our tribesmen when they are caught stealing, having accepted the cynical and self-serving narrative that "our tribe is being finished," perhaps do not realize just how grave a danger corruption at its current levels poses to our viability as a nation-state. It costs Kenya upwards of a trillion shillings to service its public debt. Of the trillion or so left, a huge amount goes into maintaining the fabulous lifestyles of our MPs and other state officials. Another huge fraction is stolen, leaving a small amount for development.

Now this latest revelation that four Cabinet secretaries (this is the number that is known; there could well be more) are linked to massive theft answers the question we posed at the beginning: How deeply entrenched in the state is corruption? The answer, proved beyond doubt by this revelation, is: The whole state is rotten. Accordingly, there is only one logical and moral option for Uhuru Kenyatta: Disband the whole government and reconstitute it anew! Not by bringing back old farts or recycling this discredited bunch, but by bringing in new blood using stringent criteria of integrity, performance record, ability to work beyond the call of duty to transform lives, etc. Kenya is so far behind countries it was at par with at Independence; we have to run many times faster if we are ever to catch up. That requires a paradigm shift in the way we do business.



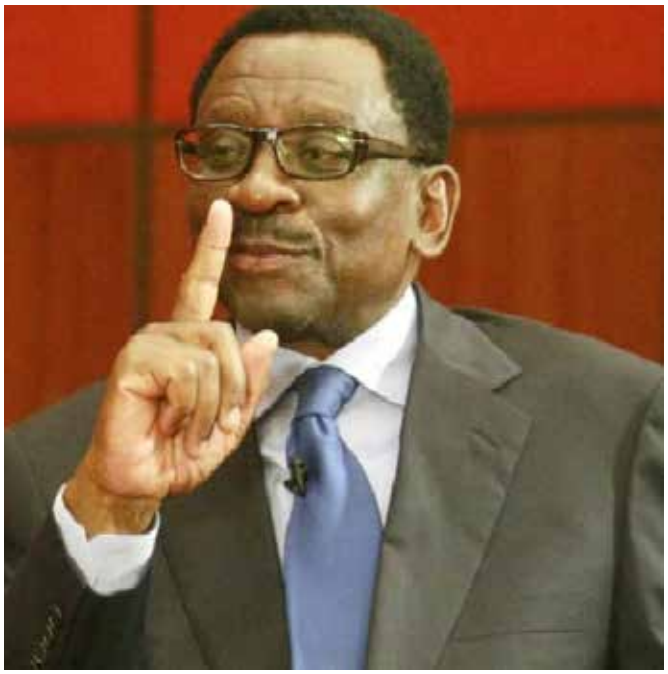
Independent Electoral and Boundaries Commission Chairperson Wafula Chebukati

The corruption in Kenya seems to be deeply institutionalized especially in the public sector space. In 2021 President Uhuru Kenyatta revealed that over 2 billion was lost by the government daily courtesy of corruption. That just shows how corruption is deeply rooted and how despite having a criminal justice system the culprits aren't brought to book. The first term of President Uhuru Kenyatta has nothing worth taking into account. If I am to grade him a perfect C- score is what he deserves for his first term. He made Kenyans believe in his lofty promises contained in Jubilee manifesto but he ended up disappointing those who expected the same promises. I therefore proceed to the second term of President Uhuru Kenyatta. The second term of President Uhuru revealed how he still operated under the old constitutional dispensation despite him knowing the edicts of new Constitution. What a malady? I seek to illustrate that boldly.

Second term of President Uhuru Kenyatta's tenure: 2017-2022

Just as it is encoded in the Constitution of Kenya, on 8th August 2017 Kenyans participated in the general elections and Independent Electoral and Boundaries Commission Chairperson Wafula Chebukati declared him as the winner of the presidential polls.[20] According to official figures released by the electoral commission on Friday, President Uhuru Kenyatta secured 54.27 percent of the ballots cast, while his rival, Raila Odinga, won 44.74 percent. Shortly before the results were announced, opposition members

[20]Hamza Mohammed, Uhuru Kenyatta wins Kenya presidential election, Available at https://www.aljazeera.com/news/2017/8/11/uhuru-kenyatta-wins-kenya-presidential-election Accessed on 16th June 2022



Senior Counsel James Orengo

said they would reject it. "We are not going to be party to it. Our issues have not been addressed. One can conclude they [electoral commission] are not keen on taking our concerns seriously," Musalia Mudavadi. Senior Counsel James Orengo, called the election process a "charade" and a "disaster".[21]

Mr Odinga, who was making his fourth bid for Kenya's presidency, declared "an attack on democracy", adding that his party's internal results were "completely different" to the official tally. Right Honorable Raila Odinga who was President Uhuru main rival rejected the results by the Independent Electoral and Boundaries Commission. He claimed the country's electronic voting system had been hacked and the results were doctored. As Kenyatta's supporters celebrated his victory in Nairobi, Odinga's supporters clashed with police, setting objects on fire to protest the results. Shots were also fired in the capital[22]. Abdi Latif observes that; 'After Kenyatta was declared the winner on Friday (Aug. 11), protests engulfed opposition strongholds in Nairobi and Kisumu in western Kenya. At least 28 people were shot dead and dozens more wounded, according to human rights observers, including a 10-year-old girl who was killed in Mathare slum in Nairobi while she was on the balcony of her parents' home.'[23]

Following the opposition disputing the results definitely they had a recourse and that was to proceed to the Supreme Court. This was similar to a move that Raila made in 2013 in which the Supreme Court delivered a judgement in favor of President Uhuru Kenyatta and the Independent Electoral and Boundaries Commission. The opposition then never took it lightly even though they just had to adhere to that decision. In 2017 Raila called on the Supreme Court to redeem itself and deliver justice to the millions of Kenyans who decided to cast their votes in the general elections.

Kenya's supreme court declared that Uhuru Kenyatta's victory in the presidential election was invalid and ordered a new vote to be held within 60 days last month invalid and ordered a new vote to be held within 60 days. The six-judge bench ruled 4-2 in favor of a petition filed by Odinga, who claimed the electronic voting results were hacked and manipulated in favor of the incumbent. The judges said: "[The election commission] failed, neglected or refused to conduct the presidential election in a manner consistent with the dictates of the constitution." They did not place blame on Kenyatta or his party. Kenyatta said he regretted that "six people have decided they will go against the will of the people" but he would not dispute the judgment. "The court has made its decision. We respect it. We don't agree with it. And again, I say peace … peace, peace, peace. That is the nature of democracy." The judgment prompted scenes of jubilation among opposition supporters across Nairobi, the Kenyan capital. In the narrow streets of Kibera, an overcrowded shantytown that has long been a stronghold of Odinga and his National Super Alliance (Nasa) coalition, crowds of people blew whistles, shouted, wept and sang.

Even though President Uhuru Kenyatta said that he was willing to abide by the decision of the Supreme Court, he said some words which many years later became much evident. He said that I will respect this decision but we will revisit.[24] President Uhuru was elected in the repeat polls after Right honorable Raila Odinga decided not to take part in the race alleging that the issues that the court raised were not dealt with by the Independent Electoral and Boundaries Commission[25]. It will go on record that during that period the opposition supporters were killed, shot, beat and amputated courtesy of the police using force on them. Scores of Kenyans especially from opposition strongholds met their makers without them planning.

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[21]Ibid

[22]David Pilling and John Aglionby, Kenya opposition leader Raila Odinga claims election fraud (9th August 2017) Available at https://www.ft.com/content/2f795986-7cda-11e7-ab01-a13271d1ee9c Accessed on 15th June 2017)

[23]Abdi Latif, Kenya's opposition is heading to court to contest the election's result. Available at https://qz.com/africa/1053878/election-in-kenya-2017-raila-odinga-heads-to-supreme-court-to-contest-the-election-results/#:~:text=Kenya%E2%80%99s%20opposition%20is%20heading%20to%20court%20to%20contest%20the%20election%E2%80%99s%20result

[24]Available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjx_fiQ_rH4AhXQyaQKHYtuBykQwqsBegQIBRAB&url=https%3A%2F%2Fwww.youtube.com%2Fwatch%3Fv%3DokMAP5S0rfM&usg=AOvVaw1AOhrpGlsriZUaHyqRJ6cU Accessed on 16th June 2022

[25]Sara Okuoro, President Uhuru Kenyatta sworn-in for second term in office (28th November 2017) Available at https://www.standardmedia.co.ke/politics/article/2001261546/president-uhuru-kenyatta-sworn-in-for-second-term-in-office Accessed on 16th June 2022

Big four agenda

President Kenyatta assumed office for his second and last term on 28th November 2017. President Kenyatta cited provision of quality healthcare services, decent housing, job creation and boosting agriculture as some of the key planks of his agenda. The aforementioned issues were to be his key agenda for his second and last term in office. The four issues were christened big four agenda. This paper briefly gives a cursory look at the Big Four agenda as per the speech by President Uhuru Kenyatta.

On Universal Health Coverage, the aim is to increase the current Universal Health Coverage (UHC) from 36% to 100.0% by 2022 through scaling up NHIF uptake, increased budgetary allocation to health and adoption of low-cost service delivery models. This agenda conforms to the third goal of SDG; Good health and well-being - ensure health and well-being for all, at every stage of life. The health sector is facing critical challenges which may hinder achievement of UHC targets. These include; contentious policy changes by NHIF e.g. requiring new members to wait for three months before accessing scheme benefits, low staffing numbers, capacity gaps, actual availability and ease of access to health facilities as well as lack of essential medical products and equipment. Management of health facilities in counties is seemingly facing teething problems. Further, the cost of the roll-out has been slowed down by a poor performing economy. The success of the UHC will require significant governance reforms and close strategic collaboration between the national and county levels of governments. It is dependent on improvement of health facilities in the counties and employment of more health workers.

Manufacturing sector plays a vital role in sustaining economic growth and development, job creation and poverty alleviation. Infrastructure development e.g., roads, electricity supply, etc. is also boosted to support the sector. Kenya, like many other developing countries, has not managed to develop a robust manufacturing sector and growth has been primarily driven by the agriculture and services sectors respectively The aim is to grow the contribution of manufacturing to GDP from 9.2% in 2016 to 15% by 2022 through establishment of industrial parks, Special Economic Zones and implementation of policies to boost processing of textiles, leather, oil, gas, construction material, foods, fish, iron and steel. This agenda conforms to the ninth goal of SDG; Industry, Innovation and Infrastructure - Build Resilient Infrastructure, Promote Inclusive and Sustainable Industrialization and Foster Innovation.

Affordable housing implies the development of adequate, standardized and well-spaced houses with continuous supply of clean water and electricity. The houses are to be located in decent places and be readily available to both the lower, middle and upper class in the society. Article 43 of chapter four of the constitution clearly states that every person has a right to accessible and adequate housing and to reasonable standards of sanitation. The aim is to provide at least 500,000 affordable new houses by 2022, thereby improving the living conditions for Kenyans. This agenda conforms to the third goal of SDG; Sustainable cities and communities – Make Cities and Human Settlements Inclusive, Safe, Resilient and Sustainable.

Access to affordable, quality housing brings many benefits. In addition to the improved structure itself, there is the benefit of financial security—in many cases the new homeowner now has an asset that is far more secure and valuable than any asset they have ever owned. There are also proven health benefits of this new home. Disease thrives in the unsanitary, crowded conditions of slums and tenement housing.

There is 22% of Kenyans living in cities, and the urban population is growing at a rate of 4.2% every year. Nairobi alone requires at least 120,000 new housing units annually to meet demand, yet only 35,000 homes

are built. This mismatched supply and demand has caused housing prices to increase by 100% since 2004. This pushes lower income residents out of the formal housing market and into the slums. About 60% of urban residents live in slums.

Food security is "a situation in which all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food which meets their dietary needs and food preferences for an active and healthy life" (Kenya Food Security Steering Group, 2008). The agricultural sector contributes approximately 30% of the country's GDP annually. The government plan was to achieve 100% food security through expansion of food production and supply, reduction of food prices to ensure affordability and support value addition in the food processing value chain. This agenda conforms to the second goal of SDG; Zero Hunger - End Hunger, Achieve Food Security and Improved Nutrition and Promote Sustainable Agriculture.'

The big four agenda was of major importance to President Uhuru Kenyatta as he aimed to leave an indelible ink on Kenyans. This was going to be his legacy. I proceed to check the progress of the same. In less than two months President Uhuru Kenyatta will be out of office and thus it is notable to check how he faired in implementing his agenda. Unfortunately, I will be candid enough to look the issues candidly without any fear or favor. I will just be objective in my analysis.

When President Uhuru Kenyatta told Kenyans of his legacy project it was envisioned that once the same is completed it will good news to the country at large. However, Kenyans did not know what was in store for them unfortunately. It seems just like the Jubilee Manifesto was good on paper, the same is the case with the Big Four Agenda unfortunately. I do agree the proposals in the Big Four Agenda were rather ambiguous and far-fetched. With the borrowing spree that Jubilee government has been on, Big Four Agenda was expected to fail. Covid 19 revealed that the health sector is in crisis. Interestingly, even the funds given by donors were embezzled in the famous KEMSA saga.

President Kenyatta as well revealed that the Big Four projects won't be realized yet this was his key agenda for his last term. On food security, Kenyatta cited the implementation of the Agricultural Sector Transformation and Growth Strategy, which he said is underway. He further cited reforms in the agricultural inputs' subsidy programme. Farmers still face challenges in finding market for their produce, especially maize farmers, and that continues to hinder food security. On the manufacturing sector, Kenyatta said his administration is focused on trainings that match the needs of the industry. He cited the enrollment of 430,598 students in 182 technical and vocational training colleges, saying the objective was to shift the focus of young people from being 'earners of wages' to 'owners of capital'. Despite this, companies have continued to close down, some due to bad business environment and unfavorable tax regimes.[26]

Admitting that his administration could not deliver on the Big Four agenda, this is what he had to say regarding the same, 'Even as we mooted the four intentions, we recognized then, as we still recognize now, they would not be completed in a single term of office.'[27] Oh, my somebody to just wake

[26]Moses Nyamori, Uhuru admits Big 4 Agenda will not be realised in his term (15th November 2020) Available at https://www.standardmedia.co.ke/politics/article/2001393959/uhuru-climbs-down-on-ambitious-big-four Accessed on 17th June 2022
[27]Ibid

me up from my sleep. The President categorically noted that he will deliver the big four agenda in 2017. Towards the end of his term in office he comes up with a new song after having not delivered on what he promised over forty million Kenyans.

By 2021 June, under the housing agenda, a target to provide 500,000 affordable and decent housing for all Kenyans by 2022 fell short of expectations. Only 1,370 housing units along the city's Park Road project had been achieved under this programme. This represents an achievement rate of 0.3 per cent.[28] No miracle can make that percentage 50% in less than a year. That is just a failed project by all costs. Unto the Kenyans who expected the same to be delivered on behalf of the government I do tell you learn to manage your expectations of Kenyans politicians. They will embarrass you. By 2019 a study revealed that an array of Kenyans were very skeptical whether the Big Four Agenda will be achieved, it seems they were right.[29] I hope with that nobody needs any other evidence.

Uhuru's relations with Parliament

Uhuru Kenyatta definitely made Parliament a subbranch of the Executive by all means. It is through Parliament that the Executive managed to get a myriad of bad bills passed into law. Some of the bad laws include; the increase of Kenya's debt ceiling, increase in the value of commodities, increase in taxes name it. In short Parliament was nothing but an appendage of the Executive, by the virtue that President Uhuru Kenyatta party had a large number of representatives in both the National Assembly and Senate; he did take advantage of the same to ensure that all government bills were passed. A good chunk of the bills which came into law that I have highlighted had negative ramifications to the ordinary mwananchi. Regardless, it is well we will remember Uhuru Kenyatta for the high cost of living.

The Constitution did envision Separation of Powers and checks and balances. Although not expressly written in the Constitution, it can be derived by inference. The term "Separation of Powers" was coined by the 18th century philosopher Montesquieu. Separation of powers is a model that divides the government into separate branches, each of which has separate and independent powers. By having multiple branches of government, this system helps to ensure that no one branch is more powerful than another. Typically, this system divides the government into three branches: the Legislative Branch, the Executive Branch, and the Judicial Branch. Uhuru seems to be bent towards

Kenya Human Rights Commission Executive Director George Kegoro

contravening the Constitution regarding the operations of the Legislature.

Economy under Uhuru's second tenure

Overtime records from the Kenya National Bureau of Statistics have been to the effect that the economy of Kenya is progressing relatively well. Once such reports are exposed to Kenyans many do wonder whether they live in Kenya or in another country. For ideally if the economy is progressing on well the same should be felt by the citizens, unfortunately that isn't the case. A report by World Bank revealed that more than forty percent of Kenyans live in extreme poverty. This report was done in 2021 regardless it remains an authoritative source that inference can be made to. The level of poverty was approximately 10 times higher than in Pakistan and Egypt which are also categorized as lower-middle income economies.[30] Pundits argue that Uhuru government led more Kenyans in poverty as compared to the late President His Excellency Emilio Mwai Kibaki.

Militarization of government

The then Kenya Human Rights Commission Executive Director George Kegoro raised an alarm regarding militarization of government. This is what he had to say:

> *"What is happening in Nairobi is not innocent. Uhuru has killed the idea of a political state, and has replaced this with a military state. Starting with Nairobi, Uhuru is building towards establishing a military state over the*

[28]Susan Nyawira, Big Four agenda not achievable by end of Uhuru tenure — MPs, Available at https://www.the-star.co.ke/business/kenya/2021-06-10-big-four-agenda-not-achievable-by-end-of-uhuru-tenure--mps/ Accessed on 17th June 2021

[29]Jacob Onyango, 77% of Kenyans think Uhuru will not deliver Big Four because of corruption, new poll shows, Available at https://www.tuko.co.ke/305988-77-kenyans-uhuru-deliver-big-four-agenda-corruption-poll-shows.html Accessed on 17th June 2022

[30]Susan Nyawira, Forty per cent of Kenyans live in extreme poverty - World Bank (26th January 2021) Available at https://www.the-star.co.ke/business/kenya/2021-01-26-forty-per-cent-of-kenyans-live-in-extreme-poverty-world-bank/ Accessed on 17th June 2022

Former LSK President Nelson Andayi Havi

> *entire country as an act of self-succession what he now refers to a constitutional-change moment is design to provide a constitutional anchorage to the militarized state that he has already created'.*[31]

Kegoro wasn't alone, 49th Law Society of Kenya President Nelson Andayi Havi added his voice in this manner;

> *The militarization of civilian functions and duties of Government and Government agencies is a manifestation of bad governance. It is not an answer that civilian appointees to Government agencies have failed to deliver, are corrupt or incompetent. The solution lies in merit-based appointments and effective Parliamentary oversight of the Executive.*[32]

Section 8 of the Kenya Defence Forces Act[33] enumerates the functions of the military at large. The Act states that:

> *(1) Pursuant to Article 241(3) of the Constitution, the Defence Forces—*
> *(a) shall be responsible for the defence and protection of the sovereignty and territorial integrity of the Republic;*
> *(b) shall assist and co-operate with other authorities in situations of emergency or disaster and report to the National Assembly whenever deployed in such circumstances; and*
> *(c) may be deployed to restore peace in any part of Kenya affected by unrest or instability only with the approval of the National Assembly*[34].

This said article doesn't state that the military should be involved in running of the government. The military do have their province which is enshrined in law. That's their place and they shouldn't get into civilian duties. Whenever the military gets into civilian issues it is a recipe for anarchy. Unfortunately, President Kenyatta and General Kibochi decided to trample on the law by all costs. If one wants to know the effect of militarization of government kindly make google your friend and assess countries in west Africa where coups have been prevalent. As well President Kenyatta decided in his own wisdom or lack of it to militarize Kenya Meat Commission. To some extent the military revitalized the commission but that does not take away the fact that court gave orders to the effect that, the move to militarize Kenya Meat Commission was illegal.[35]

Devolution

The Constitution passed in 2010 provided for the devolved governance, with the main purpose being making government services locally available to the people. It also aimed at cutting at bringing accountability to power by limiting the centralized power of government. [36]Article 174 of the Kenyan Constitution stipulates the objectives of devolution on Kenya. The objectives of the devolved government in Kenya go hand in hand with the principles of devolution in Kenya stated in Article 175.[37]

Article 174 of the Kenyan Constitution states the objectives of devolution in Kenya (or the objectives of the devolved government in Kenya) are to: promote the democratic and accountable exercise of power; foster national unity by recognizing diversity; give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; recognize the right of communities to manage their own affairs and to further their development; protect and promote the interests and rights of minorities and marginalized communities; promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; ensure equitable sharing of national and local resources throughout Kenya; to facilitate the decentralization of State organs, their

[31]Sharon Maombo, Uhuru creating a militarized state - rights activists (24th June 2020) Available at https://www.the-star.co.ke/news/2020-06-24-uhuru-creating-a-militarised-state-rights-activists/ Accessed on 17th June 2022
[32]Available at https://twitter.com/NelsonHavi/status/1461787230763204623 Accessed on 17th June 2022
[33]Section 8 of Kenya Defence Forces Act
[34]Ibid
[35]Susan Muhindi, LSK challenges transfer of Kenya Meat Commission to Defence Ministry Available at https://www.the-star.co.ke/news/2020-09-18-lsk-challenges-transfer-of-kenya-meat-commission-to-defence-ministry/ Accessed on 17th June 2022
[36]Article 174 of the Constitution of Kenya 2010
[37]Article 175 of the Constitution of Kenya 2010

functions and services, from the capital of Kenya; and to enhance checks and balances and the separation of powers.

Professors, Yash Ghai and Jill Cottrell Ghai while commenting on the provisions of Article 174 reiterated the need for devolution in the following terms:

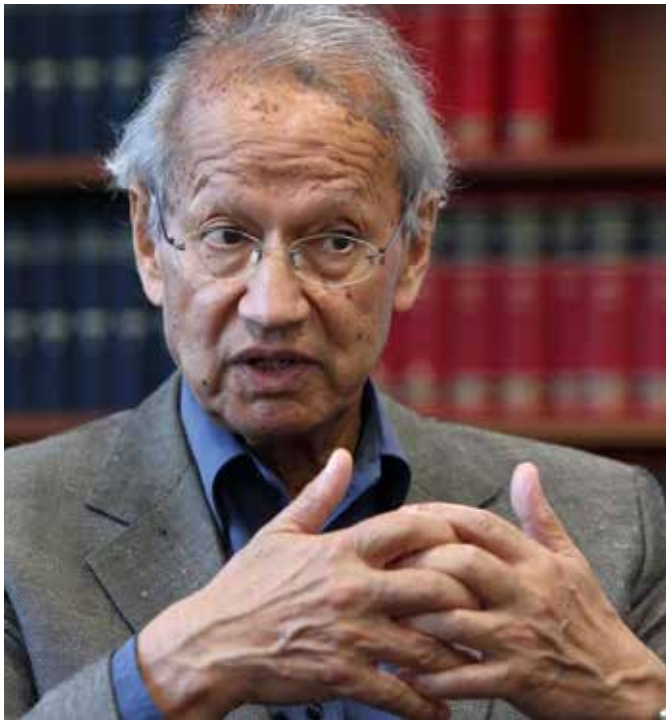
> *'These objectives are elaborations of the national values and principles and show the importance of devolution to the new system of government. An essential purpose of devolution is to spread the power of the state throughout the country; and reduce the centralization of power, which is the root of our problems of authoritarianism, marginalization of various communities, disregard of minority cultures, lack of accountability, failure to provide services to people outside urban areas and even within them."*[38]

President Uhuru administration has made sure that devolution fails. This is courtesy of the national government failing to disburse funds to counties on time. Chairperson of Council of Governors since 2013 have been lamenting on this issue. At times the national government fails to disburse funds for three straight months. How does the national government expect the counties to operate? For as well the counties have resources to prioritize and as well staff to pay. This is a major dint on President Uhuru Kenyatta legacy.

Unconstitutional moves by President Uhuru Kenyatta

The man, Uhuru Kenyatta, will go on record as the President who trampled on the Constitution and other laws as he wished. I tend to believe that Uhuru in running of the government was using the previous Constitution. Let me explain before you throw the first stone at me. The previous Constitution provided for a President who had enormous powers and could not be challenged. In fact, at one time Former Attorney General who is the current Senator of Busia County Honorable Amos Wako was of the opinion that the President was above the law. That is definitely laughable, only an intoxicated man can argue as such. However, that was the reality back then. This is the mentality that President Uhuru Kenyatta had. To him he was above the law and could do anything. However, what he failed take notice is that Kenya is under a new constitutional dispensation.

Put differently, Uhuru still thought that he was this imperial president. Unfortunately, the man was living in his past. He ought to have been reminded that Kenyans promulgated



Professor Yash Ghai

a new Constitution. In fact, the High Court in the case of *Dennis Mogambi Monga're* enumerated the promise of the new Constitution as follows: *when the people of Kenya voted in favor of the Constitution, they made a decision to make a break with the past and bring in a new constitutional dispensation on the basis of the values and principles set out in the Constitution.*[39]

In similar vein, Dr Willy Mutunga posited as follows on the vision of the Constitution:

> *That oppressive constitutional outlook was dismantled in 2010, with the emergence of a democratic constitutional order following a referendum many years after the first political opening in 1992. At the heart of it, the making of the Kenyan 2010 Constitution is a story of ordinary citizens striving and succeeding to reject or as some may say, overthrow the existing social order and to define a new social, economic, cultural, and political order. Some have spoken of the new Constitution as representing a second independence. There is no doubt that the Constitution is a radical document that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism and 54 years of independence.*[40]

[38]Ghai Y.P. &Ghai J. C., Kenya's Constitution: An Instrument for Change (Katiba Institute, 2011) Pg. 119

[39]Dennis Mogambi Monga're para 53.

[40]See also Linus Mwangi, 'The 'Dying' Oracles of the Law and the Looming Resurrection of Dugdalian Jurisprudence' Available at https://thealchemyofatransformativeconstitution.wordpress.com who argues that "If the Constitution of Kenya 2010 is transformative; if it is inherently activist; if it eschews authoritarianism and embraces the culture of justification in decision making; if it discards the traditional strict disjunction between law and politics; if it approbates interdependence while reprobating absolutism in the functioning of the three branches of government; if it contemplates a substantive conception of the principle of separation of powers; if it bridges our dark past and promises to delivers us to a holistically democratic and egalitarian society; if our Constitution is supreme and reigns above all, where can the above sentiments by aspiring candidates to the position of CJ find refuge?"

Former Chief Justice Maraga

Joshua Malidzo

Infant Jurist and Scholar, Joshua Malidzo had this to say on President Uhuru Kenyatta:

> *Although the 2010 constitution is different from the 2005 draft, little has been achieved and as Prof Yash had earlier predicted that some presidents would see the constitutions as mere rhetoric, this is what the 2010 constitution is to President Kenyatta. Relatedly is the old soviet joke that Tom Ginsburg and Alberto Simpser remind us in their Constitutions in Authoritarian regimes that when a man goes to a restaurant, surveys the menu and orders for chicken. He is told that there is no chicken and same happens for all the dishes in the menu until he gets upset and says, "I thought this was a menu, not a constitution." The joke according to them captures the usual perception of dictatorial constitutions as meaningless pieces of paper, without any function other than to give the illusion of legitimacy to the regime but don't be shocked when those who look at the law as if it does not count when they embrace the same when it suits their fancies.*
>
> *No matter how you look at it, the current president is wearing what the Nigerian scholar, Ochereome Nnanna, called a dictatorial toga or let's say that Kenyatta has unfortunately fallen to the autocratic temptation. He is quickly destroying all the gains that Kenyans had made before he came to power. Don't look further, since he came into power in 2013, his modus operandi has been to destroy and do away with all checks and balances. Not muzzling the registrar of civil societies who attempted to deregister civil societies, militarization of Nairobi County, attempt to control and direct the constitutional commissions, branding the Judiciary as Wakora and now cooptation of the opposition through the famous handshake and the problematic use of Executive orders.*[41]

Joshua Malidzo perfectly captures how President Uhuru Kenyatta has subverted the Constitution he swore to defend by all means. In my paper, *Offending the Law: Resuscitating the Spirit of Bill Barr: Spotlight on the Office of the Attorney General: Kenyan Discourse*[42], I did highlight the various instances in which the government has disregarded the Constitution and court orders. President Uhuru via Executive 1 of 2020 decided to place various constitutional commissions under various ministries. This definitely was a clear disregard of the Constitution for the Constitution deems the commissions to be independent entities. Placing them under ministries had the effect of watering down the independence that is guaranteed by the supreme law of the land.

Another scenario had to do with appointment of judges, this was a major issue between Chief Justice Maraga and President Uhuru Kenyatta. Maraga reminded the President that his role on matters appointment of judges is limited for he has no right to refuse any name submitted by the Judicial Service Commission for after all the President has representatives in the Judicial Service Commission. It seems this advice by the then Chief Justice was irrelevant to him. He remained true to his word and decided not to

[41]Nyawa Joshua Malidzo, The Broken Promise: Kenyatta's Love for Abusive Constitutionalism and Imperial Presidency (July 25, 2020). Available at SSRN: https://ssrn.com/abstract=3660631 or http://dx.doi.org/10.2139/ssrn.3660631

[42]Odhiambo Jerameel, Offending the Law: Resuscitating the Spirit of Bill Barr: Spotlight on the Office of the Attorney General: Kenyan Discourse (July 29, 2021). Available at SSRN: https://ssrn.com/abstract=3895957 or http://dx.doi.org/10.2139/ssrn.3895957

Chief Justice Martha Koome

swear the judges. Luckily, when Martha Koome assumed office, he partially appointed the judges. Which begs the question which law or laws allow him to do so? This was disregard of the Constitution and the numerous court orders failed on the same. This was the first element of revisiting the judiciary. Another has to do with funding of the judiciary. Post the 2017 presidential polls judgement, the Executive and Legislature decided to reduce the budget of the Judiciary. This had negative ramifications on the justice sector. Chief Justice Emeritus Kenani Maraga raised this issue severally but it seems he had no one ears.

Former Chief justice Willy Mutunga wrote a scathing article to the President to that effect. Here is a snippet of the letter:

> *Mr. President I have elected to speak elaborately and strongly on this issue because when apparently innocuous and blithe breaches to the Constitution begin to occur, especially from the highest office in the land, they signal a dangerous dalliance with impunity. This is particularly so when these occurrences are intentional, persistent, defiant, and brazen – fueled by an inexplicable determination to overrun the barricades of Kenya's constitutional order.*
>
> *There is a reasonable presumption that anyone seeking public office would be familiar with the Constitution. The presumption is even stronger that such persons have read, re-read, and understood provisions specific to the office they seek and, consequently, fully comprehended the allocation and demarcation of power and authority thereto. If they haven't, then they don't deserve to be in those offices in the first place. If they have, they have an obligation to respect every provision. That's the meaning of public officers taking an oath before assuming office to protect, defend, and promote the Constitution, and to abide by all other laws of the Republic. Nothing in the oaths says, 'I will obey and protect only those aspects of the Constitution that I find convenient and self-fulfilling; so help me God'. The oath is comprehensive, total, and unqualified; and its administration is not an exercise in jest, but rather a very solemn commitment to conscience and to country; to self and to the public, in the performance of public duty held in trust for the Kenyan people. If any public officer does not like the powers the Constitution donates to them, or find the exercising of those powers annoyingly inconvenient, they have no business continuing to occupy those offices. Resignation and early voluntary retirement are readily available options that the Constitution merrily provides, in order to protect itself from individuals who may find further fidelity to its edicts a burdensome enterprise.*
>
> *The provision on the appointment of judges is clearly articulated in Article 166, as well as the Judicial Service Act. The JSC discharged its mandate properly and completely in 2019 by recommending for appointment 41 judges. The president, by dint of plain, clear constitutional provisions, and numerous court orders, is obliged to appoint all the recommended judges without hesitation, review, or negotiation. It is disappointing that this standoff, needlessly occasioned by presidential obduracy, has recurred. Sadly, it has done so in a manner that lowers the esteem of the office, undermines the rule of law, and erodes public confidence both in the elevated majesty of statecraft, and in the granularity in administration of justice.*
>
> *Even Chief Justices, myself included, have had to answer to public petitions in an open and fair process — and that is as it should be. That the president has delayed appointments for two years without presenting any evidence to the Commission in spite of active and repeated solicitation points to bad faith, and most likely, absence of any actionable information on the judges. And this is not the time to commence muck-racking adventures in a feeble and abominable attempt to besmirch the character of the judges and judicial officers. The president must resist the temptation to be garlanded in the pettiness of performing power, particularly by those who have built a thriving pettiness cottage industry, completely consumed by the pursuit of personal vendetta, at the expense of the national good and Kenya's fledging constitutional democracy. It is urgent that the president immediately appoints the six judges, many of whom are exceptional, because that's what fairness, common decency, the rule of law and the Constitution require. The independence and accountability of the judiciary is not negotiable. And in the fullness of time, everybody gets to learn this lesson — some rather too painfully, too late, having played a part in undermining it. Mr President,*

> *you bear a burden of history to do the right thing for Kenya's Constitution, her institutions, and the general public. Discharge this burden. Simply do the right thing.*[43]

President Uhuru in a bid to make sure those who campaigned for him got something to do. He decided to create an office which was declared unconstitutional by the courts. The office he created was that of Chief Administrative Secretary. Okiya Omtatah following the appointment of folks to the Chief Administrative Secretary position filed a case in court which was ruled to his favor, the decision of the court was that Chief Administrative Secretary position is unknown to the law and thus is illegal and unconstitutional.

Justice Mativo recently delivered a groundbreaking judgement. He delivered a judgement to the effect that the Standard Gauge Railway contracts be made public. This case was filed by civil rights activists Khelef Khalifa and Wanjiru Gikonyo. Justice Mativo held as follows:

> *A declaration be and is hereby issued that the failure by the respondents to provide information sought under Article 35 (1) (a) and also to publicize the information in accordance with Article 35 (30 on the basis of the first petitioner's request dated 16th December 2019 is a violation of the right to access to information as well as Article 10 of the Constitution of Kenya 2010.*[44]

These are just but a few instances in which President Uhuru has led in contravening the Constitution. In the words of Atwoli, was the Constitution safe while President Uhuru was in power? Unfortunately, it was not the President found means of circumventing the law and employing situational ethics in application of the Constitution and other laws. That is his legacy from my end. So, what was his score for his second term? For his second term he scored a C-. An average of the two terms reveals that President Uhuru from my assessment scored a perfect C-.

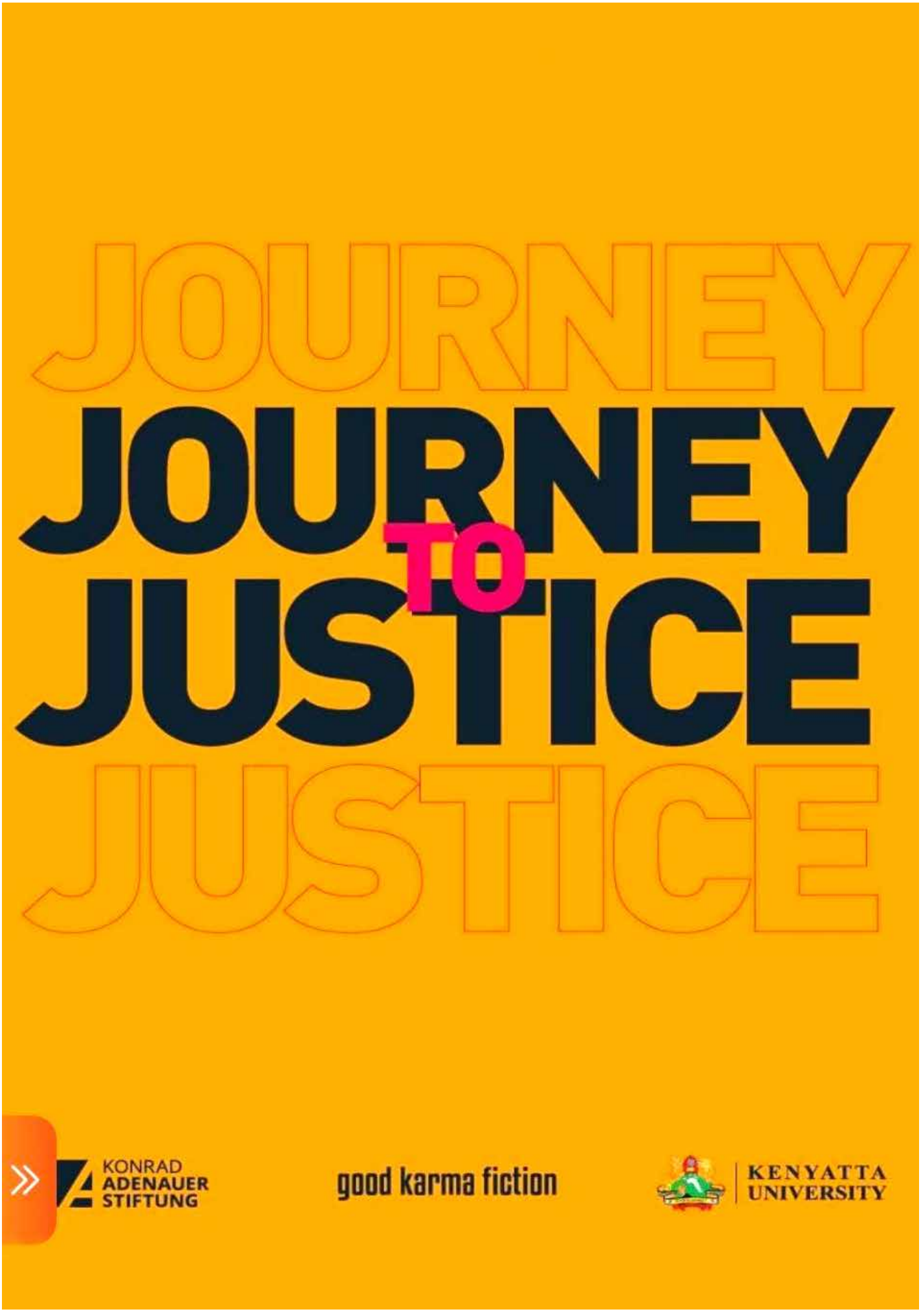
Conclusion

There isn't anything that Kenyans will miss about President Uhuru Kenyatta's tenure. His regime has prioritized corruption, embezzlement of funds, trampling on the Constitution and regarding court orders as mere pronouncements. Regardless, he will be remembered for the road projects he initiated, talk of the express way, wide electricity connectivity to the urban and rural areas among others. Those achievements are superb. Generally, President Uhuru Kenyatta elevated his raw partisan agenda above the Constitution. As a President he ought to have been a role model unfortunately he decided to be a rebel of the Constitution. His sunset is not worth emulating to bit.

Odhiambo Jerameel Kevins Owuor is a law student at University of Nairobi, Parklands Campus.

[43]Willy Mutunga, Mr President, in the Name of the Constitution, Swear in the Judges (9th June 2021) https://www.theelephant.info/op-eds/2021/06/09/mr-president-in-the-name-of-the-constitution-swear-in-the-judges/ Accessed on 17th June 2021

[44]Constitutional Petition No E32 of 2021


JOURNEY
JOURNEY TO JUSTICE
JUSTICE
KONRAD ADENAUER STIFTUNG
good karma fiction
KENYATTA UNIVERSITY

Journey to Justice: Justice for One is Justice for All: A Review of the Documentary

By Victor Ombonya

Justice. Environment. Communities. Future generations. Four very recurrent, relevant and rudimentary pillars of being. Humanity is oftentimes shaped by how we approach and situate ourselves with them. How we align our collective aspirations, and temper individual desires for more and better. In a sense, these were the emotions evoked after watching the *Journey to Justice: Justice of One is Justice for All* documentary. Which brings us to our present predicament – Do I start at the beginning or the end?

I will begin anyway. *Journey of Justice: Justice for One is Justice for All* is a beautifully constructed documentary that is fun, and light and peppered at times with heavy legal discourse. It is after all, a production Konrad Adenauer Stiftung (KAS) Rule of Law Program and Kenyatta University School of Law. It adopts a storytelling format, in which 5 narrators (who are Law students), Prince King'ori, Gladys Nyangweso, Martin Kioko, Rafaa Mazrui and Peter Kariuki move the story along, interactively and reflectively drawing the audience into this journey. It also employs use of graphics text which is easy on the eye to break down complex legal terminology and enhance the understanding of the key legal concepts at play.

Justice is often perceived as a strange rare occurrence that only happens to the connected. Most Kenyans have been socialized to not expect it. For they are not worthy of it. They are too small and inconsequential to. This documentary actually provides hope that justice is indeed available and accessible. To all. Listening to the interviewees, among them Chief Justice Emeritus Honorable David Maraga, Judge President of the East African Court of Justice (EACJ) His Lordship Honorable Nestor Kayobera, Advocates of the High Court Walter Amoko, Christine Nkonge, Lempaa Suyianka, Waikwa Wanyoike and Rose Birgen discuss matters of law and justice outside of the courts, one gets the impression that justice is everywhere you look, and outside of the formal structure of the judicial system, one sees the faces of justice in these officers of the court. They are as normal as you and me and as invested in justice, equality and fairness. All of a sudden, it becomes clear as the idea of justice begins to form and gel in your mind.

Without communities, African societies would literally collapse. Communities are repositories of strength, resilience and knowledge that fuel the concept of "*Africanicity*", our way of life. The environment plays one of the greatest roles in Africanicity – in terms of spirituality, health and wealth. For years, Africans have lived side by side with nature, taking only what they needed and believing in reincarnation and regeneration. Indeed, the centrality of a clean and healthy environment to our Africanicity led to the right to a clean and healthy environment being enshrined in Article 24 of the African Charter on Human and People's Rights. Despite this, huge commercial interests consistently put fragile environments and ecosystems in even more danger, with the continuous exploitation of the environment for natural resources undermining these environmental rights.

The documentary highlights two landmark environmental cases affecting two communities and using the style already described above, weaves together a remarkable story of how communities in Lamu and Turkana stood together and championed for their environmental rights. The Narrators introduce us to heroes like Ikal Angelei, Esther Epetet, Francis Kalukowi Nakapel, Stephen Ekuwom, all from Turkana and Mohamed Athman and Mohamed Somo from Lamu, who had the courage to say no and lead their communities to reclaim their environmental rights that had been stripped from them. In the case of Turkana, in a case, ELC Suit No 825 of 2012 filed by Friends of Lake Turkana, the courts held that the construction of Gibe III dam on Omo River would adversely affect the livelihoods of fisherfolk communities around Lake Turkana and that there was no sufficient public engagement and environmental impact assessment done on the project, as well as lack of access to critical information on the project that jointly being undertaken by Governments of Kenya and Ethiopia.

In 2018, in Petition No 22 of 2012, The High Court declared in a judgement where fishermen, led by Mr. Mohamed Ali Baadi had challenged the Sh2.6 trillion Lamu Port-South Sudan-Ethiopia (LAPSSET) project, that the construction of the Lamu port violates indigenous community's right to information, healthy environment and culture, and ordered compensation to those who will lose fishing rights. The government was also directed to draw up a Management Plan to preserve Lamu Island as a UNESCO World Heritage site as requested by various declarations by UNESCO within a year from the day judgment was given.

Personally, I was not aware of the specific details of the rulings as presented in the documentary, even though I knew of them. Stephanie Rothenberger, the director of the Rule of Law program at KAS, and Ravi Karmalker, the film's director had a vision that translated these rulings and the circumstances surrounding them – the stories of the lives of the communities involved and what was at risk for them because of these projects – into a visual feast that has propelled environmental justice to the top of issues that are important for the public to be aware of. This style of storytelling has also shifted the responsibility of pursuing justice back to communities whose rights are being infringed upon, whether by their very own government which is meant to secure those rights for them, or commercial and/or foreign direct investments, whose main motivation is profit. This documentary demonstrates to communities and "little people" and reminds them of the power they have to force change and reclaim their rights, using the formal justice systems. Only they can save themselves.

At the film launch ceremony held at Kenyatta University School of Law on 13th June 2022, Honorable Chief Justice Emeritus, Prof. Willy Mutunga in his remarks noted that the film glorifies; the sovereignty of the Kenyan people as central and pivotal in the struggle for justice for all; Public Interest Litigation (PIL) and *pro bono* representation by lawyers who are engaged in reverse learning with the communities they serve; the solidarity between PIL and the community gives robust expression to the sovereignty of the people (decreed by Articles 22(1) and (2) and 258 (1) and (2)); the participation of the students of Kenyatta Law School as researchers, actors, narrators in the film is a hallmark of radical legal education; the courage, commitment, and fidelity to the Constitution by the High Court Judges who handed down these decisions, with the voice and opinions of CJ Maraga in the film being part of this glorification of the Judiciary. Finally, he noted that the film brings in another element that he has always argued is the new frontier for the struggles in Constitutionalism, human rights, and social justice. The artist movement. Finally, he noted that the film brings in the artist movement as another element that he has always argued is the new frontier for the struggles in Constitutionalism, human rights, and social justice. The arts can be used to complement ongoing efforts at mobilizing access to justice, human rights and Constitutionalism.

In his keynote address, Chief Justice Emeritus Honorable David Maraga, noted the documentary as being a milestone which will undoubtedly inspire other communities and persons to claim their rights. It also highlights *inter alia* how social mobilisation and demands for social accountability, especially for environmental justice, can be achieved. For instance, the civil societies' legal empowerment strategies such as initiatives to raise legal awareness, and monitoring the impact of the government and investors' policies and programmes on peoples' rights, resulted in the public interest litigation in the two cases for the promotion and protection of peoples' fundamental rights and liberties. He went on to further state that the documentary demonstrates that environmental rights are closely tied to the livelihoods, health, and well-being of communities. The lessons learnt from this documentary should not only inspire people, particularly, the marginalized and vulnerable groups in Kenya and Africa, to fight for their rights, but should also challenge the society at large to recognize the power they all have, individually and collectively, to promote and protect their rights and dignity, using proper community mobilisation strategies and institution of appropriate legal proceedings to ensure and assure protection of individual rights, especially those of the most vulnerable in our society.

In his remarks, the President of the EACJ, His Lordship Honorable Nestor Kayobera noted the documentary highlights the importance of community awareness on their environmental rights as well as steps to access justice and adequate remedies available through legal avenues. It also showcases the power of united citizens seeking to enforce their rights with support from civil society, and lastly it reassures ordinary citizens that they can always take the bold step of facing any perceived violators of their rights

A lot of appreciation also goes to legal aid organizations like Katiba Institute, Natural Justice and Open Society Justice Initiative as well as Civil Society Organizations in those communities like Friends of Lake Turkana and Save Lamu for standing with these communities and pointing them to the right paths of their journeys to justice and the Director of the KAS Rule of Law Program, Stephanie and the Acting Dean Kenyatta University School of Law, for inspiring the law students to undertake such an audacious, innovative and necessary social justice film project.

Can this film encourage citizens to seek justice? Is film an effective advocacy tool in furtherance of the rule of law? I would answer with a resounding 'Yes' to both questions. What is your journey to justice? Remember, Justice to one is Justice to all. Seek it. Always.

Currently the Executive Director of Community Media Trust, Victor Ombonya is a community media practitioner who believes in the power of media to transform communities.

Opening remarks by the Deputy Vice-Chancellor (Academic) for the launch of the Kenyatta University-Konrad Adenaeur Stiftung film 'journey to justice' on June 13th 2022 in parklands campus

Hon. David Maraga, Chief Justice Emeritus of the Republic of Kenya
Hon. Prof. Willy Mutunga, Chief Justice Emeritus of the Republic of Kenya
Hon. Justice Nestor Kayobera, President of the East Africa Court of Justice
Distinguished Guests
Kenyatta University Staff
Students
Ladies and Gentlemen,

Good evening,
I am pleased to join this evening for the launch of the KU-KAS Film 'Journey to Justice' and to welcome you to Kenyatta University. I also thank each of accepting our invitation to this this launch.

A year ago in May 2021, the School of Law floated the idea of developing a film on access to justice with a focus on environmental rights in partnership with the Konrad Adenauer Stiftung (KAS). The idea was unprecedented and timely because today issues of environmental protection are at the top of the global agenda. This evening we are gathered here to launch the Film titled 'Journey to Justice'. I commend KAS and the School of Law together with the School of Creative Arts, Media and Film Studies for working hard to materialize the Film.

This Film tells a story of justice. It documents the stories of ordinary people and communities in their quest for the right to a clean and healthy environment and right to livelihood. It gives voice to ordinary people from Lamu and Lake Turkana to tell their 'journey to justice' in asserting their environment rights. The lens through which the Lamu and Lake Turkana people talk about justice moves away from hard, cold and authoritative discussions on laws and legal principles. In this regard, the Film will be a valuable tool for awareness creation on environmental rights and access to justice to ordinary people and communities nationally and in the region.

Kenyatta University is proud to be part of this noble and innovative Film which is in line with the University's community outreach mandate. In addition, the involvement of law students in the development of the Film and their interaction with ordinary and marginalized communities underscores the vision of the Kenyatta University to educate legal entrepreneurs of conscience, competence, and compassion with the ability to meet the challenges of justice in Africa and beyond.

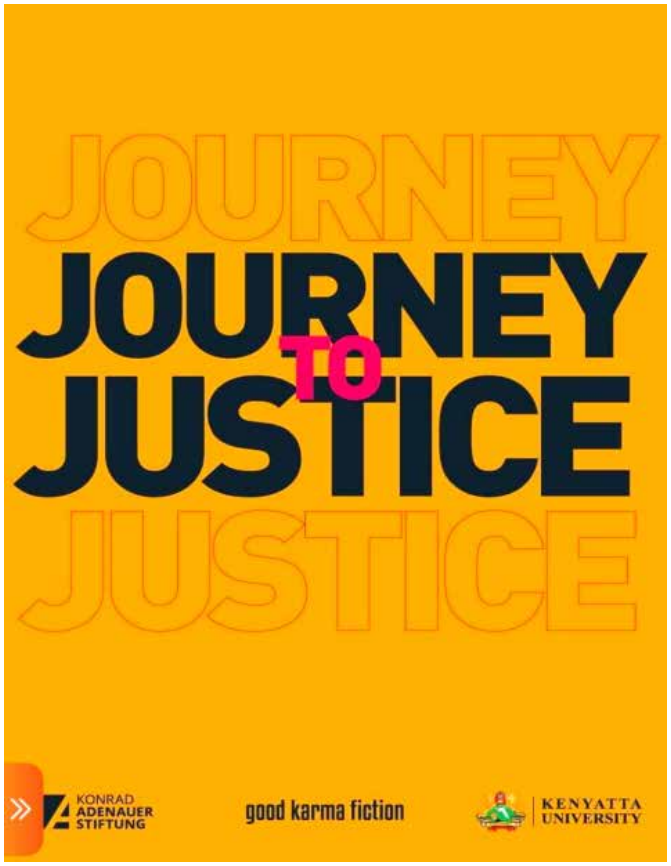
Finally, I would like to extend our gratitude to KAS for extending a hand of partnership to Kenyatta University in the development of the Film. As stated earlier, we are proud to be part of this unprecedented initiative as the University's contribution to the topical global discourse on protection of the environment. I also thank each of you once again for joining us this evening to celebrate the culmination of developing of the Film and a start of discussions on access to justice.

I wish you a wonderful evening.

Thank you.

A Background: "Journey to Justice"

Remarks by the Director of the Rule of Law program at KAS, Dr. Stefanie Rothenberger, during the launch of the film at Kenyatta University on 13th June 2022



Dr. Stefanie Rothenberger

I got the initial idea for the film when I read an article about a spectacular public interest litigation case in Kenya in a German newspaper in 2020, months before I took up my position in Kenya. The Kenyan Environment and Land Court had awarded high damages in an environmental law case to an affected community and I thought it would be worth it to pay some further attention to this.

When I came to Kenya in October 2020 to take up my position as the Director of Konrad Adenauer Foundation's Rule of Law Program for Anglophone Sub-Saharan Africa I started asking people about this case -the Owino Uhuru case- and I was surprised to learn that not many citizens were aware of it. Consequently, I thought it would be important to raise citizens' awareness on cases like this, and to promote positive role models of individuals and communities who had brought their cases successfully to court.

Soon the idea of producing an educative film was born that would show citizens which basic steps they would have to take to have their rights enforced. Because what positive impact can you create with regard to the rule of law if citizens are not aware and sufficiently knowledgeable of their constitutional rights?

Film appeared to me as the ideal means to further a project like this, as it bears the opportunity to reach out to a broad audience in an appealing manner.

In Ravi Karmalker, whom I had met earlier that year at the Berlin International Film Festival, I found a wonderful film maker of international reputation, with extensive experience in behavior-change, educative film making, based in Nairobi. He liked the idea right away and luckily was on board immediately.

I also got in touch at an early stage with high-ranking members of our KAS network of legal experts from whom I got very positive feedback regarding a potential educative film project on public interest litigation. They told me that this would be an unprecedented approach and encouraged me to go ahead.

As the KAS Rule of Law Program is a regional program it was essential to produce a film that is of relevance not only for Kenya but for the whole region. Environmental Justice appeared as an ideal topic for a production with an intended regional outreach.

However, to do a production like this as KAS alone was not an option for me, I wanted a strong Kenyan partner by my side which I found in Kenyatta University School of Law, in

particular in the Dean, Dr. Faith Kabata, and Prof. Tomasz Milej who were convinced of the idea right away.

They gave us ten of their best law students to present us in a first step of the project the 20 most prominent Kenyan environmental law cases from which we then chose two landmark cases, the Lake Turkana case and the Lamu port case. In a second step, the students conducted in-depth legal research on these two cases which included a field trip to Turkana and Lamu to have interviews with the communities involved in the cases.

I joined the students on their trip to Turkana, which was an intense experience I will never forget. I will also not forget the commitment and passion with which the students approached their task. If we want to talk about the success of this project, it is clearly already there, even before the release of this film. It is the involvement of these ten exceptional students that makes this project already a success. Some of them even spoke of a life-changing experience. Maybe we have our environmental lawyers of tomorrow here. We soon decided that the students should also feature in the film, and so we had some of them become our narrators.

If I go back to the very beginning, I have to thank those who were always there for me to give me advice on the project, if I did not know in which direction to go or what would be the right approach to a certain legal issue. They would always be reachable for me, their advice was essential to me in a project where we were all accessing new land.

I want to mention in particular Chief Justice Emeritus Prof. Willy Mutunga, Chief Justice Emeritus David Maraga and Supreme Court Justice Issac Lenaola. With the President of the East African Court of Justice, Honourbale Nestor Kayobera, I had the chance to talk about strengthening the regional perspective of the film at an early stage. I am grateful for all this valuable support.

Thank you to Ravi Karmalker, without whom we could have never realized this project, to KU, to the communities and lawyers involved; Save Lamu, Friends of Lake Turkana. We now have to make this project fly. There are representatives from civil society, the judiciary, academia etc. here tonight.

Please let us join forces, cause this project now has to travel to reach those who can and should benefit from it. It is a gift of KU and KAS to the citizens of Kenya and the whole region, a gift that comes as a "We drive" or on a memory stick; for the sake of strengthening the Rule of Law in the region, which is the core mission of our KAS Rule of Law Program.

Our "Journey to Justice" begins here and now.

Remarks by Chief Justice (Emeritus) David K. Maraga, FCIArb, EGH during the official launch of the documentary "journey to justice" at the Kenyatta University School of Law, Parklands, Nairobi

Former Chief Justice David K. Maraga

Ladies and gentlemen:

1. I am delighted to join you this evening as we launch this documentary, which narrates the journey that two communities in Lamu and Turkana travelled to protect the constitutional rights to their environment, communal land and natural resources. Indeed, it is a classic demonstration of ways in which communities that are aggrieved, can use the available channels to access justice and vindicate their rights.

2. Access to justice simply refers to the means and ability of the people to access legal processes, courts, and formal justice institutions in pursuit of justice and enforcement of their rights. Where access to justice is stifled, people are often unable to have their voices heard to challenge discriminations against them and violations of their rights and hold the State, its agencies and officials accountable in their decision-making.

3. There are various components to the theme of access to justice. They include the legal regime that ensures or provides the basis for legal protection; people's awareness of their rights and how they can access processes and institutions that will guarantee their rights); as well as ways to enforce and realise their rights when they are violated.

4. The Constitution of Kenya lays down basic principles and norms with regard to access to justice. First, it obliges the State to ensure equal access to justice for all without discrimination. Secondly, the Constitution also recognises that "justice delayed is justice denied"

and has therefore prescribed the need for expeditious resolution and disposal of disputes.

5. Thirdly, the Constitution calls upon courts of law to avoid undue regard to technicalities and instead ensure that substantive justice is served to victims who seek the protection of their rights. Finally, the State is required to ensure that all forms of justice (including the traditional and alternative dispute resolution systems) are consolidated into the formal justice processes and given full effect in order to better facilitate the broadest protection of individual and collective rights.

6. As stated, while States have the primary and overarching duty and responsibility to protect the rights of their citizens, in many cases, State institutions and Agencies are themselves the main violators of the people's rights. Such violations often occur as a result of the direct acts of institutions or officials in the name of the State but actually designed to serve those officials' personal interests. Violations also occur indirectly when the State fails to take measures that will guarantee the respect of people's rights.

7. Where the State fails to take full and effective measures to protect the rights of its citizens, the Judiciary and the courts generally have the constitutional and primary duty to provide remedies for such violations and ensure full restoration of rights.

8. As the documentary demonstrates, environmental rights are closely tied to the livelihoods, health, and well-being of communities. In turn, the realisation of these rights is tied to a whole range of other rights, which are at the core of the survival of the communities. Accordingly, such acts of violation not only undermine the environment and other goals of sustainable development, but also put the very lives and livelihoods of concerned communities at risk.

9. Whenever they are confronted with petitions for relief and enforcement of environmental rights, courts have the onerous task of striking a fair balance between the country's developmental needs and the local communities' rights. To avoid conflicts, development should be people -centred and focused, sustainable, and sensitive to the circumstances of those who will benefit and also those who will be affected. More importantly, the people should shape the developmental agenda and priorities.

10. It is therefore absolutely necessary that the jurisprudence from the courts should reflects these concerns. Indeed, as one scholar has observed, *"development at the expense of peoples' rights, welfare, dignity and threat to their very existence without commensurate compensation and or provision of adequate alternative, is a skewed persuasion that is not worth pursuing."*

11. In reality, however, the journey to justice is littered with many challenges and obstacles that need to be overcome in order for the rights of communities to be vindicated.

12. The documentary we are launching today highlights inter alia, how social mobilisation and demands for social accountability, especially for environmental justice, can be achieved. For instance, the civil societies' legal empowerment strategies such as initiatives to raise legal awareness, and monitoring the impact of the government and investors' policies and programmes on peoples' rights, resulted in the public interest litigation in the two cases in this documentary for the promotion and protection of peoples' fundamental rights and liberties.

13. The Lessons learned from this documentary should not only inspire people, particularly, the marginalised and vulnerable groups in Kenya and Africa, to fight for their rights, but should also challenge the society at large to recognise the power we all have, individually and collectively, to promote and protect our rights and dignity, the might of the perpetrators not withstanding.

14. In all such cases, the necessary outcome must be the actual realisation of the rights of the communities. In turn, this can only be achieved where there is an innovative crafting and pursuit of effective remedies through the court process, and the enforcement of such remedies through implementation of court orders. This, of necessity, translates into a duty (on the part of the court and parties) to see through the enforcement of court orders.

15. The greatest lesson learnt from this documentary is that, individual and communities' constitutional rights cannot be given on a silver platter. They have to be fought for. As we know, courts have to be moved to protect people's rights. With the proper community mobilisation strategies and institution of appropriate legal proceedings, the Constitution can ensure and assure the protection of individual rights, especially those of the most vulnerable in our society.

16. As I conclude, I wish to thank Kenyatta University and the students who took part in the preparation of this documentary. You have done an incredible work in communicating to the public the important steps taken by communities in Lamu and Turkana to enforce their constitutional rights. This documentary is a milestone which will no doubt inspire other communities and persons to claim their rights. I also wish thank Konrad Adenauer Stiftung (KAC), Goodkarma, and all other organisations and persons that facilitated the students to undertake this exemplary work.

Thank you and may God bless you.

Remarks by President of East African Court of Justice by Hon. Justice Nestor Kayobera during the official launch of the documentary "journey to justice" at the Kenyatta University School of Law, Parklands, Nairobi

Hon. Justice Nestor Kayobera

The Hon. Justice David K. Maraga, Chief Justice Emeritus;
The Hon. Prof. Willy Mutunga, Chief Justice Emeritus;
Prof. Paul Wainaina, Vice Chancellor, Kenyatta University;
Dr. Faith Kabata, Dean - Kenyatta University School of Law;
Lecturers - Kenyatta University School of Law;
Dr. Stefanie Rothenberger, Director - Rule of Law Program for Anglophone Sub-Saharan Africa;
Students present from Kenyatta University and other Universities;
Members of the Law Society of Kenya present;
The Film making Crew;
Ladies and Gentlemen: all Protocols observed

It's my pleasure to participate in the launch of this important film that highlights the victory of ordinary people and communities in protecting their environmental rights.

Importance and message in the film:

1. The film signifies the importance of community awareness on their environmental rights as well as steps to access justice and adequate remedies available through legal avenues.

2. The message in the film is to showcase the power of united citizens seeking to enforce their rights with support from civil society.
3. It also reassures ordinary citizens that they can always take the bold step of facing any perceived violators of their rights.

The role of the EACJ in environmental rights:

4. Chapter 19 of the EAC Treaty stipulates Partner States dedication to the co-operation in environment and natural resources management.

   The Partner States recognize that, development activities may negatively impact on the environment leading to degradation and depletion of natural resources. The EAC also appreciates that, a clean and healthy environment is a prerequisite for sustainable development.

5. The EACJ as a judicial organ of the Community, is mandated to hear matters arising from the Treaty interpretation and application.

   The Court has occasionally interrogated environmental rights. Among such cases is the Africa Network for Animal Welfare (ANAW) filed in 2010 by a Kenya NGO challenging Tanzanian government decision to build a "super highway" across the Serengeti National Park. In 2014, the EACJ ruled that, Tanzania could not build a paved bitumen road across Serengeti as planned. The Court issued a permanent injunction restraining Tanzanian from operationalizing its proposal of constructing the road subject to its right to undertake such other programs or policies in the future which would not have a negative impact on the environment and ecosystem in the Serengeti National Park.

6. The EACJ therefore welcomes matters relating to the protection of the environment as well.

7. To access the EACJ, one only needs to be familiar with the EAC Treaty and the Court Rules of Procedure all available in the official website. No need of exhausting local remedies, the Court is accessible by all legal and natural person's resident in East Africa and complains must be brought within two-month limitation period.

8. While the EACJ does not charge filing fees, a hurdle to accessing the Court may be the costs of getting legal services. This is an opportunity for Advocate's to take up pro bono briefs especially in public interest matters.

9. Chapter 25 of the EAC Treaty affirms the place of the private sector and civil society in the integration process. They act in public interest and sometimes appear before the EACJ on matters affecting the Community to keep the Partner States accountable in their actions.

   Most of the complaints against the Partner States and the EAC organs and Institutions are on violations of the principles governing the achievements of the objectives of the Community.

   These include; good governance, rule of law, accountability, transparency, social justice and human rights.

   Among the cases being; Prof. Anyang'o Nyong'o case (Republic of Kenya), James Katabazi case (Republic of Uganda), Plaxeda Rugumba case (Republic of Rwanda), Manariyo Desire (Republic of Burundi), Santi Santino (Republic of South Sudan), the recent Mbowe case (United Republic of Tanzania), Hon. Martha Karuwa case (Republic of Kenya) and many others of which all came to shape certain behavior of the Partner States and EAC Organs and Institutions in dealing with their subjects.

10. Since Article 127 of the EAC Treaty provides for a people driven Community, with non-state actor participation, their place in the integration process cannot be disregarded.

Final statement and call to action

- Regional integration is a process that largely depends on the goodwill of the cooperating states since it has a bearing on their sovereignty.
- However, the state is not a unitary actor, nor is it a single conscious being. Its actions are a composite of individual human choices: by its citizenry and all participants in the economic and social process; its political leaders; its diplomats and bureaucrats, all aggregated through the internal structures of the state.
- Non-state actors are therefore very instrumental in keeping states engaged in the achievement of the goals of regional integration.
- Let us rally together and support the access to justice and adequate remedy for victims of human rights violations in the Community.
- Every single one of us therefore has a part to play in making our Community better for everyone.

THANK YOU FOR YOUR ATTENTION
ASANTENI SANA

Journey to justice

The Judiciary's contribution under the 2010 Constitution

Remarks by Dr. Willy Mutunga, Chief Justice and President of the Supreme Court, 2011-2016 during the official launch of the documentary "journey to justice" at the Kenyatta University School of Law, Parklands, Nairobi

My brief remarks are based on the contribution of the Judiciary on the struggle for justice for all under the 2010 Constitution.

I: The blueprints

There have been three blueprints that reflect the Judiciary's concern with the journey to justice for all. These are the Judiciary Transformation Framework 2012-2016, Sustaining the Judiciary Transformation Framework 2017-2021, and Social Transformation Through Access to Justice September 2021-. All the three blueprints address this issue. Based on the fact that 95% of Kenyans do not access justice from formal courts, and implementing the provisions of Article 159 (2) (c) and (3) of the Constitution the issue of African Justice Systems (AJS) or traditional justice system have become urgent. Indeed, what we call the formal justice system (colonial, postcolonial, and modern) is the informal one because it caters only for 5% of the population. AJS are the formal one in this sense.

II: Integration of the two justice systems and reverse learning

The quest for access to justice to all under both justice systems have the following critical pillars:

- Rethinking the integration of formal and informal justice systems;
- Consequently reverse learning from both systems;
- The development of jurisprudence that the Constitution decrees specifically under Article 259 (1). It is expected that the incoming AJS will enrich the jurisprudence that the Constitution and Section 3 of the Supreme Court Act 2011 decrees;
- Realizing that the development of this jurisprudence encompasses all *strands and streams* of justice, none being left behind;
- Rethinking the development of an African Judiciary;
- Reverse learning on these experiences with African Judiciaries and others the world over;
- Rethinking the curriculum of the Law Schools in Kenya, and Africa so that its content is enriched by integration of the two justice systems

III: The film

The film glorifies several aspects that are critical to realizing our dream for justice for all:

- The sovereignty of the Kenyan people is central and pivotal in the struggle for justice for all. We see the courage, commitment, and mobilization skills of the two communities;
- Public Interest Litigation (PIL) and *pro bono* representation by lawyers who are engaged in reverse learning with the communities they serve. It is always important to remember what one of the famous German philosophers said that even the educated can be taught by the uneducated;
- The solidarity between PIL and the community gives robust expression to the sovereignty of the people. Indeed, that is what is decreed by Articles 22(1) and (2) and 258 (1) and (2);
- The participation of the students of Kenyatta Law School as researchers, actors, narrators in the film is a hallmark of radical legal education;
- The solidarity between all the stakeholders and KAS brings in a global solidarity that is necessary in the 21st Century. That KAS would invest in these two cases and be part of its success is radical form of global solidarity on matters of the Rule of Law, Constitutionalism, and jurisprudence;
- There is also another aspect of solidarity between global citizens, that of a German filmmaker who produces a great film;
- The film brings in another element that I have always argued is the new frontier for the struggles in Constitutionalism, human rights, and social justice. The artist movement is one of the new frontiers;
- The film glorifies the courage, commitment, and fidelity to the Constitution by the High Court Judges who handed down these decisions. The voice and opinions of CJ Maraga in the film is part of this glorification of the Judiciary.

IV: Conclusion

Through this film we will continue to make significant and giant steps in this long journey to justice. Its robust dissemination in Kenya, Africa, and abroad will speed up this journey.

Nairobi, 13th June 2022

'The role of alternative justice systems in accelerating social transformation through access to justice'

By Hon. Chief Justice Martha Koome

The Deputy Chief Justice and Vice President of the Supreme Court, Justice Philomena Mwilu
The Director of Public Prosecutions and Vice-Chair of the NCAJ, Mr. Noordin Haji
The Vice Chancellor Designate of Tangaza University, Rev. Prof. Chisugi Apollinaire
The Chairperson of the National Steering Committee for the Implementation of the Alternative Justice Systems (AJS) Policy, Justice (Prof.) Joel Ngugi
Members of the National Steering Committee for the Implementation of the Alternative Justice Systems (AJS) Policy,
Distinguished Participants,

1. Let me start by thanking the National Steering Committee for the Implementation of the Alternative Justice Systems (AJS) Policy, led by Justice (Prof.) Joel Ngugi, for coming up with this revolutionary idea of holding a National Conference on Alternative Justice Systems. This Conference provides an ideal opportunity for spirited conversations and exchange of ideas on how to dig up and make use of our indigenous systems of justice.

2. I also thank the Tangaza University College and our development partners for partnering with the National Steering Committee for the Implementation of the Alternative Justice Systems (AJS) Policy in hosting this 1st National Conference on Alternative Justice Systems.

Ladies and Gentlemen,

3. The defining spirit of the '***Social Transformation through Access to Justice***' vision for the Judiciary which also resonates with the defining mood within the justice sector is deepening access to justice.

4. When we talk about '***Social Transformation through Access to Justice***', what we mean is that the Constitution by stipulating social justice, human dignity, and the rule of law as its foundational values and principles aims to satisfy our people's longing for justice.
5. The Constitution in its text speaks to the need to satisfy

8. In such a context, we are expected to embrace a responsive role to respond promptly to the ordinary citizen's quest for justice by providing a solution to their claims of injustice. It also means that access to justice should be easy and cheap enough to be afforded by even resource-poor individuals or groups. All persons, especially the marginalised and vulnerable in society, expects that the doors of justice will be opened and remain ajar when they seek a solution to their grievance and protection of the law.

Ladies and Gentlemen,

9. This ambitious mission of "unchaining justice" is not restricted to the confines of state institutions, like the Judiciary. I have always believed that all of us are Agents of justice. What I mean by this is that all of us, as individuals and within our communities, have the capability of resolving any disputes or conflicts that we have between our ourselves in our communities. It means that we should not see courts as the "sole" institutions or places where justice reside.

10. This idea is nothing new but reflects the reality that our communities going all the way to pre-colonial times to contemporary times have always had indigenous systems of justice that operate outside the strictures of state institutions. Indeed, most of our communities emphasised social harmony as the overriding ideology of social organisation. It is pursuant to this that the communitarian ethos of "Utu" or "Ubuntu" as it is called in Southern Africa is observed in our communities. The foundation of the "Utu" philosophy is basically that all humans are symbiotic. We are all human simply because we all belong to, participate in, and have stakes in our respective human societies. In societies upholding Utu, maintaining constructive social relations is a communal undertaking to which every person is committed. Thus, we are called upon to be Agents of justice and resolution of societal conflicts in our communities.

11. It is in appreciation of this reality that the 2010 Constitution envisages a broad dispute resolution system. Article 159(2) of the Constitution points us to the possibility of open-ended pursuit of justice

the desire for inclusion, recognition and empowerment of every person and various groups in our society. It vests in the State a mandate of serving social welfare and enabling human flourishing, facilitating the participation of everyone in the decisions that affect them, ensuring peaceful co-existence, entrenching democratic governance, and promoting a just social order.

6. It means that our justice system must be responsive and alive to the lived realities of our people and offer tangible and substantive justice that speaks to their concerns, vulnerabilities, and pains. We must protect the voiceless, the weak and the vulnerable in our society. In effect, we must come up with and promote initiatives and interventions that are aimed at responding to our people's social needs, that is, their plight and cries for justice.

7. Moreover, the mission of the justice system is to give life to the Constitution and, in the process of doing so, to generate social transformations that reduce the gap between constitutional promises and real life. This means that justice must be unchained, and we must act as the bridge between the lofty aspirations contained in the Constitution and the lived reality of our people.

beyond the confines of state institutions. It does this by commanding the Judiciary to promote the use of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

12. These alternative forms of dispute resolution allow for the resolution of disputes outside the courts. By commanding us to embrace the multi-door institutional approach to the pursuit of justice, the Constitution is alive to the need for efficient and timely delivery of justice.

13. The underpinning premise of this view is that the courts are not the sole forum for the delivery of justice. It is in appreciation of this reality that one scholar by the name Marc Galanter has famously observed that:[1]

"Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. Ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged".

[1]Marc Galanter, "Justice in Many Rooms" in Mauro Cappelletti (ed), *Access to Justice and the Welfare State* (Sijthoff and Noordhoff, Alphen aan den Rijn, 1981) pp 147, 161–162.

14. The empirical reality of this view in our country came out in the "Justice Needs and Satisfaction in Kenya Survey" report of 2017 which showed that only around 10% of disputes are channelled to be resolved through the courts.

15. The multi-door approach to justice has the potential of deepening access to justice. The desirability and utility of this approach is that it has the potential to address the concerns around the cost-effectiveness and speed of delivery of justice.

16. By channelling a significant number of disputes for resolution outside the courts, we will avoid the current problem of courts that are swamped and paralysed with disputes that might be better resolved elsewhere.

17. To illustrate this point, family disputes are better resolved in a non-adversarial process. Thus, mediation and reconciliation processes, including those conducted within our traditional justice mechanisms, would be ideal for resolution of family disputes given that they are collaborative processes that foster long-term relationships. In contrast, court litigation takes an adversarial approach therefore tends to work against maintaining social harmony.

18. The '***Social Transformation through Access to Justice***' vision of the Judiciary takes seriously and embraces the constitutional command that the Judiciary should dig up our indigenous systems of justice by promoting the use of traditional dispute resolution mechanisms. We believe that the AJS offers an appropriate and effective system of justice to our people given that our communities have used elements of facilitated consensus-building in dispute and conflict resolution outside state structures for centuries.

19. I consider AJS an ideal forum for resolution of disputes as it is closer to the people, more affordable, easier to access, familiar, and less bureaucratic. It also serves as a form of restorative justice. In addition, due to its participatory nature, it ensures more social inclusion. It also prevents injustice and reduces harm suffered by people by focusing on root causes of injustice and on justice needs of entire communities and societies rather than just individuals.

Ladies and Gentlemen,

20. It is in this context that under the leadership of the National Steering Committee for the Implementation of the Alternative Justice Systems (AJS) Policy, we have already implemented the AJS Action Plan and launched AJS Suites (Kumbi) in Isiolo, Kajiado and Nakuru counties. We are committed to extending this work to all the counties across the country.

21. To conclude, let us use this Conference to re-imagine and re-conceive these traditional mechanisms to serve our need for making justice accessible to our people and re-orient them towards becoming human rights friendly. It is in this spirit that I hope this conference will be a forum for robust exchange of ideas and interventions on how the AJS structures can be harnessed to ensure accessible, fair and expeditious delivery of justice.

22. With that, I declare the 1st National Conference on Alternative Justice Systems officially open.

Thank You and God Bless You.

Official opening and keynote address at the 1st national alternative justice systems (AJS) conference – Tangaza University College, Karen, 21st June 2022

Hon. Justice Martha Koome, EGH
Chief Justice, and President of the Supreme Court of Kenya

Delivered by:
Hon. Justice Philomena Mwilu, DCJ
Deputy Chief Justice and Vice-President of the Supreme Court of Kenya

The fight against corruption and economic crimes in Kenya: the plight of EACC and its lack of prosecutorial powers

One significant but often ignored truth is that fighting corruption is primarily a political project. The political will leading that fight will only succeed if it is credible. Vehemence, however boisterous and loud; righteous but false indignation, however shrill, are all "a tale told by an idiot full of sound and fury signifying nothing.:"'
Dr. Willy Mutunga.[1]

By Kipkoech Nicholas Cheruiyot

1.0 Introduction

Corruption, being one among many other forms of economic crimes[2] has been a painful thorn that has been unable to get off the Kenyan flesh since independence, with almost every socio-economic challenge faced by the Kenyan people being linked to corruption incidences[3]. Kenya has for a long time had to put up with a number of corruption-related incidences which have milked the Kenyan resources, without finding a solution that completely tames the vice. Some of the notable incidences include the coffee smuggling and poaching during the reign of the late President Jomo Kenyatta, the infamous Goldenberg scandal[4] during the late President Moi's era, the Anglo-Leasing scandal during President Kibaki's reign, the infamous National Youth Service (NYS) scandal, the infamous Arror and Kimwarer Scandal and the latest being the Kenya Medical Supplies Agency (KEMSA) scandal, the latter two being the largest corruption incidences in President Uhuru Kenyatta's reign.[5]

The government agency that is supposed to investigate and recommend the prosecution of individuals and companies implicated for acts of corruption is the Ethics and Anti-Corruption Commission (EACC), as established under the EACC Act of 2011. One of the greatest challenges which have been faced by the Commission is a lack of prosecutorial powers to prosecute against corruption and other related

offences. This is a challenge that is not only being faced by the EACC but was also faced by its predecessors the Kenya Anti-Corruption Authority (KACA) and the Kenya Anti-Corruption Commission (KACC).

In August 2020, a media expose was released, detailing a series of corruption incidences that led to the loss of Billions of Shillings in the process of purchasing the medical equipment to combat Corona Virus Disease of 2019 (COVID-19) Pandemic by the Kenya Medical Supplies Agency (KEMSA). A number of these findings

[1]Dr Willy Mutunga, The Retired Chief Justice of Kenya in 'Slaying the Monster: How to Win the War on Corruption in Kenya' (2019). Read more at: https://www.theelephant.info/op-eds/2019/02/10/slaying-the-monster-how-to-win-the-war-on-corruption-in-kenya/>accessed 13 November 2021.

[2]Section 2 of the *Anti-Corruption and Economic Crimes Act of 2003* defines and economic crime to mean an offence under Section 45 of the Act, or an offence involving dishonesty under any other written law in Kenya. Under Section 45, an individual is guilty of an offence if he fraudulently or otherwise unlawfully *inter alia* acquires public property or mortgages, charges or disposes of any such property.

[3]Karen Koech, 'The Kenya's Corruption Journey | A 10 Year Audit on Provisions in The Constitution on Leadership and Integrity in Curbing Graft' (The Youth Cafe | Youth Empowerment in Africa | Creating a Better Future) <https://www.theyouthcafe.com/perspectives/the-kenyas-corruption-journey-a-10-year-audit-on-provisions-in-the-constitution-on-leadership-and-integrity-in-curbing-graft> accessed 15 November 2021.

[4]The scandal is reported to have taken more than 10% of Kenya's Gross Domestic Product (GDP), an effect that almost paralysed the effective delivery of essential services during President Moi's reign.

[5]Supra note 3.

Director of Public Prosecutions Noordin Haji

were vindicated by the report of an audit that was done in September 2020.[6] The EACC has conducted its own investigations on the matter and have found several KEMSA officials culpable. EACC has recommended to the Office of the Director of Public Prosecutions (ODPP) for the prosecution the concerned persons, but the ODPP has returned the file to the EACC for further investigations.[7] This not being the only incident for failure of prosecution by the ODPP, it depicts a clear picture of the dilemmas being faced by the EACC when it has been empowered to investigate but have no power to prosecute.[8] This is mostly seen whenever the cases are of a high profile, involving governmental agencies and individuals.

2.0 The establishment, functions and powers of the EACC

The EACC is an independent constitutional body that is established pursuant to Article 79 of the 2010 Constitution of Kenya (The Constitution) which mandated Parliament to enact a legislation to establish an independent ethics and anti-corruption commission which is to aid in the implementation of Chapter Six of the Constitution. As such, Parliament enacted the EACC Act in 2011 to give effect to Article 79 of the Constitution, establishing the EACC.[9] The EACC has a mandate to combat and prevent corruption and economic crimes in Kenya through the enforcement of the laws on corruption, preventive measures, public education and the promotion of standards of integrity, ethics and anti-corruption.[10]

The Commission has powers among others to conduct investigations either on its own motion or acting upon a complaint by a member of the public[11] concerning any corruption, economic crime or an incident of a breach of a code of conduct.[12] It will then, upon conducting investigations, recommend the prosecution of any individual that they find culpable of the offences under the EACC Act or any other relevant law of Kenya.[13] The EACC has four main directorates, which are Investigations and Asset Tracing, Legal Services and Asset Recovery, Preventive Services, Finance and Administration. EACC has also been empowered to conduct public education which is aimed at helping it discharge its functions, being done through the National Anti-Corruption Campaign Steering Committee (NACCSC).[14]

3.0 Lack of prosecutorial powers by the EACC as an impediment to its constitutional mandate

One of the greatest impediments which have impaired the fight against corruption is the lack of prosecutorial powers by the EACC, which has seen it not being in a position to prosecute corruption and other economic crime offences. This has been seen to be caused by lack of a good political will to empower the EACC in its fight against corruption. This position has been occasioned by Parliament not willing to enact a legislation that grants prosecution powers to EACC, leaving it to operate at the mercies of the ODPP despite it being an independent constitutional body.[15]

A plain reading of the EACC Act shows that the Act gives the EACC no teeth to bite, and it hesitates on the issue of fines and the penalties against those whom the Commission have found culpable of any crime under the Act. The Commission is only allowed to exercise the powers vested upon it under Section 11 of the Act. The Act also denies the Commission prosecutorial powers, leaving it to rely on, upon concluding its investigations, the ODPP to

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[6] 'Coronavirus in Kenya: Fearing "money Heists" amid Pandemic' BBC News (6 May 2020) <https://www.bbc.com/news/world-africa-52540076> accessed 1 November 2021.

[7] Human Rights, 'Kenya: Quarantine Conditions Undermine Rights' (2020). Available at https://www.hrw.org/news/2020/05/28/kenya-quarantine-conditions-undermine-rights.

[8] See Ethics and Anti-Corruption Commission Annual Report 2016/2017, Table 5 at page 26. Available at https://eacc.go.ke/default/wp-content/uploads/2018/07/EACC-Annual-Report2016-2017.pdf.

[9] *Ethics and Anti-Corruption Commission Act of 2011*, Section 3 (1).

[10] Ibid, Section 11.

[11] Ibid, Section 13.

[12] Supra note 8.

[13] EACC Act, Section 11.

[14] The Committee was established by the Retired President Kibaki in 2004 to conduct public awareness and public education campaigns with the aim of influencing positive attitudes in the fight against corruption. For more, visit https://www.naccsc.go.ke/.

[15] Teresa Gachagua, 'Toothless Bulldog? Escalating Corruption Indices in Kenya Notwithstanding Chapter Six of the Constitution' (2015), 13.

prosecute any act of corruption or economic crime.[16] This is not a challenge that has been faced by the EACC alone, but it had also been faced by its predecessors the Kenya Anti-Corruption Authority (KACA) and the Kenya Anti-Corruption Commission (KACC).

3.1 The Kenya Anti-Corruption Authority (KACA) and the Kenya Anti-Corruption Commission (KACC)

The KACA and the KACC also suffered the challenge which is currently being suffered by the EACC, since they lacked prosecutorial powers to prosecute any form of corruption or economic crime.[17] The KACA was established in 1975. Its powers were conferred by the repealed Prevention of Corruption Act (PCA), which empowered it to investigate and subject to the directions of the Attorney-General, prosecute for offences under the PCA Act and other offences involving corrupt transactions.[18] Its powers to prosecute were therefore limited, and was subject to the approval of the Attorney-General. Among other factors, this is one of the issues that led to its collapse, since it was seen to be unconstitutional based on the 1963 constitution,[19] which only vested prosecutorial powers on the Attorney General. This position was to be confirmed by the Court in the *Stephen Gachiego* Case where the High Court stated thus;[20]

> *… ..It is crystal clear that S.10 and S.11B of Cap 65 are in direct conflict with S.26 of the Constitution. Whether or not KACA purports to act under the direction of the Attorney General in relation to prosecution, the exercise of powers under S.11B of Cap.65 offends the Constitution. By alienating powers conferred upon him by the Constitution the Attorney General was being escapist and is a mark of abdication of responsibilities bestowed on him by the Constitution.*

The Kenya Anti-Corruption Commission (KACC) was established by the Anti-Corruption and Economic Crimes Act (ACECA)[21] to replace KACA. The KACC had no powers to prosecute, unlike its predecessor whose powers were limited. However, unlike its predecessor KACA, ACECA gave the KACC wide range of investigative powers[22], privileges and immunities possessed by the police officers.[23] Despite the powers granted upon it by the ACECA and the EACC Act, KACC, like its predecessor, could not conduct any form of prosecution.[24]

Twalib Abdallah Mbarak CEO of the Ethics and Anti-Corruption Commission

The KACC was thereafter replaced by the EACC, upon the adoption of the Constitution in 2010. As the law currently stands, the Attorney-General has been empowered to handle all matters which are civil in nature,[25] whereas the Director of Public Prosecutions has been empowered to handle all matters which are criminal in nature.[26]

3.2 Failure by parliament to enact a legislation to confer prosecutorial powers on the EACC

Article 157 (12) of the constitution empowers Parliament to enact a legislation that confers powers of prosecution on other authorities other than the Director of Public Prosecutions. Parliament therefore has powers to grant the EACC prosecutorial powers either through ACECA, EACC Act or any other legislation. Despite the numerous calls to see Parliament enacting a legislation that will give EACC prosecutorial powers, it has failed to do so.[27]

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[16]Joachim Njagi, 'Legal Gaps Facing Implementation of EACC Mandate on Weeding Out Corruption Cases' (2017) 1 *International Journal of Law and policy (IJLP)*, 59.
[17]KACA had prosecutorial powers which were limited, and were subject to the directions of the Attorney-General who was the only Constitutional prosecutorial organ on matters of public interest.
[18]Prevention of Corruption Act (Act No. 33 of 1956), Section 11B (3) (c).
[19]Kibwana K, Akivaga S K, Mute L M, and Odhiambo M (Eds), *Initiatives against corruption in Kenya: Legal and Policy Interventions 1995-2001 (2001)* ,36.
[20]*Stephen Mwai Gachiengo & Another v Republic* [2000] eKLR.
[21]*Anti-corruption and Economic Crimes Act* (Act No. 3 of 2003), Section 6 (1).
[22]Ibid, Sections 7 (1) (a) and 65.
[23]Ibid, Section 23 (3).
[24]The Standard Team, 'Kenya: KACC Accuses Attorney General of Frustrating Graft War,' (The Standard, September 25th 2006). Available at http://allafrica.com/stories/200609250173.html.
[25]*The Constitution*, Article 156.
[26]*The Constitution*, Article 157.
[27]Gathii J, 'Kenya' s Long Anti-Corruption Agenda: 1952-2010: Prospects and Challenges of the Ethics and Anti-Corruption Commission Under the 2010 Constitution' (2011) 4 *Law and Development Review*, 69.

Director of Criminal Investigations (DCI), George Kinoti

Failure to enact a legislation by Parliament to confer prosecutorial powers upon the EACC has led to the ineffectiveness in of EACC in the fight against corruption and other forms of economic crimes, a situation that has been contributed to by the legal and political system that has been seen by many as being geared towards the protection of the accused government officials validating their conduct(s).[28] Some Scholars have argued that during the process of its enactment, ACECA was diluted by Parliament with an aim of cushioning the MPs and other personnel interested in vying for political seats.[29]

This is despite the fact that Article 10, Chapter Six and Article 260 of the Constitution bars State officers who have been implicated and have any pending integrity issues from holding office.[30] In a matter instituted by the Commission on the Implementation of the Constitution (CIC), the Petitioners had opposed and challenged the watering down of the Act to the detriment of the EACC by Parliament.[31] In *The Commission for the Implementation of the Constitution v Parliament of Kenya & Another,*[32] CIC had argued that the powers of the EACC had been clipped by Parliament, paving way for those with pending integrity issues to vie and hold elective positions. Further, the CIC faltered the Act for failing to provide relevant and adequate mechanisms upon which the EACC can enforce the provisions of the Act. The High Court dismissed the petition, claiming that the mechanisms were relevant and adequate. This was an unfortunate position by the High Court, coming at a point when a lot of taxpayers' monies had been lost to corruption. Additionally, it had been on an instance evident that EACC had been denied prosecutorial powers by Parliament, a move that had impeded its attempt to enforce laws on corruption and other forms of economic crimes.

3.3 Independence of the Ethics and Anti-Corruption Commission (EACC) and the Office of the Directorate of Criminal Investigations (ODPP)

The matter regarding the independence of the two offices has arisen before the Kenyan Courts in several instances. Section 35 of ACECA requires that the EACC writes to the DPP giving it a report of the investigations, and where necessary a recommendation to prosecute any allegation of corruption that has been investigated by the EACC.[33] The question that has always been raised is on whether or not the letter by the EACC and the recommendation to prosecute is binding on the DPP. In *Mary Moraa Angwenyi v Republic,*[34] the High Court was approached on such an issue. The High Court held that the reports and the recommendations of the EACC to the DPP are not binding on him. Further, that being an independent office, he has to independently evaluate the evidence in the file presented to him and act accordingly. The Court relied on Article 157 (10) of the Constitution, which requires the DPP to perform his duties independently and not act upon the consent of any person or authority in the performance of his duties.

The same issue had arisen in *Kenneth Chege Kabetu v Republic,*[35] where the Court had contrasted the provisions of Section 12 of the repealed Prevention of Corruption Act and Section 35 of ACECA. The Court held that the ODPP is an independent office, and does not operate under the directions of any individual or a corporate body. Further, that the ACECA does not have any provision(s) similar to the provisions of Section 12 of the repealed Prevention

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[28]Gathii J, 'Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya,' (2008) 49 *William and Mary Law Review*, 1125-1134.

[29]Prof Ben Sihanya, 'Constitutional Commissions in Kenya Experiences, Challenges and Lessons' (2013) *Presented at Conference on State Implementation of the Constitution since 2010 Laico Regency, November 20, 2013, 3.*

[30]See *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR, Civil Appeal No. 290 of 2012. Noteworthy, the High Court in *Mumo Matemu* had rendered a good decision, using a rationality test to bar *Mumo Matemu* from being appointed as the Chairperson of the EACC due to his numerous 'unresolved issues.' The Court of Appeal declined to rule on the matter, hiding under the shadow of separation of powers. The Court of Appeal's decision has had haunted the EACC since its inception, and most Kenyans prefer to report to the Ombudsman and not the EACC. For more, see 'Scandal: How NSSF Gifted EACC Officials with Houses, Tenders to Stop Corruption Investigations' (Kenya Today, 25 March 2015) <https://www.kenya-today.com/news/scandal-how-nssf-gifted-eacc-officials-with-houses-tenders-to-stop-corruption-investigations> accessed 16 November 2021. See also The Devolution Forum, 'Press Statement on the Corruption Scandals Within the Ethics and Anti-Corruption Commission (EACC),' at Hilton Hotel, 20 March 2015.

[31]Supra note 28.

[32]*The Commission for the Implementation of the Constitution v. Parliament of Kenya & Another* [2013] eKLR.

[33]ACECA, Section 35 (1).

[34]*Mary Moraa Angwenyi v Republic* [2018] eKLR. ACEC Criminal Appeal no. 2 of 2017.

[35]*Kenneth Chege Kabetu v Republic* [2017] eKLR. Anti-corruption criminal appeal no. 10 of 2010.

of Corruption Act. The court further held the view that once the reports of the investigations have been forwarded to the DPP as provided for under Section 35 (1) and (2) of ACECA, the DPP then independently reviews the file and may recommend for either further investigations or prosecution of the person or closure of the file. This can be seen to be a progressive ruling by the High Court, upholding independence of independent commissions and offices.[36]

The independence of the two institutions has seen the EACC not being able to act on its own motion or in any way compel the DPP to prosecute for any act of corruption and economic crime, which has hampered its ability to fully combat such crimes. The position, being good and promoting constitutional independence and non-interference in other words requires that the EACC allows the ODPP to independently perform its constitutional mandate. In the scandal that led to the loss of lots of taxpayers' money in the process of the procurement and supply of COVID-19 Vaccines, the investigations were conducted by EACC but there are still no notable prosecution and convictions.[37]

With a lack of a consensus among different players on whether or not Parliament ought to enact a legislation to grant EACC the prosecutorial powers,[38] EACC has been on the dark with their hands being tied especially in the events that the offences they have investigated are not prosecuted by the DPP. Without prosecutorial powers, EACC cannot fully perform its functions.[39] Transparency International have argued that that some agencies such as the IEBC, ACA and even NEMA have prosecutorial powers which they did not really seek, and are not even being utilized by them.[40] On the contrary, EACC has sought and needs the prosecutorial powers yet it does not have.[41]

4.0 Conclusion

As was postulated by the Retired Chief Justice of Kenya Dr. Willy Mutunga,[42] the fight against corruption and other forms of economic crimes requires a political goodwill by different players and different government agencies. Everyone ought to perform what is expected of them in an attempt to fight corruption in Kenya. The intensity placed on it is due to its swift and unprecedented expansion, and also due to its debilitating effects being as a symptom of poor governance, leading to poverty and the intensification of poverty not only in Kenya but also in the entire sub-Saharan Africa.[43] Failure of anti-corruption attempts are linkable to the weak institutions,[44] the leading one being EACC in enforcing the present laws. To strengthen the EACC in terms of enforcing the present laws on corruption and economic crimes, Parliament needs to step up and enact a legislation to confer prosecution powers upon the EACC.

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[36]Chapter 15 of the Constitution establishes independent commissions and offices, which are supposed to operate independently, subject only to the Constitution and not to any person or authority.

[37]Humphrey Malalo, 'Kenya Anti-graft Agency Slams Procurement of COVID-19 Equipment.' (24th September 2020) Reuters <https://www.reuters.com/article/us-kenya-corruption-idUSKCN26F3CC>ccessed 25 October 2021.

[38]Brian Kimari Mwaniki, 'Enhancing the Fight Against Corruption in Kenya: Making the Case for Conferral of Prosecutorial Powers on the Ethics and Anti-Corruption Commission' (2017) *An LLB Dissertation at Strathmore University Law School*, 5.

[39]Prof Ben Sihanya, 'The United Nation as Convention Against Corruption Implementation Review on Kenya-2013 Omnibus Assessment Checklist' (2013) *Presentation at Brackenhurst Conference Hotel, Limuru on November 7 & 8 2013.*

[40]Dalmas Okendo, Ivy Muriungi & Oyesanmi Alonge, 'Anti-Corruption Agencies and Prosecutorial Power: Which Way for Kenya?' (2013) *Transparency International.* Available at http://www.tikenya.org/index.php/blog/220-anti-corruption-agencies-and-prosecutorial-power-which-way-for-kenya.

[41]Ibid.

[42]Supra note 1.

[43]Gafar Idowu et al, *Assessing the Strategies of The Defunct Kenya's Anti-Corruption Commission (KACC): Lessons for The Ethics and Anti-Corruption Commission (EACC),'* 2. Available at http://ssrn.com/abstract=2638761.

[44]Arvind K. Jain, 'Corruption: A Review' (2001) 15 *Journal of Economic Surveys.*

The right of publicity in Kenya: real, surreal or outright legal cozenage?

By Kibet Brian

Introduction

The rise in the access and popularity of digital spaces has enabled the digital presence and influence of persons to be an invaluable asset that can be leveraged for commercial purposes.[1] As such, the role of "influencers" and "celebrities" in social media marketing and advertising has been lauded for "boosting brand awareness" and as an effective way of "enhancing credibility and gaining visibility for brands".[2] This advances the need for the existence and development of a legal framework that guides the expropriation of the uniqueness that individualizes persons and the protection of publicity rights.

The right of publicity or image rights is generally theorized under personality rights alongside the right to privacy.[3] The right to privacy has been adequately protected in the Constitution of Kenya, 2010 in Article 31.[4] However, a framework for the protection of the right to publicity has not been adequately provided for in the Constitution and in legislation.[5] In most cases, the courts have been relied on to determine the position of the law on the right to publicity and the court in *Jessicar Clarise Wanjiru* defined the right as "a person's right to commercialize aspects of his personality such as physical appearance, pictures or caricatures, signature, personal logos and slogans, and also the right to prevent other people from commercially making use of them".[6]

The divergence between the right to privacy and the right to publicity has been discerned to exist in this sense; that whereas the former occurs when true facts about an individual are disclosed contrary to the will of the concerned person, the latter rings itself around the violation of an individual's right to determine who should have access to their image and likeness.[7]

This work limits itself to how personality rights and particularly the right to publicity have been defined and protected in Kenya. It does so by firstly offering the rationale that has been advanced for the protection of personality rights. It goes ahead to discuss the philosophy that girds personality rights and then delves into the existing Kenyan legal framework on the same. It then proceeds to offer possible changes to the legal framework on personality rights with a view of making the right to image real, which is the overarching goal of this article. It is also keen to highlight the Bailiwick of Guernsey as a benchmark for the Protection of Image Rights in the world.

Rationale for the safeguarding of personality rights

Those pushing for the recognition of personality rights have offered three main justifications for the same. Firstly, an economic incentive justification has been offered. The

[1]A. E Helling, *'Protection of 'Persona' in the EU and in the US: a Comparative Analysis' 45 LLM Theses and :says, University of Georgia School ofLaw* (2005), Available at https://digitalcommons.law.uga.edu/stu_llm/45/ Accessed on 24/09/2021

[2]Martin R. in *The Effects of Celebrities on advertisement*, Available at https://smallbusiness.chron.com/five-advantages-using-celebrities-advertising-34394.html Accessed on 24/09/2021

[3]Wafula J. N, Social media and its effects on personality rights: the case for a defined legal framework on personality rights in Kenya, Available at https://su-plus.strathmore.edu/handle/11071/6195 Accessed on 24/09/2021

[4]Constitution of Kenya 2010, Article 31

[5]Wafula J. N, *Social media and its effects on personality rights: the case for a defined legal framework on personality rights in Kenya*, Available at https://su-plus.strathmore.edu/handle/11071/6195 Accessed on 24/09/2021

[6]Paragraph 17 of Clarise Wanjiru V Reconstruction Center & 2 Others , 2017, Available at http://kenyalaw.org/caselaw/cases/view/140816 Accessed on 24/09/2021

[7]See Generally National Media Limited and Another vs Jooste 1996 (3) SA 262 (A) at 271C-H), McQuoid-Mason, "Invasion of Privacy: Common Law v Constitutional Delict – Does it make a difference?" 2000 Acta Juridica 227 and Neethling: "The Concept of Privacy in South African Law" op cit 24.

rationale behind the argument is that personality rights majorly concern themselves with celebrities and public figures keen to "protect the market values of their images"[8]. Through the protection of their images, the celebrities can focus on their chosen fields resulting in their own and general economic growth.[9] It is the value of these images that scholars argue cannot be protected under other the right to privacy approach such as copyright or trademark.[10] A case for the recognition of personality rights and the right to image to be incorporated in the laws is thus made.

Secondly, the moral rights justification has been advanced. It focuses more on labor rights of the celebrity whilst making a cause for personality rights.[11] This argument is derived from John Locke's theory on labor which posits that if a person works hard on their images, they deserve to decide who benefits from it.[12] Finally, a legitimate expectation exists that legislators will at all times endeavor to protect the entitlements of individuals to what is theirs.[13] This comes about under the private property rights theory which was advanced by scholars such as Immanuel Kant and postulates that the need for individuals to meet their fundamental human needs can only be if entitlements to resources are defined by the legislators.[14] Put simply, a defined legislative framework on personality rights accords individuals a chance to meet their fundaments need through the exploitation of their private property, which in this case is their image and likeness.

Theoretical foundations for personality rights

Marcus Cicero's analogy of the world as a great theater, common to the public, but where a person can lay individual claim[15] best exemplifies mankind's concern in their day to day lives with "the idea of rights and the right to things".[16] This is to mean that man, in his quest to survive, strives to protect his dominions from other persons and seeks to enjoy them comfortably. As such humans exercise these rights against any person or in *rem*.[17]

Sir William Blackstone put out that all things were given to humankind in common and everyone took from the public stock to his own use such things as their immediate

[8]Nimmer M. The Right to Publicity, 2004
[9]Schlegelmilch J. Publicity Rights in the UK and the USA, 2003
[10]Greenberg M and Lovitz N, "Right of Publicity and the Intersection of Copyright and Trademark Law"
[11]Moses Muchiri, Is there a jurisprudential justification for the recognition of a right of publicity in Kenya? 2018
[12]Nimmer M. The Right to Publicity, 2004
[13]Wafula J. N, *Social media and its effects on personality rights: the case for a defined legal framework on personality rights in Kenya*, Available at https://su-plus.strathmore.edu/handle/11071/6195 Accessed on 24/09/2021
[14]B. St. Michael Hylton, and Peter Goldson. "The New Tort of Appropriation of Personality: Protecting Bob Marley's Face." The Cambridge Law Journal 55, no. 1 (1996): 56–64 Available at http://www.jstor.org/stable/4508169, Accessed on 24/09/2021
[15]Marcus Tullius Cicero, a roman statesman and academic skeptic, is attributed with the saying as quoted in Blackstone W. Commentaries on the Laws of England in four books. vol 1, JB Lippincott Company, Philadelphia, 1893
[16]Francs Kariuki, Smith Ouma and Raphael Ngetich; Property Law, Strathmore University Press, 2016
[17]Hohfeld W, 'Fundamental Legal Conceptions as applied in judicial reasoning' 27 1917

necessities required.[18] The Blackstonian view of complete exclusion of the world from an individual's property was conceptualized when property was still considered as "that which can be seen and touched". This is because in some modern property rights take an "invisible form". Such an invisible form of property includes image rights and the right to publicity.

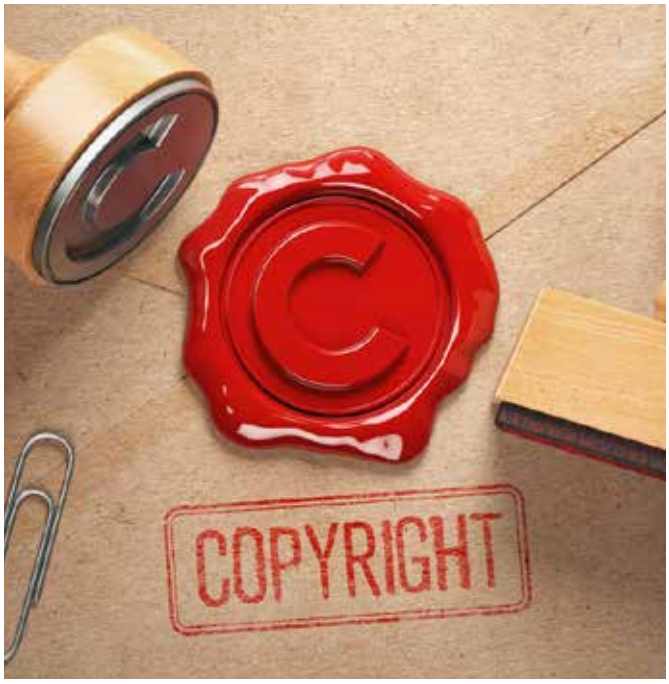
Posner, while advancing the economic theory of property, avers that the world is filled with economically rational actors who are "constantly seeking to maximize their selfish interests, necessitating an efficient property system to facilitate free market exchange and efficient allocation of resources".[19] The view that persons always seek more money as advanced, by this theory, means that the emerging field property like personality rights must influence the property rights regime. This will enable the people to maximize the individual's willingness to pay resulting in more money for those in the society.

Utilitarianists view the purpose of law as the attainment of "the greatest happiness of the people". Jeremy Bentham wrote that a legislator who drafts property legislation must do "what is essential to the happiness of society: when he disturbs it, he always produces a proportionate sum of evil".[20] Legislations must therefore always seek to advance the happiness of the society. Therefore, as technology advances the new fields must be exploited for the greatest good as enabled through the enacted statutes. This greatest good can be found by recognizing and entrenching personality rights. Therefore the right as to "things" in personality rights ought to be included in the property law regime.

The Kenyan legal framework on personality rights

This part briefly highlights the Kenyan legal framework on personality rights and particularly the right to image. In the absence of a specific statute on image rights, this work feels for pulses of these rights in the Constitution, existing statutes and case law where image rights were issues.

The Constitution of Kenya, 2010 makes a case for personal property rights under Article 31. This article provides for the right to privacy. This includes the right



not to have 'information relating to family or private affairs unnecessarily required or revealed'[21] and 'the privacy of their communications infringed'.[22] From this constitutional provision, it can be deduced that the right of privacy can be understood to mean; the right to "be alone',[23] the protection of human dignity or inviolate personality,[24] person's control over access to information about himself,[25] person's limited accessibility to others,[26] and autonomy or control over the intimacies of personal identity.[27]

Section 12 of the Consumer Protection Act, 2012 seeks to protect personality rights of individuals. The section prohibits "unfair practices" one of which touches on publicity rights. The representation that the goods or services have the approval of a person in the form of sponsorship, approval status, affiliation or connection yet such do not exist is criminalized under the section.[28] Section 2 of The Copyright Act defines the author of an image, in this case a photograph, as the "person who is responsible for the composition of the photograph".[29] This vests the right to ones likeness in a photograph to the photographer and not the owner of the likeness.[30]

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[18]Blackstone W, Commentaries on the laws of England in four books, vol 1 JB Lippincott Company, Philadelphia, 1893,305
[19]Posner R. Economic Analysis of Law: 6 ed
[20]J. Bentham; The Theory of Legislation
[21]Article 31 (c), Constitution of Kenya,2010
[22]Article 31 (d), Constitution of Kenya,2010
[23]R. Gavinson, 'Privacy and the Limits of Law' (1980) 89 Yale
[24]E.J. Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 NYUL Rev 962, 1001.
[25]C. Fried, 'Privacy' (1968) 77 Yale
[26]R. Gavinson, 'Privacy and the Limits of Law' (1980) 89 Yale
[27]Gerety, 'Redefining Privacy', 236
[28]Section 2, Consumer Protection Act, 2012, Available at http://www.parliament.go.ke/sites/default/files/2017-05/ConsumerProtectionActNo46of2012.pdf Accessed on 24/09/2021
[29]Section 2, Copyright Act, 2001 Available at http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2012%20of%202001 Accessed on 24/09/2021
[30]Dr. Ouma M. 'Photography: Image Rights' 18 *Copyright News*, A Publication of the Kenya Copyright Board

Kenyan courts have defined personality rights as "the right of an individual to control the commercial use of his or her name, image, likeness or other unequivocal aspects of one's identity".[31] The right to the protection of one's image is thus one of the essential components of self-development. It mainly presupposes the individual's right to control the uses of that image, including the right to refuse publication.[32]

In the case of *Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others*, Justice Mativo put forth the tests for the determination of whether an individual's right to image had been violated as when: a) Use of a protected attribute; The plaintiff must show that the defendant used an aspect of his or her identity that is protected by the law. This ordinarily means a plaintiff's name or likeness, but the law protects certain other personal attributes as well. b). For an exploitative purpose; The plaintiff must show that the defendant used his name, likeness, or other personal attributes for commercial or other exploitative purposes. Use of someone's name or likeness for news reporting and other expressive purposes is not exploitative, so long as there is a reasonable relationship between the use of the plaintiff's identity and a matter of legitimate public interest. c) No consent: The plaintiff must establish that he or she did not give permission for the offending use.[33]

In *Alfred Ombudo K'ombudo v Jane W. Odewale & another*, Justice Aburili issued an injunction barring the respondents from publishing or airing the wedding photographs of the petitioner. The petitioner had no prior agreements with the respondents on the publication and airing of the videos and photographs of their wedding. To the judge an injunction was the most appropriate remedy to the applicant since no amount of damages could restitute the applicant.[34]

The courts have pronounced themselves that the position in the country at the moment is that claims involving unauthorized use of images and photographs are founded on the violation of an individual's right to privacy. In *Dennis Oliech V East African Breweries limited (EABL)*,[35] three prominent Kenyan footballers sued EABL after the company used their photographs to market one of their products called "Tusker". The court held that this amounted to breach of their right to privacy.

Suing for defamation under torts is also an option. This is because a person cannot sue another private party for a purported infringement of their constitutional right to privacy. This was held in the case *Uhuru Muigai Kenyatta V Nairobi Star Publications Limited*.[36] The court pronounced itself that a person cannot sue another for the right to privacy rather should sue the other through torts which are under private law for remedies they may seek for the breach of their rights that are personal in nature.

[31]Jessica Wanjiru V Davinci Aesthetics and Plastic Reconstruction Clinics & 2 others (2017) eKLR
[32]Von Hannover V Germany (No.2), Grand Chamber judgment of 07/02/2012
[33]In this particular case, the images of the petitioner had been used on billboards along Kenyatta Hospital Road in Nairobi advertising reconstruction and plastic surgery without the consent of the petitioner. The case is available at http://kenyalaw.org/caselaw/cases/view/140816 Accessed on 24/09/2021
[34]Alfred Ombudo K'ombudo v Jane W. Odewale & another [2014] eKLR
[35]Dennis Oliech V EABL, unreported case as cited in Moses Muchiri; Is There a jurisprudential justification for the recognition of a right of publicity in Kenya? 2018
[36]Uhuru Muigai Kenyatta V Nairobi Star Publications, 2013 eKLR

The Bailiwick of Guernsey approach to publicity rights

This work recognizes the Bailiwick of Guernsey as possessing one of the most progressive image and publicity rights framework in the world. The Bailiwick is one of the crown dependencies alongside the Isle of Man and the Bailiwick of Jersey and is located in the English Channel.[37] The Bailiwick has enacted an image rights legislation called, The Image Rights (Bailiwick of Guernsey) Ordinance, 2012.[38]

The ordinance provides for registration of a personality to wit an individual will enjoy exclusive property rights.[39] Individuals who may apply for this registration are called "personage" whom the act defines as "natural persons, legal persons, two or more natural or legal persons who are publicly perceived to be intrinsically linked and who together have a joint personality, two or more natural or legal persons who are publicly perceived to be linked in a common purpose and who together form a collective group or team and fictional characters of a human or nonhuman".[40]

Section 27 of the ordinance provides for the instances where an individual's right to an image have been violated to include cases whereby, *"the image rights attributable to a registered personality are used for a commercial purpose or a financial or economic benefit where, because the image is identical or similar to a protected image of that registered personality, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with that registered personality, or which is identical or similar to a protected image of that registered personality and the use of the image, without due cause: takes unfair advantage of the distinctive character or repute of the personnage, or is detrimental to the distinctive character or repute of the personnage, or the value of that registered personality or that registered personality's images."*[41]

In what seems to be an attempt to define the right to image as enjoyed only by persons who have a public following, Section 28 of the Ordinance provides that the images must have actual or potential value at the time where they are infringed. The test for determining whether an image has actual or potential value is given as the potential of an image to be exploited for potential value.[42] The registered images enjoy a presumption of having actual or potential value which is rebuttable.[43]

Recommendation

In order to fully anchor personality rights and particularly the right to image in Kenya, this work advocates for the addition of the right to image and personality as an independent constitutional right. This is meant to address the challenges persons face when raising their personality rights since the remedies offered in torts is not sufficient and may need to be protected by the state. The rights to an image in a photograph also needs to be relooked since at the moment, the Copyright Act vests the rights to the author of a photograph who is the photographer or the employer who commissioned it. This takes away the ownership of an individual to his or her likeness in a photograph.

Conclusion

This work has examined the entrenchment of personality rights in the Kenyan property law regime. It has put forth the lessons Kenya can learn from the Bailiwick of Guernsey and offered possible reforms to the Kenya image rights regime. However, the novelty of this particular right presents challenges in the enforcing of the rights to image since a conundrum may arise, in the world that is a global village, will Kenyan courts have jurisdiction over image rights infringed in another country but protected and registered in Kenya?

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[37]More information on the Bailiwick is available at https://www.channelislands.eu/about-channel-islands/about-bailiwick-of-guernsey/ Accessed on 24/09/2021

[38]This legislation is available at https://www.guernseylegalresources.gg/ordinances/guernsey-bailiwick/i/intellectual-property/image-rights-bailiwick-of-guernsey-ordinance-2012/ Accessed on 24/09/2021

[39]Section 51, The Image Rights (Bailiwick of Guernsey)Ordinance (2012), Available at https://www.guernseylegalresources.gg/ordinances/guernsey-bailiwick/i/intellectual-property/image-rights-bailiwick-of-guernsey-ordinance-2012/ Accessed on 24/09/2021

[40]Section 1, *The Image Rights (Bailiwick of Guernsey)Ordinance* (2012).

[41]Section 27, *The Image Rights (Bailiwick of Guernsey) Ordinance* (2012).

[42]Section 28, The Image Rights (Bailiwick of Guernsey) Ordinance (2012).

[43]Section 28, The Image Rights (Bailiwick of Guernsey) Ordinance (2012).

Finding a solution to the frequent bandit attacks in Kenya: a bird's eye view

By Adams Llayton Okoth

Later last month, the country witnessed a series of bandit attacks in parts of Elgeyo Marakwet County. The Daily Nation reported that three children had been killed in a bandit attack in Kerio Valley. The attack that occurred at Kapkoros area also left six other people injured. The children who were pupils at Tot Primary School were playing in a nearby field when they were sprayed with bullets. The incident left local leaders enraged while others took it to their social media platforms condemning such heinous acts while blaming the national government for failing to provide maximum security and quell such attacks in the areas. Later, in a fresh attack on the 2nd of May, a primary school teacher was killed in an attack by the heavily armed bandits while herding cattle belonging to six families in the company of some children.

This is however not the first time such attacks are occurring in such areas. Earlier in April, nine people were left dead with four injured in a banditry attack in Burat, Isiolo county. In this occurrence, the area chief reported via the Nation Africa that the bandits had the intention of stealing camels and livestock in the area. These frequent intermittent attacks call for a long-lasting solution. Peace must be maintained in such banditry prone areas, more importantly during this electioneering period. While traditionally cattle rusting was an accepted cultural practice in East Africa in particular and Africa at large to acquire livestock to replenish decimated herds after long periods of drought, the *modus operandi* of the cattle rustlers, however, has changed what was traditionally accepted to a form of criminal organization. The use of firearms and live bullets can no longer be tolerated as a form

of acquiring livestock for commercial gain and symbol status. Of worth to note is that the bandits use sophiscated guns including AK-47 machine guns. This can only be equated to armed robbery coupled with murder and rape.

But what could be the solution to such frequent attacks? Personally, I do not think that hide-and-seek games would do anything substantive to remedy the situation. The immediate result of these blame games is the politicization of an already worsened situation. Frankly speaking, while furiously calling out the national government to spring to action is plausible, making such remarks that the areas also part of Kenya though not linked to the ruling regime by the local politicos will only worsen the situation. Politics should not be a matter of debate in every occasion. There are limits especially where lives are involved.

What comes to the minds of many whenever such attacks occur is deployment of police officers in the areas to bring peace. Funnily, we fail to realize that even when the police are deployed in such areas, peace will only be maintained for a short duration before such attacks are witnessed again this time round with larger seismic forces that before. An in depth understanding of the history of this banditry is the first step into sourcing a solution to this quandary that leaves many dead or injured.

George Orwell once said that he who understands the past can control the future. This was true many years ago and it is still true today. Joshia Osamba in his paper, *The Sociology of Insecurity: Cattle Rustling and Banditry in North-Western Kenya* posits that the roots of the banditry can be found in social, cultural, political and historical factors. He contends that banditry and cattle rustling are serious threats to internal security, rule of law and democratic governance, which are so vital for political pluralism in Kenya; arguments which I adopt as if they were mine.

Historically, his point of departure is that the marginalization of pastoralist communities has contributed largely to the exacerbated violent attacks that are being witnessed in the pastoralist areas. He traces this to the colonial rule which established white settlers' plantation economy at the expense of peasant production with pastoralism being regarded as primitive. This led to the restriction of movement of the pastoralists which only meant one thing: that in case of death of a herd of one, cattle raiding was the sincerest form of adding the stock. He further attributes the cattle raiding to state repression since the colonial period. Since the northern Kenya was a closed district and was administered by military personnel, movement was restricted such that whenever there was a cattle raid, the government would send punitive expeditions against the suspected communities. This only worsened the situation as the communities resorted to being armed to protect themselves as well. He notes that the use of police force has failed to achieve its objectives. It has only led to the proliferation of illegal firearms and mass abuse and violations of human rights whenever such police raids occur. Other causal factors include the cross-border boundaries conflicts.

These causes can be a guide into finding a long-lasting if not a final solution to this menace. In my own humble opinion without being sentimental, to begin with, I think the solution does not lie with the government per se or through deployment of troops whenever such attacks occur. Deployment should only be done before such raids occur. History speaks volumes about this. These troops should build trust with the local communities through working with village *vigilantes* in combing the bandits' hideouts. Prevention is always better than the cure. The state should also prioritize and address the structural inequalities that drive the communities to violence such as historical government mistreatment as highlighted above.

Secondly, the local leaders also have a role in fact so huge than the national governments. This is through sensitization and rallying the communities to live in peace because they are their voices nationally. Peace seeking escapades begin at the grassroot, infamously known as the ground. This can be termed as a "bottom-up" security model which is desirable during such times. At the local level, there are chief's barazas, church gatherings or even community ceremonies. These are models which can be used to vouch for peace. In my early days of studies, I remember my teachers telling me as if it were yesterday, that the most important point of departure which is the first solution to any problem or conundrum is education; in this context sensitization. Sensitize the warring communities on the importance of peace. It is point blank knowledge that to some extent it is the reason why learning begins at quite tender an age; to inculcate some moral virtues in the children while they are still young and fresh. The government also on its part should do more than just sending troops to the war infested areas when the attacks are on the rise. Security experts have argued that in order to quell such frequent raids, the government needs to put in more resources to increase the human capacity of the military and provide equipment for training and they should be accounted for because sometimes they end up in the hands of cartels where they are misappropriated, and nothing left to be accounted for. The government needs to do a thorough follow up on these monies to ensure accountability and to see to it that they are put into use for the allocated activity.

Above all, we need to remind ourselves always that not all violent problems require violent solutions and that modern problems too require modern solutions. These conflicts lead to wide scale and grotesque violation of human rights. The main challenge faced is of determining who is responsible for the atrocities and assigning appropriate punishment.

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#WeCantBreathe! Understanding the right to a clean and healthy environment in Kenya

By Emmaqulate Kemunto Morang'a

On the 11th and 12th of July 2020, Citizen TV station aired a report on continued air pollution by Endmor Steel Millers Limited, which pollution continues to adversely affect the residents of Syokimau in Machakos County. From the report, residents reported ill health and even death, associated to the pollution in the area. Against this backdrop, this article dissects the status of the right to a clean and healthy environment in Kenya. '

The legal framework

a) The Constitution of Kenya, 2010

Every person in Kenya has a right to a clean and healthy environment as provided for by Article 42 of the Constitution. Complementing this right is Article 43 (1) which guarantees every person the right to highest attainable standards of health, the right to clean and safe water, the right to sanitation, the right to adequate food. Therefore, if one's health is adversely affected as a result of pollution, then their right under Article 42 has been violated.

b) Environmental Management and Coordination Act (EMCA), 1999

Section 3 guarantees every person in Kenya a right to a clean and healthy environment. It further states that this right includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.

International covenants containing this right include the United Nations Convention on the Rights of a Child,[1] International Covenant for Social Economic and Cultural Rights,[2] and the African Charter of Human and People's rights.[3] All these instruments have effect in Kenya courtesy of Article 2(6) of the Constitution.

What entails the right to a clean and healthy environment?

The Constitution does not state what amounts to a clean and healthy environment, neither have Kenyan courts been confronted with this question. Section 3 of EMCA's definition only addresses the 'access' aspect. Luckily, there is an internationally established definition of this right by the 1994 Draft Principles on Human Rights and the Environment. Under Principle 5, all persons have the right to freedom from pollution, environmental degradation and activities that adversely affect the environment, threaten life, health, livelihood, well-being or sustainable development within, across or outside national boundaries. Further, Principle 6 guarantees all persons have the right to protection and preservation of the air, soil, water, sea-ice, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems.

In wholesome, this right then comprises of persons having the access stated in section 3 (2) of EMCA, the freedom

[1]Article 24
[2] Article 12
[3]Article 24

from environmental pollution stipulated within Principle 5, and a protected and conserved biodiversity as per Principle 6 of the 1994 Draft Principles.

Consequently, by being subjected to breathing polluted air, the Syokimau residents' right to a clean and healthy environment continues to be grossly violated.

Article 42 and other constitutional rights

The right to a clean and healthy environment is so crucial to human survival that it has been directly linked to the right to life,[4] so that its violation results to a violation of the right to life.

In ***SERAC V Nigeria (2001)***[5] the African Commission[6] held that the continued pollution of the lands of the Ogoni people by Shell Petroleum Development Corporation (SPDC) through oil spillage constituted a violation of the Ogoni's right to life.[7] In Friends of Lake Turkana Trust v Attorney General & 2 Others (2014) eKLR, the Court invoked the human rights principle of indivisibly, as pronounced in the Vienna Declaration and Program of Action of the 1993 World Conference of Human Rights,[8] to hold that the right to life, dignity and socio-economic rights contained in Article 43 are interconnected.

Further, in ***Peter K. Waweru v Republic (2006) eKLR***, the Court held that the right to life is not just a matter of keeping body and soul together because that right could be threatened by many things including a polluted environment. Therefore, continued violation of Article 42 ultimately violates the Syokimau residents'' right to life.

Article 42 and the State's obligation to protect

The State and State Organs are obligated to observe, respect, promote and fulfill the rights contained in the Bill of Rights[9] The obligation to protect requires the State to prevent, investigate and punish violations of this right by private parties, and further restore the violated right. It requires the State to protect citizens from actions of private parties. It is the duty of the National Environmental Management Authority (NEMA) to investigate any pollution allegations and act accordingly. For more than two years the residents of Syokimau have complained of the pollution, yet the Factory was never really closed down. In this way, the State has violated the Syokimau residents' right to a clean and healthy environment.

In ***SERAC V Nigeria (supra)***, the Federal Republic of Nigeria was found culpable of violating the Ogoni people's right to a clean and healthy environment due to its inaction towards the continued pollution caused by SPDC.

In the ***KM & 9 Others V AG & 7 Others (2020) eKLR***, the High Court held that the State could not escape liability by invoking the polluter pays principle because it has a primary obligation to protect, investigate and punish violations of rights by private parties, an obligation to the residents of Owino-Uhuru village it failed to meet.[10]

Enforcement of Article 42

a) Locus standi

The residents of Syokimau have a right to seek redress from court over the violation of their right to a clean and healthy environment.

Unlike in ***Wangari Maathai V Times Media Trust Ltd (1989) eKLR***, the residents need not establish personal injury when seeking redress. Article 22 of the Constitution gives every person a right to institute proceedings claiming violation of any rights within the Bill of Rights, either on their own behalf or on behalf of others. Further, Article 70 (3) of the Constitution and Section 3 (4) of EMCA allow any person claiming a violation of Article 42 to apply to a court for redress, notwithstanding that such a person cannot establish any personal loss or injury.

b) Jurisdiction

i. The High Court

As was held in Owners of the Motor Vessel "Lillian SS" vs Caltex Oil Kenya Limited (1989) KLR 1, jurisdiction is the lifeline of a case and without it, a Court ought to down its tools.
Whereas the right to a clean and healthy environment is under the Bill of Rights, and therefore subject to the jurisdiction of the High Court by virtue of Article 165 (3) (b) of the Constitution, this jurisdiction is limited in respect to matters falling within the jurisdiction of the courts established under article 162 (2). One of such courts is the Environment and Land Court.

ii. The Environment and Land Court (ELC)

Sections 3, and 13 (2),(3) of the ELC Act, 2011 outlines the Court's jurisdiction to include authority to hear and determine applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution. See KM & 9 Others V AG & 7 Others (2020) eKLR.

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[4]Article 26
[5]Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria (Communication No. 155/96)
[6]The African Commission on Human and People's Rights
[7]Para 67
[8]Part I, Article 5
[9]Article 21 of the Constitution
[10]Para 87-92

iii. The Magistrates' Courts
In LSK Nairobi Branch v Malindi Law Society & 6 others (2017) eKLR, the Court of Appeal held that the Magistrates' Courts have jurisdiction to hear environmental and land matters as courts of first instance based on pecuniary jurisdiction. This holding however overlooks the fact that almost all environmental matters are not pegged on a quantifiable pecuniary value.

iv. The National Environment Tribunal (NET)
The NET's jurisdiction is strictly limited to matters outlined within section 129(1) of EMCA. This was the holding in Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another [2019] eKLR.

v. Concurrent Jurisdiction
Although courts have held that there is concurrent jurisdiction between the High Court and ELC over Article 42, my opinion is that audience of the High court should be sought only when there are additional issues for consideration, other that Articles 42, 69 and 70, such as violation of the right to information. This scenario presented itself in ***Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*** (the Lapsset case), where the High Court rightfully upheld its jurisdiction to hear and determine the dispute, although inherently environmental.
The residents of Syokimau may therefore seek redress either through the High Court or the ELC.

c) Redress
Section 3(3) of EMCA, and Articles 23 (3) and 70 (2) of the Constitution outline possible remedies available for petitioners who approach a court over violations of this right, including orders for an injunction and compensation, based on the nature of the complaint.

Conclusion
From the ***Wangari Maathai case***, Kenya had come a long way towards full realization of the right to a clean and healthy environment. It is now easier to seek redress from courts for the violation of this right. However, there is also need for the State to hasten its response to claims of violations of this right. The State's inaction and/or delay in addressing the Syokimau residents' grievances of air pollution by Endmor Steel Millers is indeed a gross violation of the resident's right to a clean and healthy environment.

The euthanasia of political party after party: an appraisal of the Political Parties Act 2011, where the law comes up for air

By Bonface Isaboke Nyamweya

Abstract

The phenomenon of political parties in Kenya is not a recent development. Even during the colonial era, our forefathers had political parties with the aim of fighting for our independence and overcoming the exploitative schemes of the cunning, greedy and brutal colonizer. The thriving of these political organisations can be associated with the rich values that enshrined the members. Those political parties before independence devoted themselves for the good of all, while those after independence have been seeking cheap popularity in their manifestos that they never fulfill rather crave for individual ends. Kenya had no specific laws regulating the political parties for a long span after independence. The registration of political parties was solely done by the Registrar of Societies, under the Societies Act (Cap. 108).

Between 1993 and 1994, Parliament tried enacting a law that would provide independent regulation and funding of political parties, to no avail. But even after the creation of the Office of the Registrar of Political Parties and the Political Parties Act 2011 to register and regulate the political parties, our politicians have hugely failed in fulfilling the promises they make in their manifestos. This paper discusses the journey towards the Political Parties Act 2011 and the Act itself in relation to the political strides that have been made by looking into a brief historical background of the political parties in Kenya, the legal and institutional framework of political parties, the dialectics of the Kenyan political parties' manifesto implementation, and the prolegomena towards an accountable political party. It then makes recommendations on the way forward before the conclusion.

I. Introduction

Whereas the duty of building the nation is in the hands of all citizens, nonetheless our political leaders have an upper

hand in this because they oversee the implementation of the government policies. Each political leader sprouts from a political party deemed to have a party constitution and a manifesto, all in the name of aiding the building of the nation as a government. This makes the Political Parties Act 2011 crucial in our appraisal of the Kenyan strides towards development.

But what is a political party? According to the *Political Parties Manual*, "A political party is widely defined as any association or organisation of persons which has for its objects or purposes the proposing or supporting of the candidates for national or county election, with a view to forming or influencing the formation of the Government."[1] This definition portrays a political party as mostly interested in producing someone or some people who can be elected by the citizens to represent and implement the people's indigenous goodwill in the government.

A political party is thus not an institution that ought to lack a national identity. In fact, Article 91 of the Constitution of Kenya 2010 emphasizes that political parties ought to have a national character and promote the democratic principles of good governance.[2] Section 2 of the First Schedule of the Political Parties Act, 2011, highlights that the behavior of the members and office holders of political parties, aspiring candidates and their supporters shall be regulated by the Code of Conduct in order to enhance good governance and eradication of political malpractices.[3]

[1]Political Parties Manual, 1.
[2]The Constitution of Kenya, 2010, Article 91.
[3]The Political Parties Act, 2011, First Schedule, s 2.

In order to grasp fully the aspect of political parties in relation to our development, we shall start by a historical background of the Kenyan political parties, the legal and institutional framework of political parties, the dialectics of the Kenyan political parties' manifesto implementation, and the prolegomena towards an accountable political party.

II. A brief historical background of the Kenyan political parties

(a) During the colonial era

The phenomenon of political parties in Kenya is not a recent development. Even during the colonial era, our forefathers had political parties with the aim of fighting for our independence and overcoming the exploitative schemes of the cunning, greedy and brutal colonizer. The Young Kikuyu Association (YKA), for example, was formed in 1921 as a breakaway from the Kikuyu Association (KA) and later renamed the East Africa Association (EAA).[4] We all know that these nascent political parties were determined to end forced labour, reclaim their land, have the Kipande system abolished, have representation in the Legislative Council, among such other ambitions. Due to their constant efforts in their pursuit of freedom, Kenya became the first East African country to have an African on her Legislative Council in 1944. This number rose to two in 1946, while in 1948 and 1951 it hit four and eight respectively.[5] This shows passion and devotion.

The thriving of these political organisations can be associated with the rich values that enshrined the members. These were leadership values that were encrusted in each African community. In her book: *The Challenge for Africa*, Wangari Maathai observes that:

> In communities where governance and leadership resided in one age group, after a period of time in power the entire age group retired in favor of the next generation. In the Kikuyu tradition, this was a formal procedure that took several years to complete and was known as *Ituika*, literary translated as 'the severance.' These ceremonies served as de facto 'term limits,' and acted as a guarantee to all generations that their time to guide the destiny of their people would come, and that they needed to be both patient and prepared to take on their responsibilities.[6]

This evinces that our ancestors embraced fairness and democracy beyond words. Each age group could do their best in serving the people so as to set a better example that could be emulated by the next generation. Thus, each generation avoided looting the properties owned together or those that were private because they were conscious of

The late Wangari Maathai

leadership as not only a service to others, but also a kind of mentorship. This made them serve their fellow people with passion and integrity.

This being the case, we really never lacked our own jurisprudence and political systems. Our laws and politics were after sustaining our people and protecting our natural resources for ourselves and those other generations to come. The common good was the burning issue of all our endeavors. But the coming of the European powers destroyed our political systems. For example:

> The last such *Ituika* in the Kikuyu community was to take place between 1925 and 1928, but remains incomplete. The British colonial authorities, fearing the gathering of a large group of people in one place, cut it short and banned it. Since the symbols of power were never handed over to the generation, this signaled the end of the Kikuyu system of self-governance. In a similar fashion, throughout the continent the European powers ended (sometimes unknowingly) or severely eroded other precolonial systems of governance.[7]

As a corollary, the African communities lost their umbilical cords of leadership as defined by their cultural deposits.

[4]Political Parties Leadership Training Source Book, 2016, 5-6.
[5]Political Parties Leadership Training Source Book, 2016, ibid.
[6]Wangari Maathai, *The Challenge for Africa* (New York: Pantheon Books, 2009), 113.
[7]Wangari Maathai, ibid.

Ronald Gideon Ngala was the leader of the Kenya African Democratic Union.

But this does not mean that we lacked these values. It only means that our way of life, our aspirations as a people, were stifled by the imposition of the white man's political, social and economic life. This forceful refereeing and remote-controlling of a people expresses the need to sow more seeds of love, care, concern, understanding, and coexistence of the human family. Thanks to our forefathers who fought and attained independence for our nation Kenya.

(b) After independence

Although we anticipated the fruits of our independence to bud, mature, and ripen with the purported warmth radiating from political commitments after independence; we have been deliciously scandalized by the plight of our nation. As we became conscious of our independence, it seems we melted away the fabric of national unity. In 1961, as we peered into our independence, ethnic consciousness percolated the efforts of the medium sized tribes as they became worried that the larger tribes would dominate them and therefore, "Under the umbrella of a political party (Kenya African Democratic Union—KADU), they demanded the division of powers between the central government and 7 regions (ensuring regional rule for some of their member tribes)."[8]

This seemingly shows that this nation was amorphous among the Kenyans. Charles Hornsby argues that all our country's boarders were alien to us since they never matched our local languages, communities or physical geography; thus, a British artificial creation involving the lumping together of neighbours although some had enmity, for the clandestine motives of the British.[9] Wangari Maathai considers the tribes as ethnic communities or micro-nations and views the current African states as superficial creations of the colonial powers.[10] Although this sounds true, we wonder: were not all political parties in Kenya before independence involved in the fight for our freedom? Were they not aware of this aspect of national identity? The truth is that they knew their tribal differences, but the common enemy made them united. Chronologically:

> After negotiations for Kenyan independence at the Lancaster Conference in 1962, two political parties, Kenya African Democratic Union (KADU) and Kenya African National Union (KANU), were formed. In the national elections of May 1963, KANU won a majority of seats in both houses of parliament. KADU dissolved voluntarily in 1964 and joined KANU. In March 1966, Kenya People's Union (KPU) was formed as a result of ideological differences, leadership struggles, and the repression of dissent within KANU. However, KPU was banned in 1969.[11]

This chronology depicts a huge difference between the political parties before independence and those that came after independence. Those before independence devoted themselves for the good of all, while those after independence have been seeking cheap popularity in their manifestos that they never fulfill rather crave for individual ends. Despite the fact that regionalism was repealed, Daniel arap Moi who was an acolyte of regionalism became the Vice President and later the president when Kenyatta passed away in 1978. President Moi's regime was just as centralised, vicious and corrupt as Kenyatta's, with a spirit soaring toward the interests of a few people from his own tribe.[12] Kenyatta annihilated all the other political parties, except KANU while Moi changed the constitution to make Kenya a *de jure* state.[13] This is not a spirit of national identity.

When our forefathers chased away the white man in the fight for our freedom, it was clear that the white man had

[8]Yash Ghai and Jill Cottrell Ghai, Constitutional Transitions and Territorial Cleavages: The Kenyan Case (Forum of Federations, Ontario, 2019) 5.
[9]Charles Hornsby, *Kenya: A History Since Independence* (IB Tauris 2013) 21.
[10]Wangari Maathai, 172.
[11]The Political Parties Manual, 3.
[12]Yash Ghai and Jill Cottrell Ghai, 5.
[13]Yash Ghai and Jill Cottrell, 5.

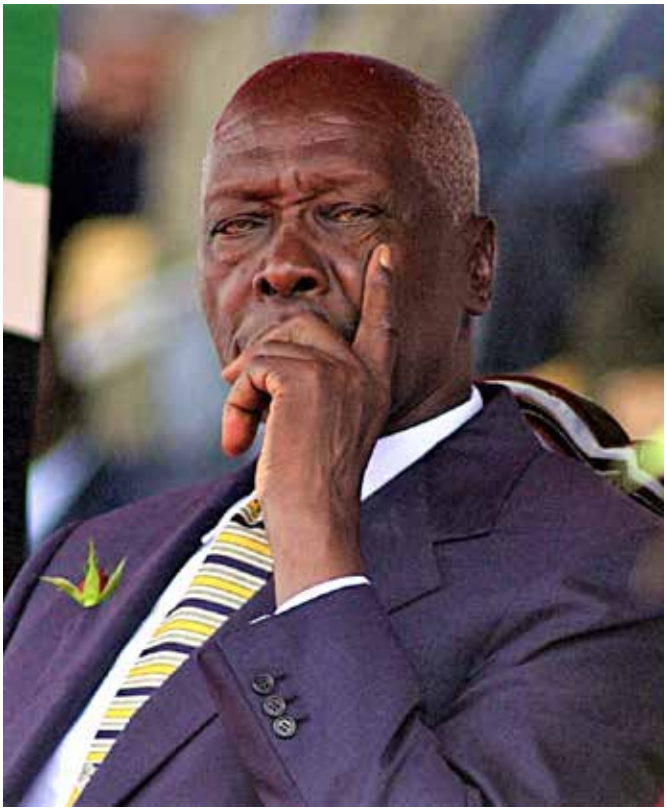
wicked intentions to exploit Africans. This is why we had to chase them away. But because the white man had tasted the richness of Africa while colonizing us, he had to find a better mask to come back and loot us to survive. This is why the involvement of Europe in Africa is mostly a way of neocolonialism. It has many strings attached that amount to the crippling of Africa. Yet, our political leaders feel insufficient without the influence of these external political powers.

Many African youths today believe that going to Europe or America is a dream God must make possible before they die in misery here in Africa. Many Kenyans apply for Green Cards each year hoping to be American citizens someday. If a white man comes to Kenya, such a person is nearly worshipped. Our villagers think of good projects, justice, and such positive elements just by seeing a white person. But if it is a fellow African, especially a political leader, ordinary people associate them with corruption, stealing of public funds, murder of fellow politicians or extra judicial officers, and such bloody wickedness. We have been conditioned to think that Europe is the antidote for all our problems.

Consequently, even our leaders have stumbled upon the imitation of our oppressors. Our freedom is no longer real. We cannot have our projects of development for the benefit of the people of Kenya, rather priority is given to exotic seductions of our policies. We therefore end up in adopting the colonizer's yardstick as the measure of our development and civilization in all matters of practical importance. Frantz Fanon reminds us that:

> Every colonized people—in other words, every people in whose soul an inferiority complex has been created by the death and burial of its local cultural originality—finds itself face to face with the language of the civilizing nation; that is, with the culture of the mother country. The colonized is elevated above his jungle status in proportion to his adoption of the mother country's cultural standards. He becomes whiter as he renounces his blackness, his jungle.[14]

This explains why even after Moi's regime lost elections, Kenyan politics still dwindle at the verge of a high cost of living upon the citizens due to misappropriation of funds, among other integrity issues. The colonizer's individualism spiced with toxic greed form the aroma of our politics. "Kenya politics is about capturing the state, for accumulating personal wealth. The key for politicians is to build support by stimulating ethnic conflicts in order to solidify their base in their own ethnic community, and then look for suitable partners from other communities to ensure a majority vote."[15] It is a pity that our political parties have failed to



Late president Daniel Arap Moi

implement our noble policies to cure our Kenyan problems. Patriotism and true leadership are phantoms that are experienced only in our dreams.

As we have examined the two historical epochs, it is evident that after independent, from one political party after another, the indigenous goodwill was and remains stifled by our failure to brand our political organisations with our indigenous aspirations and this amounts to a euthanasia of our authentic political temperaments. This is the case as we move from one political party to another- hence the euthanasia of political party after party. It is a bloody cultural euthanasia.

This status quo triggers many questions among ourselves. *Can our political leaders be good mentors of true leaders to our growing generation? Is it possible for Kenyans to co-exist regardless of our religions, tribes, gender and political differences?* All these questions persuade us to invoke our legal framework to see the much we have enacted alongside the Political Parties Act, 2011, to guide us towards a better version of our nation. These laws represent the Kenyan values and indigenous political goodwill of the people because we are the ones who form them through our leaders in parliament and in other instances, through active participation like in the case of the Constitution of Kenya, 2010.

[14]Frantz Fanon, *Black Skin, White Masks* (London: Pluto Press, 2008), 9.
[15]Yash Ghai and Jill Cottrell, 9.

Parliament of Kenya

III. The legal and institutional framework of political parties

It should be remembered that for a long span, Kenya had no specific laws regulating the political parties. The registration of Political Parties was solely done by the Registrar of Societies, under the Societies Act (Cap. 108).[16] This was the law that was in charge of the registration of every other association for example, football clubs.[17] As a natural consequence, all political parties were deemed to be private associations. This might have contributed to the diminished national identity.

What caused a Copernican Revolution in the Kenyan political arena was the democratic space of 1991 when Section 2A of the Constitution that professed Kenya to be a one-party state, was repealed by Parliament and this yielded the proliferation of many political parties.[18] The majority of these Political Parties were weak and poorly institutionalized hence deficient of a sufficient stamina to propel a democratic government. The reason behind this was the absence of an effective regulatory framework for the registration, operation, and management of our political parties.[19]

Between 1993 and 1994, Parliament tried enacting a law that would provide independent regulation and funding of political parties, to no avail.[20] The overwhelming liberty of the registration of political parties led to the mushrooming of many political parties that wrangled, split and formed new versions of these parties with similar features. Before the General Election of 2007, we had 168 registered political parties and 117 of them took part in that election.[21] This is the backdrop upon which the Political Parties Act 2007 was formed. The grand aim of this Act was to help in the party registration, regulation and funding.

As soon as the Political Parties Act 2007 commenced on July 1, 2008; the Office of the Registrar of Political Parties was established. What followed was the re-registration of all political parties that had been registered earlier under the Society's Act.[22] This had to be done within 180 days. Consequently, a massive number of political parties failed to comply with this, and out of the 168 political parties that existed before, only 47 remained by the year 2009. A year later, the Constitution of Kenya 2010 envisaged new aspects that enrich even to date our political essence.

The Preamble shows that this Constitution is a product of the Kenyans for the purpose of the realization of our aspirations. It expresses our pride in our ethnic, cultural, and religious diversity and the determination to live in peace and unity as one indivisible nation.[23] The commitment to nurturing and protecting the well-being of the individual, the family, community and nation[24] - is evident. The recognition of the aspirations of all Kenyans for a government based on the basic values of human rights, equity, freedom, democracy, social justice and the rule of law[25] - are all plausible.

Article 4 (2) states that Kenya is a multiparty democratic State founded on the national values and principles of governance referred to in Article 10. In article 27, equality and freedom from discrimination are highlighted. This invites everyone to respect each other regardless of our religious or ethnic differences. Article 36 speaks about the freedom of association. This gives the impetus to the formation of the political parties. Article 38 spells out the political rights hence justifies the citizens to belong to any political party or even to vie for any seat one is suited in.

Article 91 (1) casts the basic requirements for a political party. They are:

> (1) Every political party shall— (a) have a national character as prescribed by an Act of Parliament; (b) have a democratically elected governing body; (c) promote and uphold national unity; (d) abide by the democratic principles of good governance,

[16]The Political Parties Manual, 3.
[17]The Political Parties Manual, ibid.
[18]The Political Parties Manual, ibid.
[19]The Political Parties Manual, ibid.
[20]The Political Parties Manual, ibid.
[21]The Political Parties Manual, ibid.
[22]The Political Parties Manual, 4.
[23]The Constitution of Kenya, 2010, Preamble.
[24]The Constitution of Kenya, 2010, Preamble.
[25]The Constitution of Kenya, 2010, Preamble.

> promote and practise democracy through regular, fair and free elections within the party; (e) respect the right of all persons to participate in the political process, including minorities and marginalised groups; (f) respect and promote human rights and fundamental freedoms, and gender equality and equity; (g) promote the objects and principles of this Constitution and the rule of law; and (h) subscribe to and observe the code of conduct for political parties.[26]

These provisions correlate with the Political Parties Act 2011. In itself, this Act aimed at providing the institution, legal regulating framework for the registration, regulation and funding of political parties in Kenya. It actually implements Articles 91 and 92 of the Constitution of Kenya 2010. Under Article 91 (2), a political party, *inter alia*, ought not to be established on a religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis; engage in or foster violence by, or intimidate any of its members, supporters, opponents or any other person; establish or maintain a paramilitary force, militia or similar organisation; and engage in corruption.

Section 7 (2) of the Political Parties Act 2011 provides that a political party shall be qualified for registration if: (a) it has recruited as members not fewer than one thousand registered voters from each of more than half of the counties; (b) the members referred to in paragraph (a) reflect regional and ethnic diversity, gender balance and representation of minorities and marginalised groups; (c) the composition of its governing body reflects regional and ethnic diversity, gender balance and representation of minorities and marginalised groups; (d) not more than two-thirds of the members or its governing body are or the same gender; (e) it has demonstrated that members of its governing body meet the requirements of Chapter Six of the Constitution and the laws relating to ethics.[27]

There is a tendency in Kenya whereby the politicians intimidate each other. For example, in *Hassan Ali Joho v Inspector General of Police and 3 Others* [2017] eKLR, the court held that although the DPP had the right to carry out investigations, the applicant ought not to be harassed in the process, like in that case where Joho's education qualification issue had reached a public comic level. In *Franklin Mithika Linturi v Ethics and Anti – Corruption Commission & 3 others* [2018] eKLR, the High Court noted that the actions of the EACC amounted to harassment and intimidation. This is a violation of article 91 (2) of the Constitution that prohibits such a harassment. Echoing the words of William Wade's book: *Administrative Law* as quoted in *R v Somerset County*

Governor Hassan Ali Joho

Council, ex parte Fewings and Others [1995] 1 All ER 513 at 524, the High Court observed that:

> … A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose… But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them… [28]

This means that the political parties as public bodies have a duty to fulfill the obligations prescribed to them by the law. It means that the Political Parties Act 2011 can only be appreciated when read not in isolation but alongside other law provisions that spell out other complementary details regarding the political parties' wellbeing for the good of the people. For example, the National Cohesion and Integration Act 2008 provides in Section 25 (2) (b) that it seeks to discourage persons, institutions, political parties and associations from advocating or promoting discrimination or discriminatory practices on the grounds of ethnicity.[29]

[26]The Constitution of Kenya, 2010, Article 91 (1).
[27]The Political Parties Act, 2011, Article 7 (2) (a), (b), (c), (d), and (e).
[28]Franklin Mithika Linturi v Ethics and Anti – Corruption Commission & 3 others [2018] eKLR.
[29]The National Cohesion and Integration Act, 2008, Section 25 (2) (b).

Governor Okoth Obado

In the ongoing case of the *Republic v Zacharia Okoth Obado & 2 others* [2018] eKLR, Governor Obado is being accused of murdering his girlfriend Sharon Otieno, a second year student at Rongo University. "Mr Diero was testifying in a case where Governor Obado, his personal assistant Michael Oyamo and county government clerk Casper Obiero are charged with murder of the university student and her unborn baby. After the abduction, Ms Otieno was later found murdered and her body dumped in the Kodera Forest."[30] If these allegations will turn to be true in due course, Obado and his accomplices will be charged of murder. But this will not portray a good image of a true leader.

Regarding the two-thirds gender rule, this has not been implemented. The former Chief Justice David Maraga advised the president to dissolve parliament for failing to implement this rule as provided in Section 7 (2) (d) of the Political Parties Act 2011 and in Articles 91 (1) (f) and 197 (1) of the Constitution of Kenya 2010. The letter of the former Chief Justice Maraga read:

> [1] Your Excellency, I have before me six petitions seeking that I advise you to dissolve Parliament under Article 261 (7) as read with Articles 27 (3) & (8), 81 (b) and 100 of the Constitution… [2] The Petitions are based on the ground that, despite four court orders compelling parliament to enact the legislation required to implement the two-thirds gender rule in accordance with Article 27 (3) read together with Articles 81 (b) and 100 of the Constitution, Parliament has blatantly failed, refused and/or neglected to do so.[31]

This is really absurd. While such a sensitive aspect of law is avoided, our politicians are busy with matters that cannot make our nation prosper. In any case, it is evident that we have the legal framework to guide our political parties. The First Schedule of the Political Parties Act 2011 gives the Code of Conduct for Political Parties. In Section 2 of this Schedule, it is clear that, "This code of conduct shall regulate the behavior of members and office-holders of political parties, aspiring candidates, candidates and their supporters, promote good governance and eradicate political malpractices."[32] Each time we near the general election, we hear soothing words from our politicians. It is a time the chief armchair theorists of lies wake up to seduce the voters' will.

However, Section 4 of the First Schedule of the Political Parties Act 2011 informs us about the ingredients of the Political Parties' conduct in politics. It notes that:

Political Parties shall- (a) promote policy alternatives responding to the interests, the concerns and the needs of the citizens of Kenya; (b) respect and uphold the democratic process as they compete for political power so as to implement their policies; (c) promote consensus building in policy decision making on issues of national importance.[33]

These provisions cast a belief that truly our laws on political parties are profound. Indeed, if these provisions are followed, we are under no doubt that Kenya will be a great nation. The Leadership and Integrity Act 2012, the Public Order Act Cap 56, the Ethics and Anti-Corruption Act 2011, the Public Procurement and Disposal Act 2012, the Public Finance Management Act 2012, and the Elections Campaign Finance Act 2013, all illuminate further the aforementioned provisions of the Political Parties Act 2011. The Political Parties Act 2011 and the aforementioned provisions amount to the legal framework on political parties' registration, regulation and funding in Kenya. Unfortunately, our nation still withers in corruption, poverty, and such other deplorable conditions.

To this extent, the legal framework of our political parties is not the problem. We then wonder of the menace hindering our stepping forward as a nation since we have the laws guiding our politics. One thing is clear that although we have enacted these laws, we have not allowed them to speak to our hearts, to be integrated with our very cultural essence so as to be connatural in a way, with our values. These

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[30]Joseph Wangui, Obado Murder Trial: Witness' P3 Form Filled a Year After Abduction (Nation Media Group, February 11, 2022), https://nation.africa/kenya/news/obado-murder-trial-witness-p3-form-filled-a-year-after-abduction-3712914 [5/03/2022].

[31]David Maraga, *The Chief Justice's Advice to the President Pursuant to Article 261 (7) of the Constitution* (Judiciary: Supreme Court of Kenya, 2020), 2.

[32]The Political Parties Act, First Schedule, s 2.

[33]The Political Parties Act, 2011, First Schedule, s 4.

laws speak only to our heads but leave our hearts hollow, untouched, alienated. Thus, the euthanasia of our cultural tenets amounts even to the euthanasia of our believes on what is right and wrong, good or evil, hence a legal euthanasia of political party after party. With an alienated temperament and a hollow heart, can such a person fulfil a promise made? Let us see this in the dialectics of the Kenyan political parties' manifesto implementation.

IV. The dialectics of the Kenyan political parties' manifesto implementation

The common phrase: 'Say what you mean and mean what you say,' has lost its relevance in the Kenyan politics. The Leadership and Integrity Act 2012, Section 29, warns about misleading the public by giving false information.[34] If our political parties' manifestos are pure lies as mostly they have been seen over the years in their failure of fulfilment, is this not a legal liability? In each election period, we hear sweet words that give us an assurance of solving most of our problems. Yet, as each term expires, often not even a handful of those promises are fulfilled. The manifestos reflect an accurate understanding of the problems on the ground. The political parties' constitutions depict a mastery of the Political Parties Act 2011, the Constitution of Kenya 2010 regarding political parties, and all the other legal provisions around it.

For example, a look into the Jubilee Party Manifesto 2017 promises a lot. At the very onset, it points out that:

> Kenya has immense potential for growth, modernisation and prosperity. Growth that leaves no one behind; modernisation that secures our future for generations to come; and a prosperity that we can all share and enjoy. Alongside you all, Jubilee has been hard at work across this country and laid the foundations for a vibrant and modern Kenya that provides us all with the platform to achieve our true potential. This work continues.[35]

Who does not rejoice hearing such delicious words promising optimism? Among the things that the Jubilee government had promised are: the provision of laptops to the students, reduced cost of living and building infrastructure.[36] The laptops are nowhere to be seen. The cost of life is high and the citizens are truly suffering since cooking oil and even food are becoming very expensive every now and again. Thanks anyhow to the Jubilee government for at least building a vast network of transport systems and the provision of electricity to many parts of Kenya. However, this has come at a cost. We owe billions

Miguna Miguna

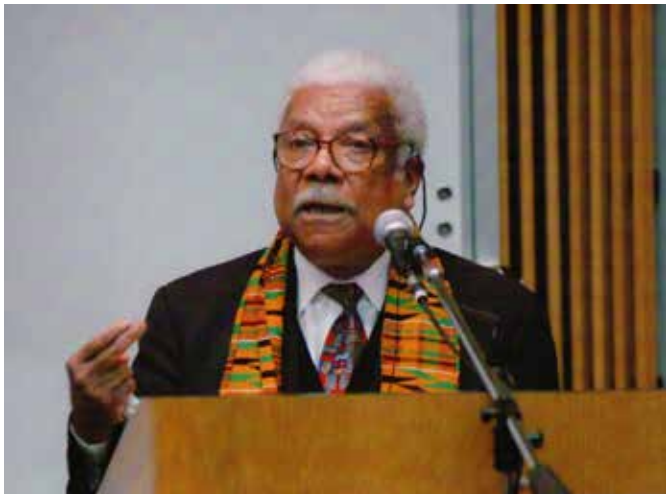
of shillings to China and other lenders. Our taxes are rising highly so as to cover for these huge loans.

In a way, a new problem has been created in our process of addressing the issue of infrastructure. In the Jubilee Party Constitution, it is observed that the Jubilee government is proud of the relationships its government has created around the world for the sake of our peace and prosperity.[37] It is true that the new infrastructure can boost our economy, but it is also true that before the Kenyans are able to harvest the real fruits of these infrastructure, a great deal of pain and suffering will be endured through the heavy taxes. We do not want to be a colony of the Chinese government. We want partnerships yes, but we must esteem self-reliance projects.

The Miguna Miguna Manifesto, for example, gives the blueprint of what can transform Nairobi drastically. Its first words are compelling: "THE TIME IS NOW. THE CHOICE IS CLEAR! TURN ON THE LIGHT, VOTE MIGUNA! VIVA NAIROBI! VIVA!"[38] This clarion call is so powerful in its diction. Now, on a serious note, he adds:

> Arise, Nairobi! Arise! You pay taxes but you have no services. You pay high taxes, but your security is not guaranteed. Millions of you have no clean running water. Millions of you live in hovels not houses. More than 90% of hard-working but poorly paid jobless Nairobians live in slums; not houses. Millions of us are surrounding with rotting, filthy and disease carrying garbage. Nairobi has no solid waste management system. Nairobi roads and streets

[34]The Leadership and Integrity Act, 2012, Section 29.
[35]Jubilee Party Manifesto, 2017, 1.
[36]Jubilee Party Manifesto, 2017, ibid.
[37]The Jubilee Constitution, 2016.
[38]The Miguna Miguna Manifesto, 2017, Preface.



Professor Ali Mazrui

> are few, narrow, decaying and falling apart. These are services you pay for and which devolution was supposed to bring.[39]

Pondering of this status quo is a painful scenario. These problems are not affecting only Nairobi County but nearly all our Kenyan counties. We wonder why these problems have not been fixed by those in power because they ought to promote, for example, the wellbeing of residents of Nairobi. Pursuant to the Political Parties Act 2011 and the Constitution of Kenya 2010, the government has an upper hand in addressing all these problems. They are not only encrusted in the Miguna Miguna manifesto but even in the Jubilee and other political parties' manifestos.

Maybe, if Miguna won the 2017 elections, then Nairobi would have been better. In that case, Miguna would have set an admirable record to all other Kenyan leaders that it is possible for us to fix our problems. Or, perhaps, like other Kenyan political leaders, he would have forgotten these promises as soon as he would be sworn in as the governor. But Miguna seems to be unique. He further claims in his manifesto that:

> Unlike our visionless opponents who thrive on fake, hypocritical humility and cynical handouts, I am a pragmatic, practical and realistic revolutionary. Unlike my competitors who have a horrible history and record of ineptitude, looting, theft, mismanagement of public resources- my record and history is untainted. I am the only candidate for the position of Governor of Nairobi who is incorruptible.[40]

If these claims are true, then why not arrest the opponents of Miguna? The Political Parties Act 2011 in the First Schedule, Section 7 (c) warns that a political party should not engage in influence peddling, bribery or any other form of corruption.[41] Section 26 (2) and (3) also prohibits the use of the political party's funds for handouts. In Section 26 (5), it even explicitly states that a person who contravenes the provisions of this section commits an offence. The Election Campaign Financing Act 2013, Section 14 (2) (a) and (b) prohibits the use of public resources to support or to campaign in support of a candidate, a political party or a referendum committee; or support any organisation that is supporting or campaigning for a candidate, political party or a referendum committee.[42] The director of Criminal Investigations is aware of these provisions of the law. Why not go ahead and conduct an investigation about it? If it turns to be that Miguna is speaking lies about his opponents, he too can be held accountable because the Political Parties Act 2011 Code of Conduct prohibits any kind of intimidation of the opponents or any other person or political party.[43] Article 10 of the Constitution of Kenya in Subsection (1) and (2) reminds us of the national values and principles of governance that include good governance, integrity, transparency and accountability.[44] This creates the impression that our laws are just there to be applied selectively since the impunity of our politicians seemingly renders them a kind of immunity from accountability of what they say and do.

Everyone wants to hear the truth and to receive any gift or favour promised. As our political parties and politicians fail to fulfill their promises pursuant to their manifestos, our trust in them dwindles and eventually dies. We become indifferent and perhaps pessimistic. Once we are mentally dismembered from a political party that we used to subscribe to, chances are that we may not like to associate ourselves with another since they have demonstrated for long to share the same chalice of lies, in the unfulfilled manifestos. This leads to the euthanasia of one political party after another.

V. A prolegomena towards an accountable political party

Having had reflected upon the historical background of the political parties in Kenya, we have no doubt that the political parties we have today lack the vivacity of indigenous goodwill and commitment as those of the colonial era that fought for our independence. Professor Ali Mazrui, in his award winning essay: T*he United Nations and Some Political Attitudes*, wonders about what constitutes sovereign statehood and he notes that:

[39]The Miguna Miguna Manifesto, 2017, i.
[40]The Miguna Miguna Manifesto, 2017, iii.
[41]The Political Parties Act 2011, First Schedule, Section 7 (c).
[42]Elections Campaign Financing Act, 2013, Section 14 (2) (a) and (b).
[43]The Political Parties Act 2011, First Schedule, Section 7 (b).
[44]Constitution of Kenya 2010, Article 10 (1) and (2).

> …from the point of view of African countries the empirical answer is perhaps the simplest. These countries know that it was not when they assumed control of their domestic affairs that they ceased to be colonies. As a matter of experience, many of them found that the ultimate expression of sovereignty was not direct rule internally but direct diplomatic relations with other countries abroad. The very process of attaining independence might, in their case, be reduced to a single catch phrase-"from foreign rule to foreign relations."[45]

This form of alienation has dogged even the wellbeing of our political parties' implementation of the manifestos. The reason for this is that in this imbalanced relationship, priority is given to the powerful nations' suggestions and policies than the indigenous ones. Consequently, we end up implementing what can foster those foreign relations at the expense of thwarting our economies and wellbeing.

We already mentioned about the Chinese loans and how they threaten our autonomy regardless of the fact that they have helped us establish a vast infrastructure. They make us feel intimidated. They have strings attached that are intentioned to prove to us that we are inferior. For example, we have many students who are winding up engineering courses and those that have already completed their studies in this. Yet, we see Chinese all over our nation fixing even the leaking pipes, constructing our roads, building our bridges, and such tasks that we can do. This is the essence of the foreign relations and their impact upon the Kenyan society, notwithstanding other African countries at large. If this is the diplomacy of change, then it is the machinery of killing our autonomy and aspirations as far it makes it impossible for us to manage our resources and affairs.

Another issue is the funding of the political parties. Since we have seen how the foreign nations eye our internal affairs, how they wish to have their policies implemented in our nation, it is reasonable to think that they can readily support a political candidate who can be their sort of a puppet. In other words, a politician or a political party that will seem to dance to their tunes will obviously be supported while that party or candidate that seem to be concerned exclusively about the Kenyan wellbeing, may lack their support. This is the surest way of securing their interests. This brings to question the regulation of the funding of our political parties.

Section 27 (2) of the Political Parties Act 2011 spells out the sources of the funds for a political party, where *inter alia*, it states that a foreign agency, or a foreign political party which shares an ideology with a political party registered in Kenya may provide technical assistance to that political party.[46] But how can we know the magnitude of such an assistance and the clandestine strings attached? Can such an assistance be a political sausage intentioned to control the government in the event that party wins and forms the government? If such a party does not win, can these foreign funding bodies use such a party to disrupt the peace of our nation? Of course, all these anticipations are probable hence possible and care must be taken to avoid this foreign trap of aid.

Section 27 (1) (b) of the same Act says that voluntary contributions from a lawful source can be one of the ways of funding a political party. How do we establish that even the volunteering contributors from Kenya are lawful? Suppose a Kenyan billionaire cartel through corruption registers a business as legal, and thus makes a voluntary donation of funds to a political party, how does this provision ensure that such a person's contribution is traced and discarded?

The reason for this concern is that such cartels can easily and highly influence the policy implementation of the politicians they supported to suit their private businesses. It means that if a candidate promises to protect them and their businesses, they can readily support him or her by their donations during the campaigns. This will disadvantage the ordinary citizens who may be interested in a tender related to their business. Consequently, it violates the very values of our Constitution as aforementioned even in the Preamble that we ought to avoid discrimination of all kinds and promote good governance and integrity as the core values of true leadership. We need to rejuvenate the Political Parties Act 2011 to curb these loopholes hence ensure that our law regarding the political parties does not suffocate but is given the oxygen by the ideal amendment.

VI. Recommendations

1. The Registrar of Political Parties should be given the powers to deregister a political party that:
   a) fails to fulfil the promises stipulated in the political party's manifesto during the campaigns;
   b) fails to uphold the values of integrity it promises in the political party constitution.

2. Section 27 (1) (b) should be amended by adding after the phrase in subsection (b):
   i. a constant surveillance shall be kept by the DCI, DPP, and EACC upon all donors to ensure that cartels and all sorts of unlawful sources do not find their way to any of the political parties;
   ii. if such a person prohibited above is presented before the court and the court is convinced that at the point of making the donation, some or all the members of the political party knew the donor as a

[45]Ali Mazrui, *The United Nations and Some Political Attitudes* (Wisconsin: University of Wisconsin Press, Summer 1964), Vol. 18, No. 3, 499.
[46]The Political Parties Act 2011, Section 27 (2).

cartel or any person proscribed by Section 27 (1) (i), the court shall deregister that political party;

iii. in an event where the court finds out that none of the political party members knew that such a person belonged to any of the proscribed persons above, then the court shall not deregister the party, rather continue with the charges against him/her alone.

3. Section 27 (2) should be amended by replacing the last full stop with a semicolon and add:

i. any foreign agency or person or political party that shall be deemed beyond reasonable doubt to support a Kenyan political party with the aim of interfering with or compromising our developmental projects for the clandestine benefit of the foreign agency, or person, or foreign political party, shall be banned from making any links with the Kenyan political parties and politicians;

ii. even with the foreign aid from the foreign relations, Kenyan political parties and politicians are encouraged to foster the indigenous goodwill as a way of embracing our values as a people.

VII. Conclusion

The bloody cultural euthanasia is conspicuous through the historical appraisal of the political parties in Kenya. The legal framework of the political parties in Kenya, including the Political Parties Act 2011 fail to be effective because our leaders lack the cultural values of true leadership due to the alienation resulting from the imposition of the white man's political and economic systems. This is clear in the unfulfilled manifestos. The foreign relations and local cartels contribute to the possible interference with the implementation of our manifestos. Therefore, the suggested recommendations can revive our commitment and vivacity in implementing our policies as we reflect on the Political Parties Act 2011 and its role so far in our development as a nation.

The author holds a Degree in Philosophy from the Pontifical University of Urbaniana, Rome. He is currently winding up his Masters in Philosophy at the Catholic University of Eastern Africa. He is also a law student at the University of Nairobi Parklands. He has published two novels: Peeling the Cobwebs (2020) and Her Question Pills (2020). Currently, he is an intern at Kenya Law.

VIII. Bibliography

Books

Charles Hornsby, *Kenya: A History Since Independence* (IB Tauris 2013).

Frantz Fanon, *Black Skin, White Masks* (London: Pluto Press, 2008).

The Political Parties Leadership Training Source Book, PDF, https://www.orpp.or.ke [5/03/2022].

The Political Parties Manual, PDF, http://www.orpp.or.ke [5/03/2022].

Wangari Maathai, *The Challenge for Africa* (New York: Pantheon Books, 2009).

Journal Articles

Ali Mazrui, *The United Nations and Some Political Attitudes*, Vol. 18, No. 3, (Wisconsin: University of Wisconsin Press, Summer 1964), 499-520.

Yash Ghai and Jill Cottrell Ghai, *Constitutional Transitions and Territorial Cleavages: The Kenyan Case*, Occasional Paper Series, No. 32, (Forum of Federations, Ontario, 2019), 1-24.

Internet Sources

Joseph Wangui, *Obado Murder Trial: Witness' P3 Form Filled a Year After Abduction* (Nation Media Group, February 11, 2022), https://nation.africa/kenya/news/obado-murder-trial-witness-p3-form-filled-a-year-after-abduction-3712914 [5/03/2022].

Legal Instruments

Constitution of Kenya, 2010

David Maraga, *The Chief Justice's Advice to the President Pursuant to Article 261 (7) of the Constitution* (Judiciary: Supreme Court of Kenya, 2020

Elections Campaign Financing Act, 2013

Jubilee Party Constitution, 2016

Jubilee Party Manifesto, 2017

The Leadership and Integrity Act, 2012

The Miguna Miguna Manifesto, 2017

The National Cohesion and Integration Act, 2008

The Political Parties Act, 2011

Case Laws

Franklin Mithika Linturi v Ethics and Anti – Corruption Commission & 3 others [2018] eKLR

Hassan Ali Joho v Inspector General of Police and 3 Others [2017] eKLR

R v Somerset County Council, ex parte Fewings and Others [1995] 1 All ER 513

Republic v Zacharia Okoth Obado & 2 others [2018] eKLR

The elephant in the room: conceptualizing third world approaches to international law: through the lenses of African infant jurists: a quest for recognition

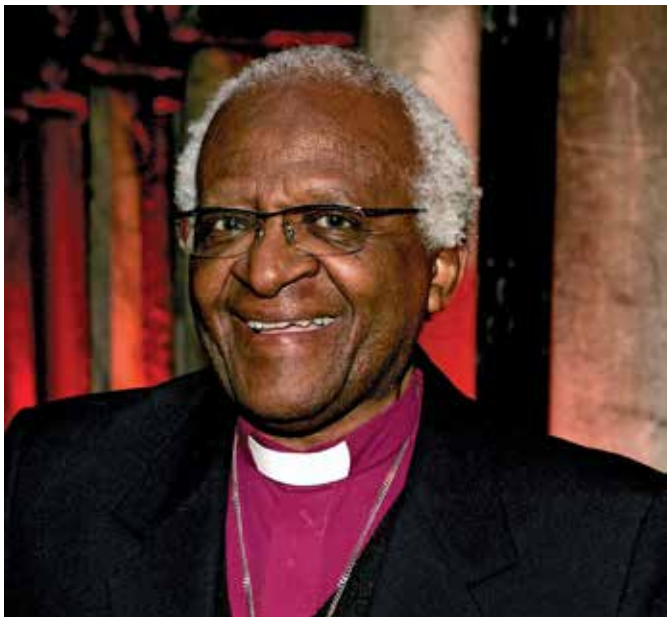
By Miracle Okoth Okumu Mudeyi

By Gibson Mapesa Kiambwa

By Charles Kipkoech Lepski

By Naomi Chepkemoi

By Oloo Arnold



Late Desmond Tutu

Abstract

The emergence of scholars from the Global South who are pushing for the recognition of International law from a third world perspective (Third World Approaches to International Law) herein referred to as TWAIL is proof that there is a need for a new theory of international law to cater for present and future realities. They look at international law as Eurocentric in nature and that it has failed to account for the history of subordinated groups within it and its current consequences such as those related to climate change, poverty and other forms of violence. TWAIL scholars view international law and criticize it for being predicated on European experiences and conceptualizations. International law should change to be more receptive to the legitimate claims of developing states. This paper will examine TWAIL perspectives in the fields of human rights, the limitation of the third world states sovereignty, sovereign debt, self-determination and the internationalization of propriety rights and environmental conservation. It will make a case for why international law should prosecute beyond Africa and the far-reaching effects of Covid-19 in the international law spectrum. It will further look at the skewed power relations in the United Nations Security Council and how it prejudices the Third-World States.

Introduction

The late South African Bishop and Nobel laureate Desmond Tutu while calling for the prosecution of Tonny Blair and George Bush for their aggression they made in Iraq in 2003 quipped, *"On what grounds do we decide that Robert Mugabe should go the International Criminal Court, Tony Blair should join the international speakers' circuit, bin Laden should be assassinated, but Iraq should be invaded, not because it possesses weapons of mass destruction, as Mr. Bush's chief supporter, Mr. Blair, confessed last week, but in order to get rid of Saddam Hussein?".*[1] He mirrored and reflected on the place of international law in the third world dispensation.

[1]Tutu D, "Why I Had No Choice but to Spurn Tony Blair" The Guardian (September 2, 2012) < https://www.google.com/url?sa=t&source=web&rct=j&url=https://amp.theguardian.com/commentisfree/2012/sep/02/desmond-tutu-tony-blair-iraq&ved=2ahUKEwiIvYjsy_T3AhWEgv0HHYbzBiIQFnoECAYQAQ&usg=AOvVaw2tUgoTziMyJ9v8TQBJZZyH> accessed May 23, 2022

Professor Makau Mutua

The scholarship and practice of international law always have seemed to favour certain locations while excluding other areas and international activities invisible.[2] The universality of international law that was seen to conquer and colonize parts of the third world in the past is still being propounded as a weapon of imposing European standards on third world states in the pretext of supporting human rights or concepts such as good governance or development. Professor Makau Mutua describes TWAIL as a "broad dialectic of opposition to international law" that resists the illegitimate, predator, oppressive and unjust regime of international law.[3] Furthermore, Professor James Thuo Gathii contends that "Third World positions exist in opposition to, and as a limitation on, the triumphal universalism of the liberal/conservative consensus in international law."[4] As African TWAIL scholars, we argue in favour of a more inclusive international law that will overcome its Eurocentric origins and colonial and imperial legacies.[5] Justice Joel Ngugi maintains that International law cannot be reformed from its own assumptions.[6]

Self-determination and the TWAIL spectrum; A case of the Western Sahara case (unmasking a colonial legacy)

"We have been engaged in drawing lines upon maps where no white man's foot ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we never knew exactly where the mountains and rivers and lakes were."[7]

The international law regime largely recognizes the principle of self-determination in the colonial context and fails to capture or consider the emerging reality of self-determination in the context of the end of the decolonization era. The boundaries of African countries' land and maritime borders were unilaterally demarcated in ignorance and disregard for the history, and dynamic, natural geography of Africa. Colonial powers had no regard for the diversities and heterogeneity of the African Continent. This is one of the major reasons for today's emergent problems in Africa such as the Maritime dispute between Kenya and Somalia; The border disputes between Nigeria and Cameroon; The Western Sahara Dispute. Debates about self-determination and its role in the modern international legal order have previously been the subject of detailed and insightful judgments by several jurists from the Third World.[8]

African territories which have attained independence and national sovereignty cannot, in a strict sense, be regarded as national States; they do not embrace one people with a common language, a common past, and a common culture; they are indeed arbitrary creations of alien diplomats. The manner European nations descended on Africa during the closing years of the nineteenth century in their scramble for territory was bound to leave a heritage of artificially contrived borderlines that now demarcate the emergent African States.[9]

The right to self-determination is one of the most aggressively sought norms of positive international law[10] however it becomes complicated during its implementation. Self-determination is a complex concept since it's riddled with caveats and reservations.[11] Self-determination in the colonial context (traditional international law practice) is majorly based on the aspect of territory and neglects the issue of an indigenous people's identity in totality. Article 1(2) of the UN Charter proclaimed the principle of self-determination and the equality of peoples to be one of the purposes of the United Nations.

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[2]James Thuo Gathii (2021) "The Promise of International Law: A Third World View," American University International Law Review: Vol. 36 : Iss. 3 , Article 1. Available at: https://digitalcommons.wcl.american.edu/auilr/vol36/iss3/1

[3]Makau Mutua, 'What Is TWAIL?' (2000) 94 Proceedings of the ASIL Annual Meeting.

[4]James Thuo Gathii, 'Rejoinder: Twailing International Law' (2000) 98 Michigan Law Review.

[5]Yusuf AA, "Pan-Africanism and International Law"

[6]Joel Ngugi, 'Making New Wine In Old Wineskins: Can The Reform Of International Law Emancipate The Third World In The Age Of Globalization' (2002) 8 UC Davis Journal of International Law and Policy.

[7]This is part of a speech made by the then British Prime Minister, Lord Salisbury, at a Mansion House Dinner, after signing the Anglo-French Convention of 1890 which formed the international boundaries between Nigeria, Dahomey (in the present day Benin Republic), Niger, and Chad Republics, cited in J.C. Anene, The International Boundaries of Nigeria 1885-1960: The Framework of an Emergent African Nation (London: Longman Group Limited, 1970) at 3

[8]See Besfort T. Rrecaj, 'Legal Consequences Of The Separation Of The Chagos Archipelago From Mauritius In 1965 (ICJ Advisory Opinion, 25 February 2019, General List No. 169)' (2022).

[9]See Anene, supra note 8 at 1.

[10]Andrew J. Pierre and Hurst Hannum, 'Autonomy, Sovereignty, And Self-Determination: The Accommodation Of Conflicting Rights' (1991) 70 Foreign Affairs.

Western Sahara is a section of the vast Saharan desert that stretches from the Atlantic Ocean to Morocco's southern border. Since the decolonization from Spain in 1975, this land has been the subject of significant legal and armed warfare. Without the approval of the local inhabitants, the former colony was split between Morocco and Mauritania. Following this, the Sahraoui people started an independence war, led by the Polisario Front (Spanish acronym for the Popular Front for the Liberation of Saguia al-Hamra and Rio de Oro) and supported by Algeria, claiming the foundation of the Sahraoui Arab Democratic Republic in 1976. Faced with rising Polisario pressure, Mauritania withdrew from the territory in 1978 and ceded the southern territory, the Western Sahara, to Morocco, which annexed it immediately. During the remainder of the 1980s and into 1991, Morocco was subjected to guerrilla warfare. The year 1991 was, in fact, a watershed moment in the conflict's history.

The end of the Cold War and the disintegration of the Soviet Union provided an opportunity for the United Nations to compel both parties to agree to a cease-fire and accept the requirements of an UN-sponsored referendum on self-determination. However, the United Nations has been unable to implement the referendum since 1992 due to competing claims made by Morocco and the Polisario Front, particularly regarding the identification procedure. While Morocco has historical rights to the land, the Polisario asserts that they are different people from Moroccans and hence have a justifiable right to self-determination. Western Sahara is under foreign rule even as the support for its people's self-determination becomes imminent.[12]

Chagos advisory opinion:[13] towards decolonization of 'self-determination' in international law (A TWAIL perspective)

The advisory opinion of the International Court of Justice stopped short of holding that the principle of self-determination had achieved the status of *jus cogens* by leaving the modalities of the completion of Mauritius' decolonization to the General Assembly.

Justice Julia Sebutinde in her separate opinion decries the court for having missed an opportunity to recognize that the right to self-determination within the context of decolonization, has having attained peremptory status (jus cogens), whereby no derogation therefrom is permitted, as a direct corollary of that right is the *erga omnes* obligation to respect that right. The failure to recognize the peremptory status of the said right has led to the failure of the Court to properly and fully consider the consequences of its violation. She contends that in failing to recognize the peremptory status of the territorial integrity rule in the context of decolonization, the Court failed to properly articulate the consequences of the United Kingdom's internationally wrongful conduct. In her view, any treaty that conflicts with the right of the Mauritian people to exercise their right to self-determination concerning the Chagos Archipelago is void.

Justice Julia Sebutinde

TWAIL and the human rights regime; beyond eurocentrism and neocolonialism

International human rights law has a tendency of promoting a sort of universal culture of human rights without adequate Third World input.[14] A TWAIL perspective of international human rights law is crucial in order to understand and appreciate the many issues that concern the mainstream discourse.

Bhupinder Singh Chimni reminds us that the contradictions that characterize contemporary international law are perhaps best exemplified in the field of international human rights law, which codifies a range of civil, political, social, cultural, and economic rights that can be invoked on behalf of the poor and marginalized, even as it legitimizes the internationalization of property rights and hegemonic interventions.[15] TWAILers propound the argument that the current human rights regime bases itself on European

[11]Rupert Emerson, 'Self-Determination' (1971) 65 American Journal of International Law.
[12]Michelle L Burgis, Boundaries Of Discourse In The International Court Of Justice (Martinus Nijhoff Publishers 2009).
[13]ICGJ 534 (ICJ 2019)
[14]Badaru Opeoluwa Adetoro. Examining the Utility of Third World Approaches to International Law for International Human Rights Law. International Community Law Review London vol. 10 n. 4 p. 379-387 2008.
[15]CHIMNI B. S. Third World Approaches to International Law: A Manifesto. International Community Law Review London vol. 8 n. 1 p. 3-27 2006. p. 26.

conceptions and philosophy even though human rights is not unique to European societies.[16] The current International human rights is riddled with Eurocentric conceptions that merely look at human rights as a way of civilizing the third world from the shackles of savage and barbaric cultures. This empowers the imposition of European standards that are colonial or imperialistic. Makau Mutua calls for the construction of a truly universal human rights corpus that is multicultural, inclusive and deeply political.[17]

Human rights, according to Makau Mutua, "have become synonymous with the human rights movement," and liberalism fails to address the roots of real and economic inequality, which is the fundamental concern facing the Third World.[18]

From an African perspective, human rights have not been made to fight against imperialism and neocolonialism practices. A TWAIL inquest into the realm of the international human rights system can enable us to highlight the historical root causes of the current dismal state of socio-economic rights in the Third World and thus not approach human rights issues from a mainly formal textual and institutional angle.[19] TWAIL can aid in the recognition of how international human rights law can be manipulated to promote and legitimize neo-liberal aspirations "unveiling the discrepancy between the contradictory languages that international law adopts in its different subject streams for example supporting the promotion of human rights and at the same time disregarding when the practice of international trade and economic law consistently violates human rights".[20] TWAIL can be a tool used "to understand the internationalization of human rights violations in the sense of how the activities in one part of the world can have detrimental effects in other parts of the world (the Third World especially) and hence could equip scholars with more justifications for demanding extraterritorial obligations from richer states.[21] TWAIL can demystify the assumption that human rights have been conceived in the West and hence should be promoted universally disregarding Third World particularities and in the same vein TWAIL can help "to deconstruct the ideology of "savage-victim-savior" that has permeated international human rights law and to criticize the human rights initiative as a preservation of the essential structure of the "civilizing mission" of the North.

The historical model of human rights will not be able to meet the needs of the Third World unless the international order is radically rethought and restructured, abandoning efforts to universalize a primarily European corpus of human rights. In some areas, such as balancing individual and group rights, giving more substance to social and economic rights, relating rights to duties, and addressing the relationship between the corpus and economic systems, it is necessary to break down hierarchical relationships between European and non-European populations and to multiculturalize the corpus.[22]

TWAIL and the state succession dialogue; A case study of Sudan and South Sudan

1. International law and state succession

Jeremy Levitt's, *The Origin of International Law: Myth or Reality*,[23] examines the nature and characteristics of ancient international law, a multi-millennial body of law that the modern international legal order remarkably resembles and, in some ways, imitates. It is the first comprehensive study of the African origins of international law, including all three *"sources"* of law (treaties, custom, and general principles of law), as well as defining key aspects of ancient international law and the taxonomy of early interstate interactions. The study's very nature opposes traditional verities in traditional and critical international law discourses, encourages urgings or studies for the applicability of pre-colonial prescriptions for present legal dilemmas and raises significant concerns regarding the origins of legal ideas like statehood and treaty-craft.

[16]Rémi Bachand cites the work of Bonny IBHAWOH who tries to show that human rights were far from being non-existent in Africa before colonization as well as their significant differences with the European model which claims its universality. See Human Rights: Colonial Discourses of Rights and Liberties in African History 2007 p. 23. BACHAND Rémi. Critical Approaches and the Third World. Towards a Global and Radical Critique of International Law. Speech at University McGill 24 mar. 2010.
[17]Makau Mutua. Savages Victims and Saviors. The Metaphor of Human Rights. Harvard International Law Journal Cambridge vol. 42 n. 1 p. 201-245 2001.
[18]Makau Mutua. The Ideology of Human Rights. Virginia Journal of International Law Charlottesville vol. 36 p. 589-658 1996. p. 636
[19]Opeoluwa Adetoro Badaru, 'Examining The Utility Of Third World Approaches To International Law For International Human Rights Law' (2008) 10 International Community Law Review.
[20]Ibid
[21]Ibid at . p. 383.
[22]Mutua Makau. Savages Victims and Saviors. The Metaphor of Human Rights. Harvard International Law Journal Cambridge vol. 42 n. 1 p. 201-245 2001. p. 243.
[23]Jeremy I. Levitt, *The African Origin of International Law: Myth or Reality* (2015) 19 UCLA J. INT'L L & FOR.AFF 113

State succession is the actual substitution of one state for another in terms of sovereignty over a given jurisdiction under international law. It includes any change in sovereignty over a given territory that is recognized by international law.[24] State succession is frequently characterized as 'undeveloped,' 'confused,' and 'lacking in precision.' State succession is an issue that arises at critical junctures in international relations under unique circumstances. For example, during the last century, there were several distinct eras in which state succession became an issue: the post-war reconstruction of 1918 and 1945, the period of decolonization from the late 1950s to the late 1960s, and more recently during the 'restructuring' of the former Soviet bloc and the recent emergence of new states in the Horn of Africa.[25]

International law has become increasingly important in determining when and how legal responsibility is transferred from a predecessor state to a successor state. International quandaries, such as treaty obligations, debt responsibilities, and asset allocation, have sparked heated debate and controversy. Despite significant progress in developing universal legal rules by the International Law Commission, there is still a great deal of ambiguity. As a result, the question of which laws or conventions apply to state succession deserves careful consideration. Under international law, three conventions are directly related to state succession. These are the Vienna Convention on the Law of Treaties of 1969, the Vienna Convention on the Succession of States in Treaties of 1978, and the Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts of 1983.[26] The 1969 Vienna Convention on the Law of Treaties deals with how states enter into agreements. The Vienna Convention on State Succession in Respect of State Property, Archives, and Debts of 1983 contains very specific provisions. It specifies the provisions that should be used to resolve issues involving state property, archives, and debts.[27]

The concept of state succession is hotly debated (in international legal circles).[28] This is partly due to the uncertainty of state practice about state succession and could be explained by a distinct agreement and set of rules distinct from "the category of state succession."[29] Not many


South Sudan's president Salva Kiir

agreed-upon legal rules have emerged. Moreover, state practice concerning succession is not coherent and is often determined not by legal but by political considerations on a case-by-case basis.[30] Furthermore, state practice in succession is incoherent and is frequently determined not by legal but by political considerations on a case-by-case basis. Several academic theories have been proposed, the content of which is still being debated.[31] The theory of universal continuity of treaties versus the theory of tabula rasa are two examples.[32]

2. State succession in South Sudan

On July 9, 2011, the Republic of South Sudan became Africa's newest independent state after crushingly voting in a referendum in January 2011. African borders largely remain as they were at the end of the colonial era. The case of South Sudan remains an outlier in a continent that has seen remarkable stability in its borders. The Organization of African Unity (O.A.U.) established doctrines of African stability during the period of decolonization in the early 1960s, and this influenced the lack of secessionist movements throughout the continent.[33]

Some authors, such as Mohammed, argue that determining South Sudan's status in light of international law rules

[24]Hiller Tim, (1998), *Source Book on Public International Law, 2rd Ed., Demon Ford University, Leicester and Cavendish Publishing Limited, Sydney, Australia*, 1998, p 189.
[25]Matthew, 'The International Law of State Succession, International Law Forum Du Droit International 2: 2002-2005 @ 2000 Kluwer Law International, Netherlands', 202.
[26]Andrew Beato, 'Newly Independent and Separating States Succession to Treaties; Considerations on the Hybrid Dependency of the Republic of the Former Soviet Union", American University Law Review 9, No.2' 527.
[27]Jürgen Oesterhelt, 'VIENNA CONVENTION ON SUCCESSION OF STATES IN RESPECT OF STATE PROPERTY, ARCHIVES AND DEBTS', *Encyclopedia of Disputes Installment 10* (Elsevier 1987) <https://linkinghub.elsevier.com/retrieve/pii/B9780444862419501226> accessed 27 May 2022.
[28]Matthew Craven, 'The Problem of State Succession and the Identity of States Under International Law, European Journal of International Law 9'.
[29]Malcolm N Shaw, *International Law* (5th ed, Cambridge University Press 2003) 253.
[30]'Ethiopian International Institute for Peace and Development, the Historical Dispute over the Sharing of the Nile: Breaking the Deadlock and Charting a Way Forward, Addis Ababa, Ethiopia', 7.
[31]Arthur Okoth- Okwiro, 'State Succession and International Treaty Commitments: A Case Study of the Nile Water Treaties, Published by Konrad Adenauer Foundation and Law and Policy Research Foundation, Nairobi, Kenya'.
[32]Mekonnen Yilma, 'International Law and the New States of Africa, 8 Maryland Journal of International Law', 303.
[33]Christian Knox, 'The Secession of South Sudan: A Case Study in African Sovereignty and International Recognition' 53.

Antony Anghie

governing state succession is critical for determining applicable treaty rules. They argue that South Sudan should not be considered a newly independent state for the Vienna Convention of 1978. Some argue that South Sudan's independence is an act of devolution, which is bilateral and consensual, and that a different set of rules will apply.[34]

More than any other scholarly approach to international law, TWAIL scholarship has placed the colonial encounter between Europeans and non-Europeans at the centre of this historical re-examination of international law.[35] 'TWAIL scholarship has thus not only rethought international law's relationship to the colonial encounter but has also challenged international law's complacency in treating the colonial legacy as a dead letter, overcome by the process of decolonization. They have expanded the third world agenda in international law beyond examining whether the third world participated in the creation of international law and international institutions.[36]

In Imperialism, Sovereignty, and the Making of International Law by Antony Anghie, the author argues that doctrinal and institutional developments in international law cannot be understood in isolation: "logical elaborations of a stable, philosophically conceived sovereignty' doctrine... [rather] as being generated by colonial order problems?' Anghie believes that re-examining the relationship between international law and colonialism is the best way to understand the enduring significance of issues such as racial discrimination, economic exploitation, and cultural subordination.[37]

TWAIL has never been formally organized as a movement or association with a membership. It has instead operated as a loose network. TWAIL's wings have thus spread far and wide. While there have been major TWAIL conferences, such as TWAIL II at Osgoode Hall in 2001 (organized by Obiora Okafor) and TWAIL III at Albany in 2007 (organized by James Gathii), there have also been numerous other TWAIL happenings. Karin Mickelson and Ibironke Odumosu organized TWAIL IV in 2008 at the University of British Columbia.[38]

TWAIL is a discipline in transition, expansion, definition, and internal debate about the diverse agendas of its scholars. However, as previously stated, there is still widespread agreement on some fundamental commitments.[39] Resistance to projections of metropolitan power and authority over third-world peoples - whether military, economic, political, cultural or otherwise - is a major theme of TWAIL work. Balakrishnan Rajagopal's work has emphasized this theme of resistance, not by elite academics, but by third-world masses, to projects such as large dams that are ostensibly for their benefit.[40]

TWAIL should not be interpreted to assume that International law never existed in Africa before colonization and globalization. Challenging the eurocentric version of international laws is the proposition that international law might have started in Africa with the Treaty of Westphalia. African nations predating the modern European nation-state by nearly 6,000 years engaged in treaty-making, the treaty of Kadesh, applied rules of custom, and general principles of law as enumerated in the Egyptian Bill of Rights.[41] European cataclysm, that is; 30 years of the Westphalia war, the world wars, and the cold war formed the foundational framework of international law[42]. Modern international law, being a system of rules from treaties, customs, general principles, scholarly writings and judicial decisions with no central organs, should no longer rely on the outdated notions of state power.

The TWAIL approach to international law has been criticized and described as insufficient because it "ultimately operates according to the very disciplinary logic it seeks to

[34]Mohammed Helal, '"Inheriting International Rivers; State Succession to Territorial Obligations, South Sudan and the 1959 Nile Water Agreements", Emory International Law Review, 2013,' 947.
[35]Anthony Anghie, 'Imperialism, Sovereignty and the Maing of International Law'.
[36]Elias T.O, 'Africa & the Development of International Law'.
[37]Anghie (n 14).
[38]James Thuo Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 Trade L. & Dev. 26.
[39]Chinedu Okafor Obiora, 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective, 43 OSGOOD HA\.1. L.J. 171, 176'.
[40]Rajagopal Balakrishnan, 'International Law from Below: Developement, Social Movements and Third World Resistance'.
[41]Ibid [1]
[42]Martti Koskeniemi, The Politics of International Law (Hart Publishing, 2011); Martti Koskenniemi, International Law and the Raison d'etat: Rethinking the Prehistory of International Law, in The Roman Foundations of The Law of Nations: Aberico Gentili and the Justice of Empire (Benedict Kingsbury & Benjamin Straumann Edn, 2010).

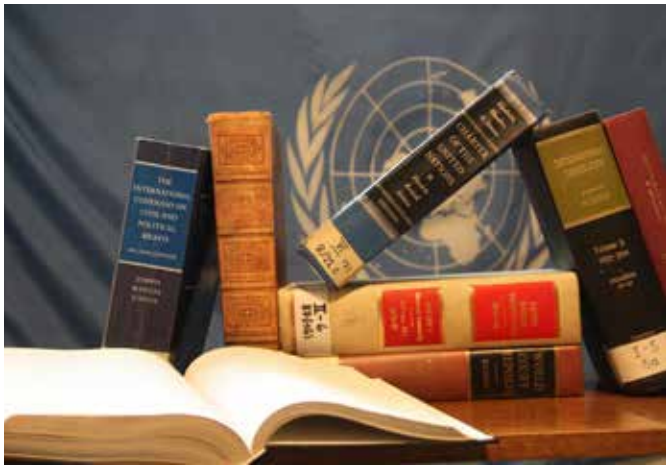
overcome."[43] Some deeper critiques include those of Bonilla, who challenges constitutionalism because legal systems in the Global South are seen as replicas of those in the Global North and that the Global South has been dismissed and regarded as backwards.[44] This approach of questioning whether the norms that the Global North applies to their countries should apply to people in the Global South allows for some exploration, but it is important to remember Parmar's caution: exploring such ideas should go hand in hand with emphasizing the importance of understanding and challenging the sources of human suffering.[45]

TWAIL and the question of sovereign debt in international law: beyond bondage

A UN expert Cristescu(1981) remarked that although the traditional form of colonisation is said to have ended, weaker countries continued experiencing domination in other spheres such as economic and political relationships. The traditional doctrine of internal self-determination became useless as newly independent countries were crippled with sovereign debts as transmitted from their colonial predecessors. The African elites who negotiated independence with their colonial masters did not think about restructuring the international law that, in the first place, rendered African continent domination and exploitation legitimate. This hegemonic international law kick-started the sovereign debt bondage in most African countries right from independence,[46] and continues to perpetuate the same in the modern-day. TWAIL provides different perspectives which can be useful in restructuring the eurocentric international law.

How international law can be attributed to the sovereign debts in third world countries during decolonization

The experience of the Latin American countries such as Haiti, fall into the blind eyes of the African elites who clamoured for independence. The elites went with the mentality of being well equipped to maintain the international and other colonial structures in place, instead of questioning the same structures that inflicted imperialism and exploitation on the African continent. The leaders of most African countries were clamouring for 'sovereignty' and 'recognition' in the hegemonic international law, little did they know this was a price for resubmission of their so-called 'independence'. The sovereign debts of the former colonies would pass to the newly independent states despite being non-beneficial to the latter. The United Nations, acting as a watchdog over the decolonization process, was structured ceremoniously whereby most colonial masters were granted top seats in the UN security council. Therefore,



UN resolution 1514 on the granting of independence to colonial countries and people which provided for the right to economic self-determination faced an obstacle. The colonial masters justified the passing of the sovereign debts in the act of granting sovereignty to these African states. This situation led to most African countries already crippled with sovereign debts on their critical dates. One example is Algeria which had sovereign debts as a result of the loans contracted by the French colony to carry out economic projects in Algeria during the war of independence. This trend buttressed the view of Anthony Anghie on sovereignty as an international law doctrine,'...presented non-European societies with the fundamental contradiction of having to comply with authoritative European standards to win recognition and assert themselves. This notion of inclusion fetter aspirations of self-determination in the name of universality.' The main attributes of this problem were the African leaders at the time. As described by Peter Ekeh, the concept of the two publics, as grooming themselves to gain favour in the eyes of the colonies like the ones highly qualified to best fill their shoes and forgetting a clamour for restructuring the oppressive structures in place.

TWAIL's reforms to international law: sovereign debts adopted from colonial masters

First, the sovereign debts from colonial predecessor states should be written off. The concept of 'odious debt' as applied by Mohammed Bedjaoui provides for the non-transferability of sovereign debts accrued by 'odious' regimes. The colonies were odious regimes as they applied exploitative measures that in no way can be said to be beneficial to the colonized territories. The debt contracts were also not negotiated by legitimate representatives. This is what should be adopted even if the colonized territories retained some traces of the investments.

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[43]'TRAIL-Ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law | Canadian Journal of Law & Jurisprudence | Cambridge Core' 383 <https://www.cambridge.org/core/journals/canadian-journal-of-law-and-jurisprudence/article/abs/trailing-twail-arguments-and-blind-spots-in-third-world-approaches-to-international-law/D3EDCF01DA192DCE340992B287D00FF0> accessed 27 May 2022.

[44]Sujith Xavier, 'Learning from Below: Theorising Global Governance Through Ethnographies and Critical Reflections from the Global South' (2016) 33 Windsor Yearbook of Access to Justice 229, 229, 236.

[45]Parmar Pooja, 'TWAIL: An Epistemological Inquiry, 10 INT'L COMM. L. REV.' p. 363, 370

[46]Aureliu Cristescu/special rapporteur on the right to self-determination: historical and cultural development on the basis of United Nations instruments (1981).

Second, is the application of the right to economic self-determination in terms of sovereign debts fully and without any severance by the hegemonic powers of international law.[47] The French government's actions of subjecting its former colonies to sovereign debts after gaining independence hindered economic self-determination as there were background rules which influenced the newly independent states' economic policies. This prompted the formation of the New International Economic Order(NIEO) after a realisation by third world countries that,' their de jure political colonisation ended only to be replaced by a defacto economic colonisation'. The organization brought the right to economic self-determination into light and would be useful in future legal discourse about the sovereign debt bondage in African countries.

International financial institutions and developed countries, sovereign debts and TWAIL reforms-a current perspective

The current sovereign debt crisis in African countries is manifested by the clamour to industrialize at faster rates in already crippled economies as from the decolonization era. This situation is highly magnified by the ongoing COVID-19 where Debt Moratorium (COVID-19) stated; "in 2019, stunningly, sixty-four countries around the world (half of them on the African continent) spent more money to service their external debt than on health care...". This problem can be attributed to the international Financial institutions and developed countries which offer sovereign debts but with conditionalities(neo-liberal economic policies) such as higher repayment amounts and structuring of the political and economic institutions as dictated by the financial creditors. For example, the debtor African country may be instructed on how to use the debt funds and this acts as an external interference of the country on how to exercise its economic self-determination by determining its property use of the loan. Some financial institutions even offer loans on top of loans leading to a cumulative effect hence hindering economic growth in these countries. TWAIL provides that the international financial institutions act as interference and perpetuate a neo-colonial agenda aimed at submitting African countries to massive sovereign debt crises to put them at the mercy of the developed countries which is justified by the hegemonic international law.

Challenge facing TWAIL in tackling the problem of sovereign debts bondage as embedded in international law

Lack of a neutral ground for reform implementation. The structure of international law is such that the oppressors have more powers than the oppressed therefore any reform to international law must be approved by the security council of the UN which cannot approve something that conflicts with their interests. For example, the Vienna Convention on Succession of States in respect of state property, archives and debts (1983) is still missing the ratification of the key UN member states. The contention was that most of the former colonial masters opposed the provisions on non-transferability of debts to newly independent states arguing that the latter were benefitting from the sovereign debts of colonial times due to proper development of infrastructure and fiscal policies left in their territories.

International law, since its inception, has principles such as sovereignty which hinder the right to self-determination by most African states. The latter traded their economic self-determination in the clamour for gaining sovereignty and recognition in international law and found themselves saddled with sovereign debts transferred to them by their colonies.[48] International Financial institutions and developed countries formulate policies which continue this subjugation hence worsening the already crippled economies of African countries. TWAIL offers reforms to this hegemonic international law but a lack of neutrality hinders these reforms.

TWAIL and the internationalization of proprietary rights

Before the wave of intellectual property (IP) disputes in investor-state dispute settlement (ISDS)[49] emerged, three learned scholars foresaw the coming changes in international IP through the realm of investment protection. In 2001, Drahos viewed 'bilateral intellectual property and investment agreements are part of [a] ratcheting process that is seeing intellectual property norms globalize at a

[47]Ekeh .p.Peter/colonialism and the two publics in Africa: A theoretical statement/comparative studies in society and history vol.17 No.1(Jan 1975)pp.91-112/<https://www.jstor.org/stable/178372>/accessed on 27 May 2022.

[48]Abbubakar.A.Aminu/right to economic self-determination and the role of international law in the contemporary sovereign debt bondage/thesis for partial fulfilment of doctor of philosophy/conventry University(2021).

[49]Pratyush Nath Upreti, *'A TWAIL critique of intellectual property and related disputes in investor-state dispute settlement'*

remarkable rate'.[50] Later, Drahos and Braithwaite warned that the United States would attempt to incorporate investment protection in the multilateral framework.[51] They argued that investment protection through bilateral investment treaties (BITs) would result in higher levels of IP protection. Therefore, they called on developing countries to form a veto coalition against the ratcheting of IP standards through BITs.[52] Subsequently, after several attempts, developed countries failed to succeed in providing investment protection in the multilateral regime.[53] In 2004, Helfer demonstrated the regime shift by illustrating how international IP law-making had left its traditional institutional premise and its interactions with other areas such as public health, human rights and other areas.[54] This was an early indication that IP norm-setting had moved beyond its institutional parameters. Therefore, interaction with other branches of law was inevitable.[55]

This realization came when Philip Morris requested investor-state arbitration against antismoking legislation in Uruguay that restricted the use of trademarks, which resulted in the expropriation -of Philip Morris's property.[56] Eli Lilly later challenged the decision of the Canadian Supreme Court to invalidate patents before an investment tribunal.[57] In the aftermath of Philip Morris and other disputes, Gathii and Ho took Helfer's vision of regime shift in international IP and argued that emerging IP-related cases in ISDS were a 'regime shift' in the IP system. They accused industries of pursuing investment disputes to destabilize the balance achieved between producers and consumers through various norms that are enshrined in international and domestic IP laws.[58] A similar view was maintained by Baker and Geddes who argued against including an IP chapter in the investment agreement. In their view, such inclusion would 'dramatically [increase] corporate power',[59] allowing the investor to enforce IP-related claims and restrict governmental regulatory rights. Similarly, many scholars have expressed concern about and interest in the emerging interactions between IP and ISDS.[60]

TWAILers approach to internationalization of intellectual property

TWAIL stands for 'third world approaches to international law'. It helps in explaining the development of international law incidental to interactions with nations that were mostly colonized, or underdeveloped, such as Kenya. An integral part of TWAIL is an array of investigative tools with which to proffer pertinent analysis.[61] The etymology of the expression third world is credited to Alfred Sauvy, a Frenchman who in a 1952 newspaper article made a comparison between the "third estates", a political ethos of the French feudalism, before the 1789 revolution, and the "third world" as a group of poor underdeveloped countries.[62] In 1949, Truman in his inauguration speech had engendered a powerful semiotic seeding when he used the expression "underdeveloped world" to symbolize their difference from other worlds, especially the "developed".

One reason for the rise in TWAIL scholarship is that Third World people have become concerned about power-relationship dynamics between states and that 'any proposed international rule or institution will affect the distribution of power between states and people'.[63]

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[50]*Peter Drahos, 'BITS and BIPS: Bilateralism in Intellectual Property (2001) 4(6) JWIP 798.*

[51]*Peter Drahos and John Braithwaite, Information Feudalism: Who Owns the Knowledge Economy? (Earthscan Publications Ltd, 2002) 208.*

[52]https://onlinelibrary.wiley.com/doi/full/10.1111/jwip.12217#:~:text=4-,Ibid.,-5

[53]*Pratyush N. Upreti, 'Intellectual Property, Investment and the WTO: A Historical Account' in Christophe Geiger (ed) Research Handbook of Intellectual Property and Investment Law (Edward Elgar Publishing, 2020) 182–206.*

[54]*Laurence R. Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) 29 (1) YJIL 1.*

[55]*See Henning Grosse Ruse-Khan, The Protection of Intellectual Property in International Law (Oxford University Press, 2016).; https://onlinelibrary.wiley.com/doi/full/10.1111/jwip.12217#:~:text=See%20Henning%20Grosse%20Ruse%2DKhan%2C%20The%20Protection%20of%20Intellectual%20Property%20in%20International%20Law%20(Oxford-%20University%20Press%2C%202016). Philip Morris v. Uruguay (n 1), Request for Arbitration, 19 February 2010.*

[56]*Philip Morris v. Uruguay (n 1), Request for Arbitration, 19 February 2010.; https://onlinelibrary.wiley.com/doi/full/10.1111/jwip.12217#:~:text=Philip%20Morris%20v.%20Uruguay%20(n%201)%2C%20Request%20for%20Arbitration%2C%2019%20February%202010*

[57]*Eli Lilly v. Canada (n 1), Notice of Arbitration, 12 September 2013.; https://onlinelibrary.wiley.com/doi/full/10.1111/jwip.12217#:~:text=Eli%20Lilly%20v.%20Canada%20(n%201)%2C%20Notice%20of%20Arbitration%2C%2012%20September%202013*

[58]*James Gathii and Cynthia Ho, 'Regime Shift of IP Lawmaking and Enforcement from WTO to the International Investment Regime' (2017) 18(2) MJLST 430*

[59]*Brook K. Baker and Katrina Geddes 'Corporate Power Unbound: Investor-State Arbitration of IP Monopolies on Medicines-Eli Lilly v. Canada and the Trans-Pacific Partnership Agreement' (2015) 23 (1) JIPL 57.*

[60]*https://onlinelibrary.wiley.com/doi/full/10.1111/jwip.12217#:~:text=interactions%2C%20see%20Christophe,Law%20International%2C%202019).*

[61]*Kiboye Okoth-Yogo 'Third World Approaches to International Law'*

[62]*Wolf-Phillips, Leslie (1987) Why 'Third World'? Origin, definition and usage... third world Quarterly, 9(4): 1311-1327: published in the August 14, 1952, French magazine l'observateur*

[63]*Antony Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2(1) CJIL 78.*

International IP evolved through the agency of colonial rule.[64] The colonial transplants of IPRs were designed to expand commercial relations[65] by controlling the colonial markets[66] and achieving uniformity in territories under colonial rule.[67] Later, colonial powers negotiated on behalf of their colonies at the Paris and Berne Conventions to affirm their imperial control over IP within their expanding empires.[68] The emergence of 'neo-liberalism' post World War II called for unity among countries that fought a war for economic cooperation for trade and investment. As a result, strong private property rights and free markets become the primary aim of the state and the international community that persisted and were persuaded to create an institutional framework.[69] As a result, IP was linked to trade through the TRIPS Agreement that endorsed the Paris and Berne Conventions, creating a global minimum standard on IP.

Internationalization of proprietary rights

TWAILers have questioned the propitiation of IP for monopolizing knowledge, which has been further commoditized through the TRIPS Agreement.[70] It is particularly argued in the TWAIL scholarship that international law has elevated the national regulation of property rights to the international level. Chimni argued that international law and its institutions have internationalized property rights[71]. Chimni drew attention to how TRIPS transformed the national property [IP] regime into an international platform to regulate property rights directly.[72] Similarly, Braithwaite and Drahos noted that 'TRIPS marks the beginning of the global property epoch… present [in] the beginning of property globalization'.[73] Therefore, for TWAILers, TRIPS is an idealistic project that strengthens private property rights at the international level. Some have also argued that private rights to exclude are inherently based on incentive theory to rationalize IP protection to achieve the public good.[74] Essentially, TWAILers believe that elevating property regulations to the international level will result in a loss of state control over property regimes. Furthermore, IP as private rights has historically been legitimized by the Paris Convention, since the members of the Paris Convention had colonized Asia and Africa.[75]

Several contributions including scholars have been made to critically examine International Proprietary rights. However, TWAIL as a methodology has not been explored as a scholarship in such examinations. Recently, Cadogan also used TWAIL as a critique to understand the socio-legal construction of IP and its development by taking a Caribbean experience as a case study.[76] Cadogan emphasized the need to use TWAIL as a methodology for the reason that TWAIL's critique of international IP rights pinpoints how actors identify and interest impacts how IP functions in the Global South.

TWAIL is a reformist methodology that addresses IP counter-hegemony from the Global South's viewpoint. Vanni used TWAIL as a framework to understand how pharmaceutical patents in Brazil, India and Nigeria were conceptualized, resisted and reformed according to their legal policies within the structural framework of TRIPS.[77]

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[64]*Susan Sell and Christopher May, 'Moments in Law: Contestation and Settlement in the History of Intellectual Property (2001) 8 (3) RIPE 479.*

[65]*Ruth L. Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (2003) 7 SJICL 321*

[66]*Alexander Peukert, 'The Colonial Legacy of the International Copyright System' in Mamadou Diawara and Ute Roschenthaler (eds), Staging the Immaterial Rights, Style and Performance in Sub-Saharan Africa (Sean Kingston).*

[67]*Seville Catherine, The Internationalization of Copyright Law (Cambridge University Press, 2006) 139.*

[68]*Sam F. Halabi, Intellectual Property and the New International Economic Order: Oligopoly, Regulation, and Wealth Redistribution in the Global Knowledge Economy (Cambridge University Press, 2018) 35.*

[69]*John D. Haskell, 'TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law' (2014) 27 (2) CJLJ 389.*

[70]*Ugo Pagano, 'The Crisis of Intellectual Monopoly Capitalism' (2014) 38 (6) CJE 1409.* https://onlinelibrary.wiley.com/doi/full/10.1111/jwip.12217#:~:text=Ugo%20Pagano%2C%20%E2%80%98The%20Crisis%20of%20Intellectual%20Monopoly%20Capitalism%E2%80%99%20(2014)%2038%20(6)%20CJE%201409

[71]*B.S. Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 ICLR 8.*

[72]*Ibid. https://onlinelibrary.wiley.com/doi/full/10.1111/jwip.12217#:~:text=36-,Ibid.,-37*

[73]*John Braithwaite and Peter Drahos, Global Business Regulation (Cambridge University Press, 2000) 63.*

[74]*Rochelle C. Dreyfuss, 'In Praise of an Incentive-Based Theory of Intellectual Property Protection' in Rochelle C. Dreyfuss and Elizabeth Siew-Kuan Ng (eds) Framing Intellectual Property Law in the 21st Century: Integrating Incentives, Trade, Development, Culture and Human Rights (Cambridge University Press, 2018) 1.*

[75]*Okediji (n 29).* https://onlinelibrary.wiley.com/doi/full/10.1111/jwip.12217#:~:text=39-,Okediji%20(n%2029).,-40

[76]*Marsha S. Cadogan, 'A TWAIL-Constructive Critique of the IP and Development Divide in the Age of Innovation- Has the Protection of Place-Based Goods changed the Narrative for the Caribbean?' in Susy Frankel (ed) The Object and Purpose of Intellectual Property (Edward Elgar Publishing, 2019) 57–89.*

[77]*Amaka Vanni, Patent Games in the Global South: Pharmaceutical Patent Law-Making in Brazil, India and Nigeria (Hart Publishing, 2020).* https://onlinelibrary.wiley.com/doi/full/10.1111/jwip.12217#:~:text=Amaka%20Vanni%2C%20Patent%20Games%20in%20the%20Global%20South%3A%20Pharmaceutical%20Patent%20Law%2DMaking%20in%20Brazil%2C%20India%20and%20Nigeria%20(Hart%20Publishing%2C%202020

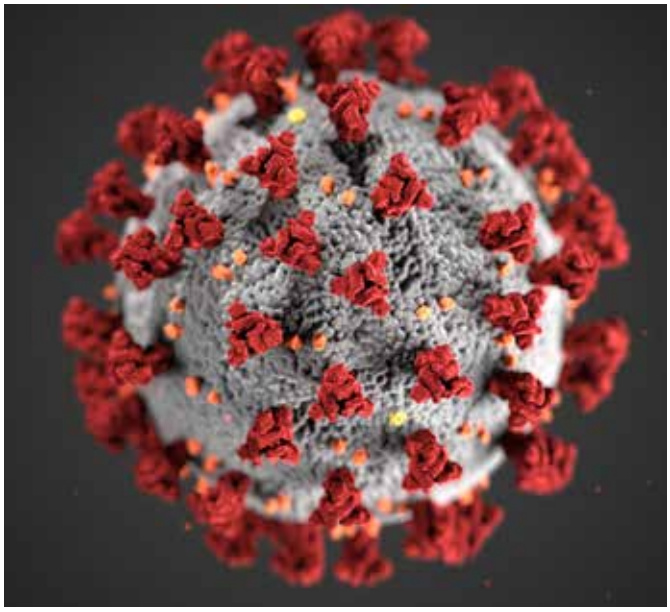
Thus, TWAIL, in general, could be a useful framework to rethink the role of IP at the local and grass-root levels. In this case, the TWAIL framework might demonstrate how different actors function at local levels, as well as their viewpoints on IP and their functions vis-à-vis international IP rules.

TWAIL and COVID 19: The future of state responsibility

The coronavirus disease 2019 (COVID-19) pandemic exposes how the increasing interconnectedness of the world will make epidemic diseases progressively more difficult to contain. Highly infectious diseases like COVID-19 typically do not respect borders or passports. They do not distinguish between nationality, race, ethnicity, gender or other categories. They pose transnational challenges that require cooperation and action through law.[78]

The corona crisis showed us more than the inequalities that we already know but fail to address meaningfully.[79] And indeed: the geopolitics of knowledge including a globally embraced Eurocentrism became visible and tangible in the way the virus descended onto the African continent. Most (registered) cases followed directly from contact with Europe – not China; it took a long time before all flights from Europe to Africa were grounded.[80]

States always turn to international law to solve issues that transcend borders and jurisdictional boundaries. The legal framework for controlling highly infectious diseases is spread across multiple regimes internationally. The regime for allocating responsibility is located under the law of responsibility, which provides that states that violate international law have "an obligation to make full reparation for the injury caused by the internationally wrongful act." Global public health law is the most specific field regulating infectious diseases and it sets out the primary obligations of states in the International Health Regulations (2005). Its main purpose is to "prevent, protect against, control and provide a public health response to the international spread of disease." The Regulations create a system of state surveillance and notification for certain infectious diseases. Another important framework is human rights law, which includes protection against the arbitrary deprivation of life and the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Under human rights law, states are to take primary responsibility to prevent, treat, and control epidemic diseases.[81]



The most common answer to how responsibility is allocated following epidemic or pandemic diseases is that no actor is held responsible and no allocation occurs. State actors tend to regard their human rights obligations as territorial, even though member states of the International Covenant on Economic Social and Cultural Rights[82] are supposed to respect the enjoyment of the right to health in other countries. State parties are also obligated to prevent third parties from violating the right to health in other countries if they can influence third parties by way of legal or political means that do not conflict with other international obligations.

Under the law of responsibility, every internationally wrongful act of a state comes with international responsibility. An internationally wrongful act of a state could be an action or omission. The first requirement is that the conduct in question is attributable to the state under international law. The second requirement for responsibility to attach to a state is that the conduct must constitute a breach of a primary international legal obligation of that state.[83]

Formal determinations of responsibility for epidemic or pandemic diseases will also be difficult to come by not just because of the lack of political appetite to pursue outbreaks that are perceived as purely biological or natural occurrences. There are also many procedural and practical limitations. For example, all international dispute settlement

[78] *Matiangai Sirleaf 'COVID-19 and Allocating Responsibility for Pandemics'* https://www.jurist.org/commentary/2020/03/matiangai-sirleaf-responsibility-for-pandemics/#
[79] *OLIVIA RUTAZIBWA 'The corona pandemic blows the lid off the idea of Western superiority;* https://www.mo.be/en/opinion/corona-pandemic-blows-lid-idea-western-superiority#:~:text=Pest%20and%20Cholera-,The%20corona%20pandemic%20blows%20the%20lid%20off%20the%20idea%20of%20Western%20superiority,-SHARE
[80] *Ibid* https://www.mo.be/en/opinion/corona-pandemic-blows-lid-idea-western-superiority#:~:text=Pest%20and%20Cholera-,The%20corona%20pandemic%20blows%20the%20lid%20off%20the%20idea%20of%20Western%20superiority,-SHARE
[81] Ibid
[82] Ibid
[83] Ibid

mechanisms are premised on state consent. Claims with allegations of harm during an epidemic or pandemic disease would not be able to proceed against a state if it withholds its consent to jurisdiction internationally.[84] A recent class-action lawsuit brought in by a US federal court seeks damages for the COVID-19 pandemic against China.

It, therefore, raises the question of the jurisdiction of domestic courts to exercise the jurisdiction given sovereign immunity and other jurisprudential doctrines over the actors and tits challenges and the issue of numerous applications for joinder by numerous actors that could make the litigation cumbersome. These situational challenges amongst others demonstrate that reimagination of responsibility is required more generally and especially as applied to epidemic and pandemic diseases. It also indicates that more substantial international legal and institutional reform is necessary to provide full redress for violations witnessed with epidemic and pandemic diseases.

TWAIL is far from perfect, but its relevance of TWAIL cannot be underestimated in the emerging evolution of IP in which norm-setting is moving beyond multilateralism. As emphasised in this article, one should embrace a liberal sense of TWAIL that looks beyond challenging the TRIPS Agreement rather than acknowledge the 'balance' achieved in TRIPS and find ways to strengthen them. This has become even more relevant as the number of multinational companies suing states in ISDS has increased.

The idea that the corona crisis shows how the West engages with knowledge touches upon the issue that it is both undesirable and impossible to decolonize international development (studies and practices).

The TWAIL-ian perspective of the United Nations Security Council

The propagators of the third world approach to international law (TWAIL-ers) have always perceived International law as a tool for facilitating continuing exploitation of the third world countries through subordination to the west. The argument is that International law plays a crucial role in legitimizing and sustaining the unequal structures and processes that manifest themselves in the growing north-south divide.[85] This view has been depicted in the mode of administration of the United Nations Security Council whose primary responsibility is for the maintenance of international peace and security.

It should be noted that the structure of the UNSC, is composed of fifteen member states with five permanent member states with veto power and ten others who serve for a given period before they are replaced. Under the charter of the United Nations, all members are obligated to comply with Council decisions. TWAIL operates on a philosophy of suspicion which enables it to adopt a critical stance in international law by pushing boundaries to expose injustice. Third world states within the international arena are often subjected to the mercy of the Security Council and are excluded from decision-making processes which may impact them. Decision making surrounding intervention is often managed by the powerful states with permanent membership. The five members who enjoy the veto power have almost the final say in most decisions because if one of them refuses to pass the agenda at hand, then the agenda is as good as nothing despite the other member's opinion. This has therefore led to a lack of transparency and efficiency in the Security Council's decision-making process.

TWAIL-ers are united in their struggle for the greater involvement of the third world peoples in the International Law arena and featuring from their critiques that the UNSC does not reflect today's world; developing countries are underrepresented and there are no permanent members from either Africa or Latin America. The propagators are of the idea that more opportunities should be created for induction of more permanent members from the third world countries which would further project their voices in international arenas. However, this has borne no fruit because the five superpowers are not ready to give up their veto powers.

Since 1945 the United Nations has played a key role in universalizing principles and norms which are European in identity and whose "principal focus has been on those rights that strengthen, legitimize and export the liberal

[84]Ibid

[85]CHIMNI B.S, *Third World Approaches to International Law*; A Manifesto, International Community Law Review. London vol.8. n.1 p 3-27,(2006).

democratic state to non-western societies."[86] TWAIL-ers refuse to accept the universal character of the international legal system arguing that it emerged solely from the European and Christian traditions. Wolseley,[87] in his arguments stated that the third world is made up of a diverse set of countries, extremely varied in their cultural heritages, with different historical experiences and marked differences in the patterns of their economics. The United Nations having clear set out rules is very rigid to accommodate the third world countries' diverse views and cultures. In contrast, third world countries were assimilated by force into the international legal system, which does not reflect their diverse heritage. Having been adopted mainly because third world countries were included in the western system as objects rather than the subject of international law and this remained the case, despite the ones that belonged to advanced ancient civilizations. This has also been depicted in the third world leaders' inability to secure the interests of their people and their failed opposition to the first world hegemony, which further hinders the struggles for the liberation of third world countries.

Okafor considers that TWAIL has a rigorous method of logical reasoning and creates testable propositions.[88] Given the major mandate of the United Nations Security Council has the responsibility to protect, TWAIL-ers think that the responsibility should be administered by regional organizations rather than the security Council, owing to the comparative advantages regional organizations do have to offer. This would mean a lack of veto power among the regional organizations thus including the voices of the less developed states in the decision-making processes surrounding interventions. The other added advantage would be the proximity to conflict regional organizations hence the ability to understand the cultural and sociological background of the state concerned resulting in amicable settlement of disputes. Regional organizations could legally intervene within the parameters of their region through the *ex post facto* application of article 53 of the charter of the United Nations.

It should be noted that the United Nations Security Council due to the skewed power relations has played a major role in propagating the continued exploitation of third world countries subjecting them to the mercies of the permanent members during decision making. TWAIL's desire to expose the unfair structures of international law has greatly been felt given the rigorous methods of logical reasoning which if implemented will see to it the creation of more opportunities for third world participation in international law.

Concluding thoughts

Through our lenses as international law infant jurists, we have extensively covered the TWAIL dispensation regarding

the African continent. The upshot of our argument is that international law should be looked at beyond the shackles of Eurocentrism. There is a continued need to breathe new life into the feeble bones of international law conversations in its different manifestations through TWAIL. This is a discourse that international law theorists, practitioners, teachers and even students from the third world cannot shy away from.

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[86]Makau Mutua, *What is TWAIL? American Society of International Law Proceedings*. Washington vol.94 pg 31-38, (2000).
[87]P. Worsley, *The Three Worlds: Culture and World Development*. Pg 306 (1984).
[88]OBIERA CHINEDU, *Third World Approaches to International Law (TWAIL)*: Theory, Methodology or both, 10 Int'l Community Pg. 371,374 (2008).

Bibliography

Anghie A, 'Imperialism, Sovereignty and the Making of International Law'

Balakrishnan R, 'International Law from Below: Development, Social Movements and Third World Resistance

Beato A, 'Newly Independent and Separating States Succession to Treaties; Considerations on the Hybrid Dependency of the Republic of the Former Soviet Union", American University Law Review 9, No.2'

Chimni BS, 'Third World Approaches to International Law: A Manifesto', *The Third World and International Order* (Brill Nijhoff 2003)

Craven M, 'The Problem of State Succession and the Identity of States Under International Law, European Journal of International Law 9'
'Ethiopian International Institute for Peace and Development, the Historical Dispute over the Sharing of the Nile: Breaking the Deadlock and Charting a Way Forward, Addis Ababa, Ethiopia'

Gathii JT, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 Trade L. & Dev. 26

Helal M, '"Inheriting International Rivers; State Succession to Territorial Obligations, South Sudan and the 1959 Nile Water Agreements", Emory International Law Review, 2013,

Knox C, 'The Secession of South Sudan: A Case Study in African Sovereignty and International Recognition' 53

Matthew, 'The International Law of State Succession, International Law Forum Du Droit International 2: 2002-2005 @ 2000 Kluwer Law International, Netherlands',

Obiora CO, 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective, 43 OSGOOD HA\.1. L.J. 171, 176'

Oesterhelt J, 'VIENNA CONVENTION ON SUCCESSION OF STATES IN RESPECT OF STATE PROPERTY, ARCHIVES AND DEBTS', *Encyclopedia of Disputes Installment 10* (Elsevier 1987) <https://linkinghub.elsevier.com/retrieve/pii/B9780444862419501226> accessed 27 May 2022

Okoth- Okwiro A, 'State Succession and International Treaty Commitments: A Case Study of the Nile Water Treaties, Published by Konrad Adenauer Foundation and Law and Policy Research Foundation, Nairobi, Kenya'

Pooja P, 'TWAIL: An Epistemological Inquiry, 10 INT'L COMM. L. REV.'

Shaw MN, *International Law* (5th ed, Cambridge University Press 2003)

Tim H, *(1998), Source Book on Public International Law, 2rd Ed., Demon Ford University, Leicester and Cavendish Publishing Limited, Sydney, Australia, 1998, p.189.*

T.O E, 'Africa & the Development of International Law'

'TRAIL-Ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law | Canadian Journal of Law & Jurisprudence | Cambridge Core' <https://www.cambridge.org/core/journals/canadian-journal-of-law-and-jurisprudence/article/abs/trailing-twail-arguments-and-blind-spots-in-third-world-approaches-to-international-law/D3EDCF01DA192DCE340992B287D00FF0> accessed 27 May 2022

Xavier S, 'Learning from Below: Theorising Global Governance Through Ethnographies and Critical Reflections from the Global SSouth(2016) 33 Windsor Yearbook of Access to Justice 229

Yilma M, 'International Law and the New States of Africa, 8 Maryland Journal of International Law'

Gathii JT, "Promise of International Law: A Third World View (Including a TWAIL Bibliography 1996–2019 as an Appendix)" (2020) 114 Proceedings of the ASIL Annual Meeting 165

Okafor OC, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?" (2008) 10 International Community Law Review 371

Tutu D, "Why I Had No Choice but to Spurn Tony Blair" The Guardian (September 2, 2012) Tutu's opinion vindicates that of many third world scholars on the prejudice of the traditional view of international law

Emerson R, 'Self-Determination' (1971) 65 American Journal of International Law

Pierre A, and Hannum H, 'Autonomy, Sovereignty, and Self-Determination: The Accommodation Of Conflicting Rights' (1991) 70 Foreign Affairs

Burgis M, Boundaries Of Discourse In The International Court Of Justice (Martinus Nijhoff Publishers 2009)

Raj B, 'Legal Consequences Of The Separation Of The Chagos Archipelago From Mauritius In 1965 (ICJ Advisory Opinion, 25 February 2019, General List No. 169)' (2022)

Sunter, A. F, 'TWAIL As Naturalized Epistemological Inquiry' [2007] 20 The Canadian

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Battle of presumptions; constitutionalizing the putrefacient "statutory presumption of guilt"

By Lawrence Kariuki

Introduction

One of the major principles of criminal law that is captured in our constitution in the presumption of innocence.[1] It is meant to prevent the conviction of accused persons until evidence evincing certainty is rendered before a court of law. However well purposed the constitutional principle is, parliament and the courts have continued to uphold the principle of reverse of onus. Reverse of onus cuts through the body and spirit of the principle of presumption of innocence by presuming the accused persons guilty till otherwise proven.

This paper explains the presumption of innocence and reverse of onus. It further gives examples of statutes and case law that uphold the reverse of onus principle. The paper gives the major reason justifying reverse of onus. It goes on to discuss the problems and effects of reverse of onus. It concludes with the major recommendations that resolves the major issues associated with reverse of onus clauses.

Presumption of innocence and reverse of onus

Article 50(2) (a) of the Constitution stipulates that the accused should always be presumed innocent till proven guilty.[2] The principle is critical as it prevents the criminal trial process from being tainted with procedural unfairness.[3] It propounds the idea that it is better for the guilty to go free than to convict an innocent person.[4] In ***R. v. Oakes*** Dickson C.J. clearly stipulated why the principle of presumption of innocence should be kept sacred. In his own diction:

> *"The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the state of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise."*[5]

To ensure that the presumption of innocence is kept immaculate, the prosecution bears the burden of proof. They should prove that the accused committed the offence beyond reasonable doubt to ensure that the accused rights of liberty and human dignity are not infringed.

The U.S. Supreme Court pronounced itself on this in **Re: Winship** where it held that:

> *"The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."*[6]

[1]Constitution of Kenya, 2010, art 50 (2) (a).
[2]Constitution of Kenya, 2010, art 50 (2) (a).
[3]Juhi Gupta, 'Interpretation of Reverse Onus Clauses' (2012) 5 NUJS L.Rev. 49 as quoted from Andrew Ashworth, Principles of Criminal Law 72 (2009).
[4]Victor Tadros & Stephen Tierney, 'The Presumption of Innocence and the Human Rights Act', (2004) 67 Mod. L. Rev. 402.
[5]R. v. Oakes, [1986] 1 SCR 103.
[6]Re: Winship, 397 US 358, 363-364 (1970).

The pure intentions of presumption of innocence are completely diluted by the principle of reverse of onus. This principle provides for the instances when the accused persons must bear the burden of proving that they are innocent. It cuts through the heart of principle of presumption of innocence and assassinates it. There several laws in Kenya that propagate for the reverse of onus. The examples shall be given in the next section.

Examples of laws that reverse onus in criminal matters
However much critical the presumption of innocence is, there are some statutes and court decisions that uphold the reverse of onus. These are just but a few: ***Section 111 of the Evidence Act*** provides inter alia that:

> *"The burden of proving any fact especially within the knowledge of such person [accused] is upon him."*[7]

Section 15 of the Immigration Act stipulates that if a person is accused of being an illegal alien in Kenya, then the accused has the burden of proving that he is a citizen of Kenya.[8]

Section 16(1) of the Stock and Produce Theft Act asserts:

> *"no person shall sell or deliver any stock or produce in a proclaimed district between sunset and sunrise, and any person so doing and any person buying or taking proclaimed delivery of any stock or produce which is sold in contravention of this section shall be guilty of an offence if he fails to satisfy the court that he has it lawfully… "*[9]

Section 96 of the Penal Code clearly shifts the legal burden of proof to the accused person. It provides, inter alia, that any person who incites violence or disobedience of the law, "the burden of proof whereof shall lie upon him" is guilty of an offence.[10] Unless Parliament is clear on how this provision should be interpreted, the craft of interpretation cannot be used to constitutionalise it. The court in Senator Johnstone Muthama v Director of Public Prosecutions has held that the said provision clearly shifts both the legal and evidential burden to the accused, ergo, falling under the class of 'reverse of onus clauses'.[11]

The judiciary, the guardian of rule of law, has not been left out. In ***Kenya Revenue Authority v Man Diesel & Turbo Se, Kenya [2021] eKLR*** the court held that:

> *"Generally, the taxpayer has the burden of proof in any tax controversy. The tax payer must demonstrate that the commissioner's assessment is incorrect. The taxpayer has a significantly higher burden. The taxpayer must prove the assessment is incorrect."*[12]

Justification of reverse of onus
The main justification for reversing the onus is access to information. **Section 111 of the Evidence Act** clearly shows this. It burdens the accused to bear the burden of proving facts that are with the knowledge of such person.[13] The same reason has been given in several court decisions.

In ***Johnstone [2003] 3 All E.R. 884***, Lord Nichols avers that those with the requisite knowledge will hardly co-operate with the investigators, hence making it hard for the prosecution to make their case. In his own words:

> *"Section 92(5) defence relates to the facts within the accused person's own knowledge. His sources of supply are known to him. Conversely, by and large it is to be expected that those who supply traders with counterfeit products … are unlikely to be cooperative. So, in practice, if the prosecution must prove that a trader acted dishonestly, fewer investigations will be undertaken and fewer prosecutions will take place."*[14]

Lord Bingham in ***Sheldrake v DPP [2005] 1 ALL E.R. 237*** opined that:

> *"I do not regard the burden places in the defendant as beyond reasonable limits or in any way arbitrary. It is not objectionable to criminalise a defendant's conduct in these circumstances without requiring a prosecutor to prove criminal intent. The defendant has full opportunity to show that there was no likelihood of his driving, a*

[7]Evidence Act, s111.
[8]Immigration Act, s15.
[9]Stock and Produce Theft Act, s 16(1).
[10]Penal Code, s 96.
[11]*Senator Johnstone Muthama v Director of Public Prosecutions & 2 others; Japhet Muriira Muroko* (Interested Party) [2020] eKLR.
[12]*Kenya Revenue Authority v Man Diesel & Turbo Se, Kenya* [2021] eKLR.
[13]Evidence Act, s111.
[14]*Johnstone* [2003] 3 All E.R. 884.

matter so closely conditioned by his own knowledge and state of mind at the material time as to make it much more appropriate for him to prove on the balance of probabilities that he would not have been likely to drive than for the prosecutor to prove, beyond reasonable doubt, that he would. I do not think that the imposition of a legal burden went beyond what was necessary."[15]

The same justification has been used in ***Kenya. In the case of Kenya Revenue Authority v Man Diesel & Turbo Se, Kenya [2021] eKLR*** the court buttressed its argument that in all tax controversies the taxpayer should bear the legal burden of proof by invoking the knowledge justification. It held that the Commissioner's determination on tax variances is correct until the tax payer brings in enough evidence to prove otherwise. If not, the court should decide against the tax payer.[16]

It is reasonable for the law and the courts to burden the accused persons with the onus of proving if they are well informed of the facts. This burden should be limited and it should not be the cause of shifting of legal burden from the prosecution to the accused. There are several inimical effects and problems of the reverse of onus. They shall be discussed in the next section.

Problems and effects of reverse of onus

First, the reverse of onus risk being misused by the prosecution. They neglect their duty and leave it all on the accused. For instance in ***Edwards [1974] 2All E.R. 1085*** the defendant was accused of selling alcohol without a justice's license. He was convicted. In appeal, the prosecution did not call evidence that the appellant did not have a license rather, he was to proof that he had one.[17] The prosecution did this even though they had access to the registry which would easily show whether the accused was registered.[18] The reverse of onus in this case was misused to the detriment of the accused.

Secondly, the principle of reverse of onus principle is unconstitutional if it is interpreted to shift legal burden of proof. Article 25(c) provides for the right to a fair trial as a right that cannot be limited at all.[19] Article 50(2) (a) expands on what it means to have a right to a fair trial in criminal cases.[20] The right to a fair trial includes the right to be presumed innocent until the contrary is proved. Presumption of innocence, being an essential element of right to a fair trial, cannot and should not be limited as per article 25(c). The High Court puts this point in the following words *"This is an impermissible position where a statutory provision supplants a constitutional edict."*[21] Therefore, any interpretation that reverses the legal burden is a direct violation of the Constitution and a mock to its supremacy.

In addition to violating the strict letter of the law, the principle alternates the idea of "innocent till proven guilty" with "guilty till you prove innocence"[22] It presumes one to be a criminal even before the process is complete thus risking his right to liberty and human dignity as per article 28 of the constitution. This leaves one open to harsh judgement by the "court of public opinion" leading to character assassination.

Further, it helps the state escape the strict standard of proof that it has to proof before one is convicted.[23] It forces the accused to prove his innocence thus violating his right to remain silent and parachutes the risk of self-incrimination.[24] The accused is supposed to make his case on a preponderance of evidence. However, this is too risky, the burden on him is final. Doubts that will arising from his case has one result, his conviction.[25]

Furthermore, having knowledge of a particular fact has no nexus with ability to prove it.[26] If the accused has knowledge but he cannot prove, then he ends up convicted even if there would be unreasonable doubt if the prosecution took the case. To avoid violating the letter of the constitution and

[15] *Sheldrake v DPP* [2005] 1 ALL E.R. 237.
[16] *Kenya Revenue Authority v Man Diesel & Turbo Se, Kenya* [2021] eKLR.
[17] *Edwards* [1974] 2All E.R. 1085.
[18] Steve Uglow, *Evidence Text and Materials* (2nd edn, Sweet and Maxwell 1997) 89.
[19] Constitution of Kenya, 2010, art 25(c).
[20] *Senator Johnstone Muthama v Director of Public Prosecutions & 2 others; Japhet Muriira Muroko* (Interested Party) [2020] eKLR.
[21] *Senator Johnstone Muthama v Director of Public Prosecutions & 2 others; Japhet Muriira Muroko* (Interested Party) [2020] eKLR.
[22] Juhi Gupta, 'Interpretation of Reverse Onus Clauses' (2012) 5 NUJS L.Rev. 49,50.
[23] Juhi Gupta, 'Interpretation of Reverse Onus Clauses' (2012) 5 NUJS L.Rev. 49,56.
[24] Juhi Gupta, 'Interpretation of Reverse Onus Clauses' (2012) 5 NUJS L.Rev. 49,59.
[25] Glanville Williams, 'The Logic of "Exceptions", (1988) 47(2) Cambridge L. J. 261, 265.

upholding the individual liberty and human dignity of the accused persons, the following recommendation should be embraced.

Recommendations

Some courts in other jurisdictions have declared reverse of onus clauses unconstitutional. However, that is not the method that should be taken by Kenya.

The Parliament should reform the law to provide a general rule that all reverse of onus clauses should be interpreted to shift to the accused evidentiary burden of proof. The proposition above has been supported by ***11th report of the Criminal Law Revision Committee (1972) Cmnd 4991*** which stated that:

> *"Wherever a burden of proof is placed in the defendant by statute, the burden should be evidential burden and not legal burden."*[28]

Lord Griffiths in ***Hunt [1987]1 ALL E.R. 1*** saw the danger of shifting the legal burden to the accused. He gave an example of drug cases. It would be difficult, in his own opinion, for the accused to bear the burden of proof to show that he did not know that the substance was an illegal drug. The prosecution would have a chance to get the substance analysed but the accused would not be given a chance to access the substance for analysis.[29]

Lord Steyn in ***Lambert [2001] 3 All E.R. 577*** continued with this argument. He proposed a way that evidential burden of proof should be used to get the same result of ensuring justice is delivered. In his own words:

> *The second [method] is to impose an evidential burden only on the accused. If this technique is adopted the matter must be taken as proved against the accused unless there is sufficient evidence to raise an issue on the matter but, if there is sufficient evidence, then the prosecution have the burden of satisfying the jury as to the matter beyond reasonable doubt in the ordinary way… it is important to bear in mind that it is not enough for the defence to merely allege the fact in question: the court decides whether there is a real issue on the matter… a transfer of a legal burden amounts to a far more drastic interference with the presumption of innocence than the creation of an evidential burden on the accused. The former requires the accused to establish his innocence. It necessarily involves the risk that, if the jury are faithful to the judge's direction, they may convict where the accused has not discharged the legal burden resting in him but left them unsure on the point. This risk is not present if only an evidential burden is created.*[30]

The evidential burden ensures that the accused provides enough evidence. The prosecution will have the opportunity to infer intent and knowledge from the evidence adduced and therefore continue proving its case to the required standard.[31] Moreover, the interpretation that reverse of onus clauses require evidential burden simply means that there would be no need to alter the textual orientation of all the laws reversing onus. That interpretation shall also render reverse of onus clauses constitutional. Those shifting legal burden are clearly unconstitutional and ought not to stand.

Secondly, there are provisions that demand the accused persons give an explanation for being in a certain state. For instance **section 323 of the Penal Code** which provides:

> *"Any person who has been detained as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanour."*

The courts should be keen to ensure that the prosecution brings forth a prima facie case. After the standard is met by the prosecution, then the accused persons can have the chance to give an explanation. That way, such provisions shall be interpreted as the accused form of defence other than shift of legal burden. Using that form of interpretation, such provisions shall be constitutional as held in ***Isaac Robert Murambi v Attorney General***.[32]

Conclusion

Reverse of onus clauses is a loophole that risk midwifing miscarriage of justice if wrongly interpreted. Their interpretation risks making them unconstitutional and risking the dignity and the liberty of innocent Kenyans. Parliament ought to provide clear instructions that all reverse of onus clauses should be interpreted to mean shifting of evidential burden. The legal burden of proof should never change from the prosecution to the accused.

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[26]Juhi Gupta, 'Interpretation of Reverse Onus Clauses' (2012) 5 NUJS L.Rev. 49, 53.
[27]For the Canadian position, see Oakes, supra note 34; for the South African position, see S. v. Zuma, 1995 (2) SACR 748.
[28]11th report of the Criminal Law Revision Committee (1972) Cmnd 4991.
[29]*Hunt* [1987]1 ALL E.R. 1.
[30]Lambert [2001] 3 All E.R. 577.
[31]David Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66(1) Cambridge Law Journal 142, 143.
[32]*Isaac Robert Murambi v Attorney General & 3 others* [2017] eKLR.

Of children born without the benefit of the clergy; who bears their parental responsibility? an acute look-see of Justice Aggrey Muchelule decision in EKTM v ECC [2020]

By Odhiambo Jerameel Kevins Owuor

While I find some justification for the High Court's finding that the man should pay child support even if the child is not genetically his, I find fault in it this way: If I decided to voluntarily pay school fees for and maintain my house worker's child and did so for ten years. If I then disagreed with this house worker and parted ways with them, will I be compelled to keep maintaining the child against my will 'in the best interest of the child?'[1]

Today's parental authority is concerned more with parental responsibilities and duties which should be exercised in the interest of children, rather than parental rights and powers.[2]

1) Introduction

When the Judge is at the arena, what is expected of him or her? This is the question that I have grappled with not once or twice. I also do remember of the quote that states that: 'Don't blame people for disappointing you, blame yourself for expecting too much from them.' Despite that quotation, the various laws and Constitution lay firm bedrock on what the Judge should be doing in the course of his or her duty as a judicial officer. It is from that basis that perhaps one can hinge his expectation on what judges should do while deciding cases on.

Retired Justice Alnashir Visram rightly noted that:

> *In a democratic society as envisioned by Thomas Hobbes, where the governed relinquish a portion of their autonomy (social contract), the legal system is the guardian against abuses by those in positions of power. Citizens agree to limitations on their freedom in exchange for peaceful coexistence, and they expect that when conflicts between citizens or between the State and citizens arise, there is a place that is independent from undue influence, that is trustworthy, and that has authority over all the parties to solve the disputes peacefully. The Courts in any democratic system are that place of refuge.*
>
> *Although the Judiciary is primarily charged with ensuring the fair and effective administration of justice, it also, in accordance with the doctrine of the separation of powers, provides a safeguard against the abuse of power by the Executive, and, in certain circumstances, the Legislature. Furthermore, it serves an indispensable role in the protection of fundamental human rights.*
>
> *The new Constitution gives the Judiciary an extensive mandate against the renewed aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. The word Judiciary is stated 37 times in*

Justice Alnashir Visram

[1]Dr Clarence Eboso Facebook post commenting on Justice Muchelule's decision

[2]Bekink M, 'Child Divorce': A Break from Parental Responsibilities and Rights Due to the Traditional Socio-Cultural Practices and Beliefs of the Parents [2012]

Ronald Dworkin

> *the new Constitution, the words Court' and? Courts' are stated 136 times. This high number illustrates the critical role and the responsibility bestowed upon the Judiciary and by extension the courts in implementing the aspirations of the citizens of Kenya. Right from Article 1 to the last Schedule of the Constitution, the Courts' renewed role is apparent. For the first time the Constitution clearly vests the sovereign power of the people in the Judiciary along with the other two arms of government.*[3]

Justice Alnashir in his speech during Judges Colloquium in 2011 noted the place that the Judiciary plays in the Kenyan Society. Definitely, he wasn't wrong on this issue. The Judges have a noble role to ensure that the Constitution is protected and promoted; rights are safeguarded and administer justice. However, there is a question that always comes to the mind of legal scholars, do judges make the law? Or are they just a conveyor belt or robots[4] as Joshua Malidzo puts it?

For long it has been the received opinion that judges filled in the gaps left by rules by using their discretion. Positivistic jurisprudence from Austin to Hart placed strong emphasis on the part played by judges in the exercise of their discretion. "In these cases it is clear", Hart has said, "that the rule-making authority must exercise discretion, and there is no possibility of treating the question raised by the various cases as if there were one uniquely correct answer to be found, as distinct from an answer which is a reasonable compromise between many conflicting interests". A competing view was espoused by the realists who placed absolute emphasis on the discretion of judges and relegated the "rules" to an obscure position. Earlier, little attention was paid to the analysis of discretion. However, a determined effort has been made lately by Ronald Dworkin, who has cast serious doubts on the orthodox opinion and has emerged as the principal opponent of Hart. Dworkin's views have posed a sustained challenge to the positivist account and have received critical acclaim by leading jurists of the world.

In 1345, an English lawyer argued to the court, "I think you will do as others have done in the same case, or else we do not know what the law is." "It is the will of the Justices," said Judge Hillary. Chief Justice Stonore broke in: "No; law is that which is right". This controversy between the two judges is still ranging after six and a half centuries. In modern terms, the problem can be phrased in order to know exactly what part do judges play in the development of law; do judges make the law or merely declare the law?

How Do Judges Make Law? What opportunities do judges have to be creative? These are the questions, which the philosophers have in the back of their mind while talking about the judge's role during adjudication. It is said that judges make new law or so-called creative especially in two fields: in the development of the Common Law and, in the interpretation of Statutes. Nevertheless, their freedom is restricted by the rules of precedent and the supremacy of Parliament & by the rules of precedent and the rules of statutory interpretation.

Judicial Precedent: The application of precedent by judges, whether they are developing the common law (for e.g. in areas such as negligence or murder), or interpreting statutes is the main mechanism whereby judges make law. Occasionally, judges are called upon to give a ruling or make a decision when faced with a situation for which there seems to be no precedent or any guiding rule. In these circumstances, judges can be said to be formulating original precedent. Thus, it is the judge's role to use his own discretion regarding when he thinks rules need to be applied, changed, improved, or abolished. For this reason, although Hart sees the function of law as being one of a system of rules, he maintains a firm belief that where there are gaps in the system judges should use their own discretion when applying the law. Hart believes that because statutes and common law rules are often too vague and unclear it

[3]Alnashir Visram, Role And Responsibility Of The Courts Under The Constitution Of Kenya, 2010. Available at http://kenyalaw.org/kl/index.php?id=1935 Accessed on 15th May 2022

[4]Joshua Malidzo, Judicial Robotism, Procedural Narcissism and Formalism in the Hijab Case: A Commentary (27th June 2019) Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3410817 Accessed on 15th May 2022

is often inevitable in "hard cases" for a judge to create new law. He talks about the open texture of law means that are, indeed, areas of conduct where courts or officials striking a balance, in the light of circumstances, between competing interests, which vary in weight from case to case, must leave much to be developed.

But according to Dworkin, principles are essential elements in deciding these types of hard cases. He seeks to argue that in all cases a structure of legal principles stands behind and informs the applicable rules. Principles control the interpretation of rules. Rules derive their meaning from principles. Judges, through the rules of precedent, merely discover and declare the existing law and never make 'new' law. A judge makes a decision, 'not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one'. He is against the judge made law mainly because of two objections. The first argues that elected representatives who are responsible to the people should govern a community and when judges make law it will be an encroachment on legislative power. The second argues that if a judge makes new law and applies it retroactively in the case before him, then the losing party will be punished, not because he violated some duty he had, but rather a new duty created after the event. Countering Dworkin's first argument, Hart says that judge's power is subject to many constraints narrowing his choice and judge's power are exercised only to dispose of particular instant cases; he cannot use these to introduce large-scale reforms or new codes. Even though if they make new law, it is in accordance with principles or underpinning, reasons recognized as already have a footing in the existing law. This indeed is the very nucleus of the "constructive interpretation" which is so prominent feature of Dworkin's theory of adjudication.

Dworkin also talks about the discretion but for him judge's choices are within the constraints of judgment, which he called as weak discretion. Dworkin does not deny the need for weak discretion but he denies the existence of strong judicial discretion. Judges do not make law because the existing law provides all the resources for their decisions. A judge does not decide a case in a legal vacuum but on the basis of existing rules, which express, and, at the same time, are informed by, underlying legal principles. The task of the judge faced with a hard case is, therefore, to understand what decision is required by the whole doctrinal structure of existing law.

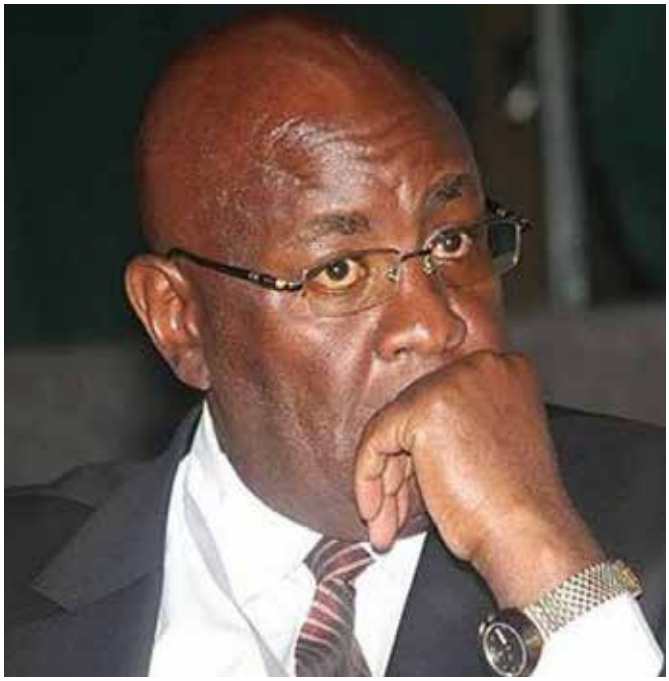
Regarding Dworkin's second criticism, Hart says that this objection seems quite irrelevant in hard cases since these are cases, which the law has left incompletely regulated, and where there is no known state of clear established law to justify expectations. It's true that in every legal system, a large and important field is left open for the exercise of discretion by courts in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in

developing and qualifying rules only broadly communicated by authoritative precedents. Nonetheless, these activities, important and insufficiently studied though they are, must not disguise the fact that both the framework within which they take place and their chief end product is one of general rules. These are rules the application of which individuals can see for themselves in case after case, without further recourse to official direction or discretion.

According to Hart, law in the area of open texture is a guarded prediction of what the courts will do. Even if the rules are clear to all, the statement of it may often be made in the form of a prediction of the court's decision. But the important thing to be noted here is that the basis for such prediction is the knowledge that the courts regard legal rules not as predictions, but as standards to be followed in decision, determinate enough, in spite of their open texture, to limit, though not to exclude, their discretion.

Judges do not generally, when legal rules fail to determine a unique result, intrude their personal preferences or blindly choose among alternatives; and when words like choice and discretion, or phrases such as creative activity and interstitial legislation are used to describe decisions, these do not mean that courts do decide arbitrarily without elaborating reasons for their decisions. And in case if there is any arbitrariness then legislature is always there to negate it down.

According to Raz, also, courts do develop the law; they do not as political agents but by working out the implications of internal legal considerations. Courts in developing the law do not give expression to their personal views, nor do they reflect external social or political forces. Rather, they unravel the spirit of the law, unfold its hidden force and reveal its meaning. He says that judges can make the law even when precedent binds them by distinguishing it with the previous decision but this is very restricted form of law making subjected to two crucial conditions. Firstly, the modified rule must be the rule laid down in the precedent restricted by the addition of a further condition for its application and secondly, the modified rule must be such as to justify the order made in the precedent. The judge's obligation is to adopt only that modification which will best improve



Justice Aggrey Muchelule

the rule. In the exercise of their law-making power the courts should- within the legally imposed restrictions act by adopting the best rules they can find. They may make a new rule in a decision, which he thinks is a purely law-applying decision.

Thus on the basis of the above debate, discussion can be boiled down to the point that judges declare the law and the question of their making law can be defended by saying that their invention is merely discovery of law within the existing precedents and principles. Limited choice cannot be termed as absolute power; it is just a weak discretion, as Dworkin will say it, constrained with certain limitations. Hart's open texture of law is also not enjoying the freedom from legal constraints; they have to also take guidance from the legal rules considering them their standard. Same with Raz too.

In C. Ravichandran Iyer v. Justice A.M. Bhattacharjee[5], the court said that the role of the judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario to make the ideals enshrined in the Constitution meaningful and a reality. The society demands active judicial roles which formerly were considered exceptional but now a routine[6].

This paper therefore proceeds to delve on how Justice Muchelule applied his knowledge to the well laid legal principles in Children's Act and the Constitution in adjudicating the case that this paper attempts to offer a commentary. Did he make a new law or just merely reiterated what the law espouses? Of concern to this paper is whether the judge rightly applied the law or used situational ethics in adjudicating the dispute in question. The author proceeds to highlight the decision by Muchelule and then analyses the decision through the legal lense devoid of emotional attachment. Lastly the author comes to a conclusion on the whole issue.

2) Cursory look at Justice Muchelule's decision in civil appeal e062 of 2020

As per the Court records, the appellant and the respondent met on 29th July 2006 and begun living together as husband and wife in September of 2006. The marriage was tumultuous but still on 11th November 2016 the couple formalized their relationship in a ceremony at the Attorney General's Office. On 18th December 2018 the respondent filed for judicial separation, and in 2019 the appellant petitioned for the dissolution of the marriage. The present position is that the couple is divorced.

In the course of the relationship between the two, three children (MC born on 5th November 2006, RC born on 5th July 2009 and NC born on 19th December 2014) were born. It is not in dispute that the only child fathered by the appellant was RC The respondent's case was that she was five months pregnant when she met the appellant; that she let the appellant know about this; he accepted to have responsibility over the child; when the child was born he gave her his name in the birth certificate; and he continued to have that responsibility throughout the relationship. Regarding NC, the appellant conceded that while the marriage was subsisting, she had a relationship with another man. She conceived and the child was born. The paternity of MC and NC was part of the reason why the parties were at loggerheads. The appellant had always provided shelter, school fees and medical cover for the three children. He told court that he did this believing that the three were his biological children. After the couple separated the respondent and the children were left to stay in the couple's matrimonial home at Athi River. The respondent agreed to have full custody and responsibility over NC. The major basis of the appeal was in regard to MC and RC.

The appellant was aggrieved by the decision of Senior Resident Magistrate based in Nairobi. In the judgment delivered on 2nd December 2020 by the Children Court, it was ordered that:- the respondent ECC shall have actual custody, care and control of all the minors herein; the appellant EKTM shall access the two children (MC and RC) on every alternate weekend of the school days and half of the school holidays; the appellant shall cater for MC's and R.C's school fees and school related expenses; the appellant shall cater for MC's. and RC's medical expenses; the appellant shall cater for MC's and R.C's monthly upkeep at the rate of Kshs.30,000/= per month; the respondent shall cater for the remaining part of MC's and NC's monthly upkeep; the

[5]C. Ravichandran Iyer v. Justice A.M. Bhattacharjee
[6]Ibid

respondent shall cater for all of NC's needs; and on shelter, the respondent and the minors shall continue living in the mortgage house in Athi River until the determination of the matrimonial property cause. However, if the determination of the matrimonial cause will have the effect of removing the respondent and the minors from the said house, both parties shall provide for shelter on a 50:50 basis.

The appellant in his memorandum of appeal raised the following grounds: that the learned trial Magistrate erred in law and in fact by holding that the Appellant assumed parental responsibility for the minor MC; that the learned trial Magistrate erred in law and in fact in holding that the Appellant should solely cater for MC and RC's school fees, school related expenses and access to MC on every weekend of school days and half of the school holidays; that the learned trial Magistrate failed to balance the scales of justice and failed to apply the correct principles of law leading to an erroneous decision in holding that the Appellant should cater for MC and RC's monthly upkeep at the rate of Kshs.30,000 per month; that the learned trial Magistrate erred in law and in fact in holding that the Respondent should only cater for all NC's and the remaining parts of MC's needs hence absolving her from responsibility towards RC who is also her child; that the learned trial Magistrate erred in law and in fact in holding that both parties should provide for shelter on a 50:50 basis if the determination of the matrimonial cause shall have the effect of removing the Respondent and the minors from the matrimonial home."

The appellant then sought the following orders from the court: the Appeal be allowed and a declaration be made to the extent that the Appellant did not assume parental responsibility for the first born minor MC; a declaration be made setting aside the order that the Appellant provides Kshs.30,000 as monthly upkeep for MC and RC and the Court be pleased to declare that the Appellant's contributions in terms of house rent, medical expenses, school fees and school related expenses as sufficient contribution for maintenance on the part of the Appellant; a declaration be made that the Respondent shall solely cater for all the needs of M.C. including upkeep, school fees and medical expenses; a declaration be made that the Respondent shall also cater for all the other needs of R.C. apart from school fees and medical expenses which the Appellant shall cater for; a declaration be made that the order directing parties to provide shelter on a 50:50 basis as speculative and the same should await the determination of the matrimonial cause; in the alternative to the order in (e) above, a declaration be made to the effect that each party to cater for their own shelter while they are with the minors;

the costs of the appeal be granted to the Appellant against the Respondent."

Justice Muchelule reasoned the facts in correlation to the law and thus was of the view that the appeal was successful only on one ground. He noted that: 'In conclusion, the appeal is allowed only to the extent that the appellant will not be required to pay Kshs.30,000/= towards the monthly upkeep of the children MC and RC.' This decision therefore is the major subject of this paper with a keen look on the ramifications thereof.

3) Addressing parental responsibility of children born out of wedlock through a legal lens

I. Putting parental responsibility into perspective

Parental responsibility refers to the key responsibilities that parents have in relation to their children's long-term needs, such as matters concerning education, their health and religion. Put differently, Parental responsibility is the legal term for the rights and responsibilities that parents have for their children. It means you are responsible for ensuring that the child is cared for and for protecting and maintaining the child[7]. One can also be right to observe that parental responsibility is the legal rights, responsibilities and authority over a child and their property. Therefore, someone who has parental responsibility for a child has the right to make crucial decisions over the child's care and upbringing.[8] United Kingdom Children's Act defines parental responsibility as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property".[9]

When certain decisions have to be taken about a child, all those with Parental Responsibility for the child are allowed to have a say in that decision. The decision will

[7]Brethertons Solicitors, Parental Responsibility: What does it mean and who is entitled to it? (1 June 2015) Available at https://www.brethertons.co.uk/site/blog/family-blog/parental-responsibility Accessed on 19th May 2022

[8]Theresa Wright, What Is Parental Responsibility? Six Things You Must Know. (1st April 2021) Available at https://brittontime.com/2021/04/01/what-is-parental-responsibility-six-things-you-must-know/ Accessed on 19th May 2022

[9]Section 3(1) Children Act 1989

have to be about the upbringing of the child. Day to day decisions should be taken by the resident parent or the person with whom the child lives without interference from other Parental Responsibility holders. In practical terms Parental Responsibility means the power to make important decisions in relation to a child[10]. This can include: determining the child's education and where the child goes to school; choosing, registering or changing the child's name; appointing a child's guardian in the event of the death of a parent; consenting to a child's operation or certain medical treatment; accessing a child's medical records; consenting to taking the child abroad for holidays or extended stays; representing the child in legal proceedings; determining the religion the child should be brought up with. Where there is a mixed cultural background this should include exposure to the religions of all those with Parental Responsibility, until the child can reach an age where he/she can make their own decision on this.

As well parental responsibility can be assumed and this will be highlighted in the next part of this paper. Assumption of parental responsibility is towards making sure that the rights of a child are guaranteed and this child isn't made to suffer. The legal text has it so and as well courts especially in Kenya have given interpretation thereof candidly.

II. Children's Act 2001 view on parental responsibility

Section 23 of the Children's Act defines parental responsibility as all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child[11]. The parental duties as per the act include the duty to maintain the child and in particular to provide him with; adequate diet; shelter; clothing; medical care including immunisation; and education and guidance; the duty to protect the child from neglect, discrimination and abuse; the right to: give parental guidance in religious, moral, social, cultural and other values; determine the name of the child; appoint a guardian in respect of the child; receive, recover, administer and otherwise deal with the property of the child for the benefit and in the best interests of the child; arrange or restrict the emigration of the child from Kenya; upon the death of the child, to arrange for the burial or cremation of the child.

Sections 24 to Section 27 of the Children's Act enumerate much on parental responsibility. I will be generous to reproduce the sections aforementioned. The said section provide as follows:

24. Who has parental responsibility

(1) Where a child's father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility.

(2) Where a child's father and mother were not married to each other at the time of the child's birth and have subsequently married each other, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in the exercise of such parental responsibility.

(3) Where a child's father and mother were not married to each other at the time of the child's birth and have not subsequently married each other—

(a) the mother shall have parental responsibility at the first instance;

(b) the father shall subsequently acquire parental responsibility for the child in accordance with the provisions of section 25.

(4) More than one person may have parental responsibility for the same child at the same time.

(5) A person who has parental responsibility for a child at any time shall not cease to have that responsibility for the child.

(6) Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in that responsibility; but nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child.

(7) The fact that a person has parental responsibility for a child may not entitle that person to act in any way which would be incompatible with any order made with respect to the child under this Act.

[10]If you have parental responsibility, your most important roles are to: provide a home for the child protect and maintain the child. You're also responsible for: disciplining the child; choosing and providing for the child's education; agreeing to the child's medical treatment; naming the child and agreeing to any change of name looking after the child's property.

[11]Section 23 of Children's Act of 2001

(8) (a) A person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his behalf.
(b) The person with whom such arrangement is made may himself be a person who already has parental responsibility for the child concerned.
(c) The making of any such arrangement shall not affect any liability of the person making it which may arise from any failure to meet any part of such person's parental responsibility for the child concerned.

25. Acquisition of parental responsibility by father

(1) Where a child's father and mother were not married at the time of his birth—
(a) the court may, on application of the father, order that he shall have parental responsibility for the child; or
(b) the father and mother may by agreement ("a parental responsibility agreement") provide for the father to have parental responsibility for the child.
(2) Where a child's father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for a period or periods which amount to not less than twelve months, or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child.

26. Parental responsibility agreement

(1) A parental responsibility agreement shall have effect for the purposes of this Act if it is made substantially in the form prescribed by the Chief Justice.
(2) A parental responsibility agreement may only be brought to an end by an order of the court made on application by—
(a) any person who has parental responsibility for the child; or
(b) the child himself with the leave of the court.
(3) The Court may only grant leave under subsection (2)(b) if it is satisfied that the child has sufficient understanding to make the proposed application

27. Transmission of parental responsibility

(1) Where the mother and father of a child were married to each other at the time of the birth of the child or have subsequently married each other—
(a) on the death of the mother the father shall exercise parental responsibility for the child either alone or together with any testamentary guardian appointed by the mother;
(b) on the death of the father, the mother if living shall exercise parental responsibility for the child either alone or together with any testamentary guardian appointed by the father;
(c) where both the mother and the father of the child are deceased, parental responsibility shall be exercised by—
(i) any testamentary guardian appointed by either of the parents; or
(ii) a guardian appointed by the court; or
(iii) the person in whose power a residence order was made prior to the death of the child's father and mother, and which order is still in force; or
(iv) a fit person appointed by the court; or
(v) in the absence of the persons specified in paragraphs (i), (ii), (iii) and (iv), a relative of the child.
(2) Where the father and mother of the child were not married at the time of the birth of the child and have not subsequently married each other—
(a) on the death of the mother of the child, the father of the child, if he has acquired parental responsibility under the provisions or this Act, shall if he is still living, have parental responsibility for the child either alone or with any testamentary guardian appointed by the mother or the relatives of the mother;
(b) on the death of the father of a child who has acquired parental responsibility under the provisions of this Act, the mother of the child shall exercise parental responsibility in respect of the child either alone, or with any testamentary guardian appointed by the father;
(c) the surviving mother or father of the child, as the case may be, shall be entitled to object to any testamentary guardian appointed by either of them acting and may apply to the court for the revocation of the appointment of the testamentary guardian and the relatives of the deceased mother or father of the child, may, if they consider the surviving father or mother of the child, as the case may be, to be unfit to

exercise parental responsibility for the child, apply to the court to make such appropriate orders as shall be necessary in the circumstances of the case to safeguard the best interests of the child.

III. Best interest of a child legal principle

The term best interest of the child refers to the consideration in all actions concerning children that focuses towards their essential needs, their growth and development and achievement to their capabilities to the maximum extent possible. Whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies all are required to ensure that the best interests of a child are realized. The term best interests of a child as well may be viewed to broadly denoting the well-being of a child. Such wellbeing is determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child's environment and experiences.

In practice, the principle has to be applied as a threefold concept: substantive rights, a fundamental, interpretive legal principle and a rule of procedure. The principle as a substantive right obliges states to consider the best interest of a child, take it as a primary consideration when different interests are considered and that the right is implemented whenever a decision is affecting a child. This creates an intrinsic obligation for states. A substantive right is directly applicable and can be invoked before a court.

The principle as a fundamental, interpretive legal principle requires that if a legal provision is open to more than one interpretation[12], the interpretation which most effectively serves the child's best interests should be chosen. According to Committee on the Rights of the Child, 'Assessing and determining the best interests of the child require procedural guarantees. This requires that the possible impact (positive and negative) of a decision has to be evaluated. States can be held accountable as they are obliged to substantiate and prove the explicit consideration of the nest interests of a child and how it has been respected in any decision concerning children.

In assessment of the 'best interest of the child' the child's view, identity, situation of vulnerability, right to health, right to education, the preservation of family environment and maintaining of relations have to be considered. This is a non-exhaustive list of considerations as the principle is flexible by nature and requires states to assess the necessary considerations on a case by case basis.

To achieve the best interests of a child principle an array of factors[13] are considered or taken into account. Such factors include but not limited to: the wishes of the child; if the child is old enough to capably express a reasonable preference; the mental and physical health of the parents; any special needs a child may have and how each parent takes care of those needs; religious and/or cultural considerations; the need for continuation of a stable home environment, support and opportunity for interaction with members of the extended family of either parent such as grandparents; interactions and interrelationship with other members of household, adjustments to school and community; the age and sex of the child; the existence of a pattern of domestic violence in the home, parental use of excessive discipline or emotional abuse; and evidence of parental drug, alcohol or child abuse[14].

Thus, what's the legal framework underpinning best interest of child? The first port of call must be the Constitution. The Constitution is the well spring or the fountain from which the other laws derive their validity and in that regard all other laws must conform to the Constitution. Any slight disharmony or discord of any other law with the Constitution is definitely an affront to the Constitution and such a law is as good as dead. For it has no force of law. Article 53 of the Constitution of Kenya 2010 vouchsafes this principle. It provides as follows:

1. Every child has the right
a. to a name and nationality from birth;
b. to free and compulsory basic education;
c. to basic nutrition, shelter and health care;
d. to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;

[12]Kilkelly U, International Human Rights of Children
[13]Andrew Wanga, Best Interests factors of the child in Kenya (22nd July 2019) Available at https://mmsadvocates.co.ke/9-%EF%BB%BFbest-interest-factors-of-the-child-in-kenya/ Accessed on 19th May 2022
[14]Ibid

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.

Section 4(2) and 3(b) of the Children's Act echos the Constitutional imperative:

(2) In all actions concerning children, whether undertaken by Public or Private Welfare Institution, Courts of Law, Administrative Authorities or Legislative bodies, the best interest of the child shall be the primary consideration .
(3) All Judicial and Administrative Institutions and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with the adopting a course of action calculated to –
a. Safeguarding and promoting the rights and welfare of the child;
b. and promote the welfare of the child.

Article 4 (1) of the African Charter on the Rights and Welfare of a Child provides that "in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be primary consideration"[15]. The Courts have had an opportunity to interact with this principle and move it from the books into action. That is, to interpret the same as per the case at hand. In[16] M A A v A B S Civil Appeal No. 32 of 2017 the court held that he interest of the children is first and paramount and everything must be done to safeguard, conserve and promote the rights and welfare of the children.

In NMM v JOW[17], Kariuki J held that the Constitution under Articles 53, 159 and 70 give a number of rights which if promoted constitute looking out for the best interest of the child. The rights are, inter alia, the right to a name

and nationality, right to education, shelter and healthcare, a right to a clean and healthy environment, and the right to access justice. Hand in glove with this, Thande J held that court decisions in matters concerning the child must be calculated to guarantee the protection of the welfare of the child. Justice Kiage deems this as the provision as the 'paramountcy principle.

IV. Contextualizing Justice Aggrey Muchelule's decision in light of Kenyan laws

On 10th May an article by Kamau Muthoni titled 'Judge Orders man to care for ex-wife's children who were born out of wedlock ' gained massive readership and the same was posted on various social media platforms to disseminate the message. This is a snapshot of what he wrote:

> *A man will continue raising two minors his former wife got from a different relationship, the High Court ruled. Although the father of three complained his ex-wife hid from him about carrying the pregnancy of another man, the court found that he has assumed parental responsibility and given the last born his own name. Justice Aggrey Muchelule declined to set aside the Children's Court order that the man codenamed EKTM should continue parenting the minors. However, he gave the man a reprieve by setting aside an order requiring him to pay Sh 30,000 on top of providing their school fees and medical expenses. In the case, it emerged that out the three children, only one, the second born, was the biological child of EKTM.*[19]

[15]Article 4 (1) of the African Charter on the Rights and Welfare of a Child
[16]M A A v A B S Civil Appeal No. 32 of 2017
[17]N M M v J O W, Judgement of 27 September 2016, High Court of Kenya, eKLR
[18]Kamau Muthoni, Judge Orders man to care for ex-wife's children who were born out of wedlock (10th May 2022) Available at https://www.standardmedia.co.ke/national/article/2001445034/judge-orders-man-to-care-for-ex-wifes-children-who-were-born-out-of-wedlock Accessed on 19th May 2022 See also, Jackson Otukho, Court Orders Man to Provide for 2 Children Ex-Wife Got out of Marriage (11th May 2022) Available at https://www.tuko.co.ke/kenya/454244-court-orders-man-provide-2-children-ex-wife-got-marriage/ Accessed on 19th May 2022. Mwova Mwenda, Muchelule orders man to raise kid ex-wife cheated on him to have (10th May 2022) Retrieved from https://biznakenya.com/high-court-aggrey-muchelule/ Accessed on 19th May 2022. John Wanjohi, Nairobi Court Orders a Man to Provide for His Former Wife's Children Born Out of Wedlock (10th May 2022) Available at https://www.mwakilishi.com/article/kenya-news/2022-05-10/nairobi-court-orders-a-man-to-provide-for-his-former-wifes-children Accessed on 19th May 2022
[19]Ibid

The men really complained of this decision of the court and I will sample some views of some men arguing about this decision. Silas Nyachwani commented as follows: 'What is the world coming to? Men, wake up and smell the coffee. This law should be amended to make the assuming parental responsibility invalid if deceit was used. If not then the law should make it mandatory or allow fathers the option of testing for DNA matches at birth. The law cannot put the burden on men without recourse.' Others were of the view that parental responsibility should be removed from the law by all means for it is bait used by the lasses on men.

Now, I proceed to lay out the reasoning of Justice Muchelule and ascertain if it is in harmony with the law. I had pointed out the provisions of Section 24 to Section 26 of the Children's act which enumerate much on matters parental responsibility and assuming the same thereof. It is imperative to note the provisions of Section 24 (5) of Children's Act which states that; a person who has parental responsibility for a child at any time shall not cease to have that responsibility for the child. In this case EKTM was providing for MC all the while and by dint of this he may be presumed to have acquired or assumed parental responsibility courtesy of Section 25 of the Children's Act which states;

> **25. Acquisition of parental responsibility by father**
> *(1) Where a child's father and mother were not married at the time of his birth—*
> *(a) the court may, on application of the father, order that he shall have parental responsibility for the child; or*
> *(b) the father and mother may by agreement ("a parental responsibility agreement") provide for the father to have parental responsibility for the child.*
> *(2) Where a child's father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for a period or periods which amount to not less than twelve months, or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child.*

Justice Muchelule definitely was right when he held that:

> *13. There is no dispute that prior to the filing of the cause in the trial court, the appellant was educating and generally taking care of the three children. Secondly, following the separation of the couple, the respondent was left in the matrimonial home with the children. It was common ground that the home (house) is on mortgage which both parties were servicing. The respondent, I find, has a stake in the house. The value of the stake will be determined when the parties file originating summons for the appropriate declaration and division of their matrimonial property. When the trial court ordered that the respondent continues to stay here with the children, that was in accordance with admitted facts and the acknowledgment that she had an interest in the property. In any case, without a court order, a spouse cannot be forced out of a matrimonial house.*
>
> *14. There was an acknowledged provision by the appellant, through his employer, to the medical welfare of the children.*
> *15. The appellant complained that in apportioning responsibility over MC and RC the trial court did not consider the financial means of the parties, and did not consider the parties' equal responsibility towards the education and upbringing of the children. Over MC the appellant's case was that because he was not the biological father, and given that the respondent hid this fact from him, he should not have been held to have any responsibility over the child.*
> *16. Beginning with MC, the trial court received evidence on how she came to be born. It was the appellant's case that all along he knew this was his biological child. That was why he gave her his name in the birth certificate and brought her up until this cause came up. The respondent's evidence was that when she met the appellant she was five months pregnant. The pregnancy was discussed and the appellant accepted to take up responsibility. They later begun to live together as husband and wife. The trial court considered the rival versions and accepted that of the respondent. I find no reason to disturb that finding.*
> *17. In any case, as the stepfather of the child, he brought her up, took her to school and provided for its medical. The trial court considered the role of a step-parent under section 94(1) of the Children Act, and considered various decided cases, including that of ZAK & Another –v- MA & Another [2013]eKLR, and found that because of the 14 years that the appellant had related with the child and provided for her in all ways, and given her his name, he should be considered to have assumed responsibility over her in the same way a father would. I find no reason to depart from the determination of the trial court on the issue.*

18. The conclusion of the trial court was that, over MC and RC the parties had equal responsibility to provide for them as was commanded by Article 53(1) of the Constitution. The trial court was alive to the provisions of section 94(1) of the Act that deal with the considerations when making an order for financial provision for the maintenance of a child. They include:-
"(a) The income or earning capacity, property and other financial resources which the parties or any other person in whose favour the court proposes to make an order, have or are likely to have in the foreseeable future;
(b) the financial needs, obligations, or responsibilities which each party has or is likely to have in the foreseeable future."
19. The trial court ordered the appellant to provide for the education and education related needs of the children, their medical needs and to provide Kshs.30,000/= monthly for their upkeep. The respondent was to cater for their other needs.
20. Whereas in the judgment the trial court discussed the financial means of the parties, there was nowhere the court, in reaching the decision on the Kshs.30,000/= per month, had considered the monthly financial needs of the two children. Where did the figure of Kshs.30,000/= come from? What was going to be bought monthly for the children? Secondly, in ordering that the respondent takes care of the children's other needs, there was no specific reference to those needs. Were they clothes, food, maid, for instance? How much were they going to cost monthly?
21. I have carefully considered the facts of the case. In my estimation, after the court determined that the appellant was going to take care of the medical needs of the children, and take care of their education and all education related needs, it was onerous, given the discussed means of the parties, to ask him to pay Kshs.30,000/= monthly for the children's upkeep. The upkeep (clothing, food, maid etc) is one that the respondent should have been asked to pick. In reaching this decision, I have considered that the parties were equally providing for the shelter of the children, and that the appellant had better financial means than the respondent. I have taken judicial notice of the fact that education and medical are two most expensive items in the upbringing of a child.
22. In conclusion, the appeal is allowed only to the extent that the appellant will not be required to pay Kshs.30,000/= towards the monthly upkeep of the children MC and RC.[20]

It is not worthy to consider the case of ZAK & another v MA & another[21], according to the court records; the 1st petitioner and the 1st respondent started cohabitation, which they did for a period of two years during which time

they had twins. He alleged that they agreed that he would be contributing to the upkeep of the twins whom he sired, which he did by allowing the 1st respondent to collect foodstuffs from a local shop, for which he would pay at the end of the month. He averred that he later disagreed with the 1st respondent after she had taken foodstuffs from the shop for only two months as she was only interested in money and did not want to collect foodstuffs from the shop as he had wanted her to.

The 1st petitioner claimed that following the disagreement with the 1st respondent, he was served with summons in March 2011 from the District Children's Officer, Langata; that upon presenting himself at the Lang'ata Children's Office, the District Children's Officer insisted that he needed to provide for all the four children. He stated that he indicated to the officer that he was providing for his biological children but that he was not willing to provide for the others who were not his children.

He claimed that he was informed that he had acquired parental responsibility for the other children under Section 25 of the Children Act 2001, and was threatened with arrest if he did not provide money for the children's upkeep to the 1st respondent. He therefore sought advice and legal assistance from the 2nd petitioner as a result of which this petition was filed to safeguard his rights. The Children's Officer, Lang'ata, Ms. Harriet Kihara, had sworn an affidavit on 28th September 2012 on the matters giving rise to this petition. She stated that she is stationed at Kibera in

[20]Supra
[21]ZAK & another v MA & another [2013] eKLR

Langata District, and that her duties under Section 38(2)(m) of the Children Act are to mediate in family disputes involving children and their parents or those having parental responsibility over them. According to Ms. Kihara, on 21st March 2011, the 1st respondent reported to the Langata District Children's Office that she had been married to the 1st petitioner for a period of 3 years and they had two children, but that in May 2010, the 1st petitioner left with their house girl, leaving the 1st respondent to fend for the children by herself; that the 1st respondent sought legal advice from CREAW, a legal aid agency, following which an agreement was reached and the 1st petitioner undertook to deposit a monthly stipend for food with a shopkeeper, which he did for only two months then stopped, as a result of which the 1st respondent sought assistance from the Children's Office to compel the 1st petitioner to take up his parental responsibilities.

Ms. Kihara averred that the 1st petitioner had acquired parental responsibility as a result of his cohabitation with the 1st respondent as provided under Section 25(4) of the Children Act, and is therefore bound under section 90 of the Act to provide for all the children of the 1st respondent, including those that are not his biologically; that he insisted that he would only contribute to the maintenance of his biological children, and that only to the tune of Kshs 500 per month; that the 1st respondent declined the offer to contribute Kshs 500 only and was therefore referred to a legal aid organisation to seek assistance in filing for maintenance in court.

The case for the petitioners as presented by their Counsel, Mr. Odera, was in two limbs. The first is that sections 24(3) and 25 of the Children Act, Cap 141 Laws of Kenya, are inconsistent with Article 53(1)(e) of the Constitution and should therefore be declared null and void. The second limb is that the said sections 24(3) and 25 of the Children Act, 2001 violate the 1st petitioner's right to equality and freedom from discrimination guaranteed in Article 27(1),(2) and (3) of the Constitution of Kenya.

Mr. Odera submitted that Section 24(3) of the Children Act is unconstitutional as it vests parental responsibility on the mother in the first instance, and provides that the father shall subsequently acquire parental responsibility, the manner of which is provided in Section 25. He argued that at Article 53(1)(e), the Constitution provides that both the mother and father of a child have equal responsibility to a child whether or not they were married to each other. Mr. Odera noted that the State had conceded the unconstitutionality of section 24(3) and 25 and submits that their continued existence in the statute had led to the threatened infringement of the 1st petitioner's rights under Article 27 to equal protection of the law. The threatened violation arose because he is allegedly being compelled to provide for children he has no parental responsibility over. Mr. Odera argued that declaring the two sections unconstitutional is in the best interests of the child and will promote Article 53 of the Constitution as any person who sires a child will be aware that he is responsible for that child.

Justice Mumbi Ngugi proceeded to note as follows on this case:

> *The petitioners have come to this court seeking declarations with regard to Sections 24(3) and 25 of the Children Act, and alleging violation of the 1st petitioner's rights under the Constitution. While the petitioners focus on the rights of the 1st petitioner and the petitioners have a duty to show in which manner the provisions of the Constitution have been violated in regard to him, in my view, the critical issue in this matter relates to the welfare of the children with regard to the maintenance of whom the dispute arises.*
> *The determination of this matter therefore revolves around the provisions of Article 53 of the Constitution, which provides, at Article 53(2) that*
> *'A child's best interests are of paramount importance in every matter concerning the child.'*
> *The petitioners have contended that Sections 24(3) and 25 of the Children Act are unconstitutional. Section 24 of the Children Act is in the following terms:*
>
> > *24. (1) Where a child's father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility.*
> > *(2) Where a child's father and mother were not married to each other at the time of the child's birth and have subsequently married each other, they shall have parental responsibility for the child and*

neither the father nor the mother of the child shall have a superior right or claim against the other in the exercise of such parental responsibility.
(3) Where a child's father and mother were not married to each other at the time of the child's birth and have not subsequently married each other—
(a) the mother shall have parental responsibility at the first instance;
(b) the father shall subsequently acquire parental responsibility for the child in accordance with the provisions of section 25.

At section 25, the Children Act provides for the circumstances under which a father of a child born outside marriage may acquire parental responsibility. It provides as follows:

25. (1) Where a child's father and mother were not married at the time of his birth—
(a) the court may, on application of the father, order that he shall have parental responsibility for the child; or
(b) the father and mother may by agreement ("a parental responsibility agreement") provide for the father to have parental responsibility for the child.
(2) Where a child's father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for a period or periods which amount to not less than twelve months, or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child.

The respondent has conceded that the provisions of Section 24(3) are unconstitutional and violate the provisions of Article 53(1)(e) with regard to children born outside marriage. Section 7(1) of the Transitional and Consequential Provisions contained in the Sixth Schedule to the Constitution is clear that:

7. (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

The 2nd respondent has also conceded that in so far as the Children Act places parental responsibility for children born outside marriage only on the mother, it is unconstitutional. In this regard, the provisions of section 90(a) and (e) of the Children Act must be considered alongside the provisions of Section 24(3) and 25 as offending against the Constitution. Section 90 is in the following terms:

90. Unless the court otherwise directs, and subject to any financial contribution ordered to be made by any other person, the following presumptions shall apply with regard to the maintenance of a child—
(a) where the parents of a child were married to each other at the time of the birth of the child and are both living, the duty to maintain a child shall be their joint responsibility;
(b)… ;
(e) where the mother and father of a child were not married to each other at the time of birth of the child

and have not subsequently married, but the father of the child has acquired parental responsibility for the child, it shall be the joint responsibility of the mother and father of the child to maintain that child.

In line with the provisions of Section 7 set out above, the Children Act must be read as imposing parental responsibility for children on both of their biological parents, whether they were married to each other or not at the time of the child's birth. The 2nd respondent has the responsibility, which I note, from its written submissions in this matter; it is fully alive to, to present the necessary amendments to Section 24(3) and 25 for enactment by Parliament. It must also take into account the provisions of section 90 set out above, and any other provisions in the Act that violate the Constitution, when presenting the Act for amendment to ensure conformity with the Constitution.

The substance of the 1st petitioner's case is that his rights are being violated because he is being required to provide maintenance for the children whom the 1st respondent had from another relationship prior to commencing cohabitation with him. The 2nd respondent counters that the 1st petitioner has acquired parental responsibility under Section 25(2) of the Children Act by his cohabitation with the 1st respondent for a period of two years or more. I believe that the 1st petitioner is mistaken in his arguments, while the 2nd respondent is correct that the petitioner may be deemed to have parental responsibility for the children, but not for the reasons that the 2nd respondent cites.

Section 25(2) of the Children Act, which in light of Article 53(1)(e) is unconstitutional, related to those situations in which a biological father wished to acquire parental responsibility for his child born outside marriage. The situation we are confronted with in this petition raises the question whether, under Article 53(1)(e), a person who is not the biological parent of a child can acquire parental responsibility in the circumstances presented by the case before me. In other words, can a person who is or has been married to or has cohabited with the father or mother of a child of whom he or she is not the biological parent acquire parental responsibility towards that child?

Our society has evolved very rapidly, from the traditional polygamous society to monogamous unions in which parties enter into marriage with children from previous unions. While the relationship between a couple in a family where there are children from either of the parties' previous relationships is working, the question of parental responsibility for such children may not arise. They are deemed and may be treated as children of the family, entitled to maintenance and all that appertains to the duties of parents to children. It is when the relationship falls apart, as in the present case, that the question of parental responsibility for the children of the other spouse may arise.

Looked at through the prism of the Constitution, particularly Article 53(2) which requires that the best interests of the child be the paramount consideration in any matter concerning the child, I believe that a step-parent in such circumstances must be held to have an obligation recognised in law to exercise parental responsibility as defined in Section 23 of the Children Act over his or her step-child. It would be an affront to morality and the values of the Constitution for a party who has had a relationship with a child akin to that of a father or mother to disclaim all responsibility and duty to maintain the child when he or she falls out with the parent of the child. Such responsibility would, however, depend on the circumstances of each case, and the relationship that is shown to have existed between the person in question and the children in respect of whom he or she is sought to be charged with parental responsibility for.

36. I am fortified in my view of this matter by a consideration of decisions from other jurisdictions. Taking into account the best interests of the child and the relationship that existed between the child and the step-parent against whom orders of maintenance are sought and the statutory provisions regulating the matters on the care, custody and welfare of the child, courts in other jurisdictions have held that such a parent has an obligation to provide financially for the child, even where the child has reached the age of eighteen years. See in this regard the decisions of the South Gauteng High Court, South Africa, in MB v NB (2008/25274)(2009) ZAGPJHC 76; 2010(3) SA 220 (GSJ) (25 August 2009); the decision of the Family Court in Australia in Keltie & Keltie & Bradford (2002) FamCA 421 (21

June 2002) and the decision of the Supreme Court of Canada in Chartier v. Chartier (1999) 1 S.C.R 242. Looked at from the above perspective, should there be sufficient evidence to show that the 1st petitioner was in loco parentis to the two other children of the 1st respondent, he would have an obligation to support them in the same way as he is under an obligation to support his biological children. This, however, is not a matter that falls for determination in this petition. Should the 1st respondent deem it fit to file a case for maintenance before the Children Court, the court seized of the matter would be able, taking into account all the facts and circumstances of the case, considered against the provisions of Article 53 (2) and Section 94 of the Children Act, to determine whether and to what extent the 1st petitioner should bear parental responsibility as defined in Section 23 of the Children Act for the two children of the 1st respondent from her previous relationship.

Suffice to say that in light of the foregoing matters, I can find no violation of the 1st petitioner's rights. If anything, if the averments by the Children's Officer are to be believed (noting that no affidavit to controvert them was filed), it is the petitioner who has shown dereliction of his parental duty to even the children that he acknowledges are his. However, the petition succeeds to the extent that I do find, as prayed by the petitioners and conceded by the 2nd respondent, that section 23(4) and 25, as well as section 90(a) and (e) of the Children Act are unconstitutional, null and void for breach of Articles 27(1), (2) and (4), and Article 53(1)1(e) of the Constitution.

The upshot of this decision which was made in 2013 is to the effect that Section 23(4) and Section 25 of the Children's Act are nullity and thus have no force of law. That said, the said provision can't erase the provisions encoded in Section 24 (5) which I heavily quotes in this article.

4) Conclusion

Children and young people have the same general human rights as adults and also specific rights that recognize their special needs. Children are neither the property of their parents nor are they helpless objects of charity. They are human beings and are the subject of their own rights. These rights can be realized when parents and the state chip in. Of essence, this decision by Justice Muchelule just enumerates what the children's act encapsulates. Despite all circumstances, children rights are intertwined with their parents' responsibilities being realized. On this decision, Justice Aggrey Muchelule interpreted the law in a just manner.

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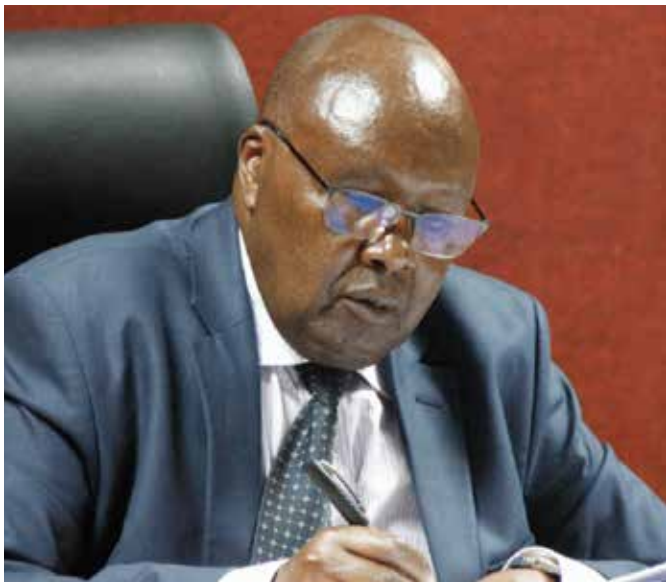
A tribute to Justice James Aaron Makau: a leading light in the protection of children's rights

By Miracle Okoth Okumu Mudeyi



James Aaron Makau

1. Introduction

The United Nations and the United Nations Convention on the Rights of the Child define universal child rights (UNCRC).[1] Child Rights, according to the UNCRC, are minimum entitlements and freedoms that should be afforded to all persons under the age of 18 regardless of race, colour, gender, language, religion, opinions, origins, wealth, birth status, or ability, and thus apply to all people everywhere. The UN considers these rights to be interdependent and indivisible, which means that one right cannot be fulfilled at the expense of another.

For this year's African Child Day, which is observed on June 16 each year, I chose to honour Justice Aaron Makau, who has been a shining beacon of hope in the protection of children's rights, as evidenced by his recent decisions. He is an exceptionally brilliant jurist in the development of child-friendly jurisprudence.

2. The role of the judiciary in protecting children's rights

The Courts' primary function is to interpret and enforce domestic law, as well as international law where relevant. Courts must maintain their independence and impartiality in administering justice to all types of litigants who approach the corridors of justice. Courts must make only reference to relevant facts – as far as they may be established – and the merits of the facts in respect to the law when deciding issues before them. However, justice necessitates far more. Judges must understand all of the facts as well as the surrounding circumstances of the parties who appear before them. They must possess the skills and competence to evaluate the ability and capability of people coming before them instantly, and they must be prepared to oversee the proceedings accordingly. It is the court's sole responsibility to preserve equality while various sections of our society struggle to navigate the quagmire of intricate procedures and evidence burden.

According to the late Justice Ruggero John Aldisert,[2] judges may occasionally make decisions for extra-legal reasons – sometimes for personal reasons, sometimes for petty motivations. Sometimes judges make decisions based on overarching motivations that cannot be stated publicly. However, he believes that decisions, regardless of their motivation, must have justification; there must be a public explanation for the decision; there must be a statement of the norms that contains the exposition of stated rules and appropriate principles of law; there must be a statement that originates with the judge's choice of the legal precept, through the interpretation of that choice; and finally, the decision must have an application to the cause at hand. Only when they reflect

[1]See Article 2 of the UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: https://www.refworld.org/docid/3ae6b38f0.html [accessed 12 June 2022]

[2]Ruggero J Aldisert, The Judicial Process (2nd edn, West 1996).

desirable current public opinion or are consistent with contemporary community moral standards are they acceptable.

Section 4 (3) of the Children's Act requires all judicial and administrative institutions, as well as all persons acting in their name, to treat the interests of the child as the first and paramount consideration whenever exercising their mandate, to the extent that this is consistent with adopting a course of action calculated to safeguard and promote the rights and welfare of the child. Torture, cruel punishment, or abuse of a child is prohibited under Section 18 (1) of the Act.

3. The scope and framework under the 2010 Constitution

The Kenyan Constitution of 2010 places a strong focus on equal access to justice for all, notably in Article 53, which emphasizes the significance of considering the child's best interests in all matters involving the child. The Children's Act of 2001 provides for the same. Access to justice for children continues to be a vital tool for improving safeguards to child rights as espoused in various legal instruments.

In the **MWK and Another v Attorney General and 3 others**,[3] it was held that the 2010 Constitution had ushered in a new era where the society was committed to raising, developing and nurturing children in an environment that is conducive to their wellbeing. The society had a duty to ensure that children receive the support and assistance that is necessary for their growth and development. The court further recognized that children merit special protection through legislation that guards and enforces their rights and liberties. In attempting to guard the children, the interventions should not expose them to harsh circumstances which might adversely affect their development.

4. The role of Justice Makau in protecting the right to education

Kofi Anann in outlining the importance of education as a human right and as a tool for unlocking everyone's potential once remarked; *"Education is a human right with immense power to transform. On its foundation rest the cornerstones of freedom, democracy, and sustainable human development.* In the case of **Joseph Enock Aura v Cabinet Secretary, Ministry of Education, Science & Technology & 3 others; Teachers Service Commission & 6 others (Interested Parties)[2020] eKLR**, Justice Makau restated his role in protecting children's right to education. He faulted the decision to close schools indefinitely, Justice Makau had the following to say:

"I find that the benefit of the petitioner's school-going children and other school children attending school in-person out-weighs the risks of COVID – 19 as urged by the Respondents provided the respondents ensure that COVID – 19 measures and safety protocols are put in place and fully complied with in every school by both the learners and the teachers. This being complied with, I find that the school-going children will reasonably be safe in school given that health conditions that may place children at health risk are given priority. Further, this Court notes that it is important for school-gong children to have the social interaction and academic development that can be ripped only from in-person learning. The best interest of any child is to be in school in person as there is more control, guidance and provision of health safe measures in the school than leaving the children roaming in the villages or shanties or towns as the case may be without observing any Covid-19 Health Protocols."

He also held out that the closure of schools had caused psychological harm to school-enrolled children and further finding that the community-based learning was illegal. Thus, in his decision, he affirmed the notion of a justiciable right to education, which implies that when this right is violated, the right-holder can bring her claim before an independent and impartial authority, and if the claim is upheld, she will be granted a remedy, which can then be implemented.

5. Protection of children from harm, torture and corporal punishment, in the case of DWK & another v Board of Management AJ Primary School & 2 others [2021] eKLR

Justice Makau found that the act of mercilessly and ruthlessly caning the minor by the 2nd and 3rd Respondents coupled with threats, intimidation and a malicious letter written by the 1st respondent to the 2nd petitioner was a clear demonstration of violence,

[3] [2017]eKLR

torture, corporal punishment, cruel, inhuman, or degrading manner. Justice Makau proceeded to award the victim(EJK) EJK general damages of Kshs.4,000,000/= for physical and psychological suffering inflicted on him on 10th March 2021, in breach of his rights against such physical and psychological torture as enshrined in the Constitution of Kenya and the international legal instruments that Kenya ratified in furtherance of the right to be protected from abuse, neglect, all forms of violence, inhuman treatment and punishment of the said minor, the award to be borne jointly and severally by the Respondents.

He further issued a permanent order restraining the 1st, 2nd and 3rd Respondents jointly and severally from interfering with, insulting, intimidating, harassing, threatening, verbally and physically abusing the petitioners, the minor namely EJK and all minors within and without the premises of [Particulars Withheld] Primary School. Perhaps even without intention, he has set a new standard of care for school-going children and the need for teachers and schools to be duty bearers in the treatment of children within the precincts of schools.

6. **Protection of children's development rights: Erick Otieno Ogumo & 2 others v Chigwell Holdings Limited; County Government of Nairobi & another (Interested parties) [2022] eKLR**
Justice Makau issued a declaration that the Respondent has violated the constitutional rights of the Petitioners' children as provided under the Constitution by failing to provide for a children's playground. The judge agreed with the homeowners that the lack of a playground violated children's rights to human dignity and appropriate sanitation standards, as well as their right to adequate amounts of clean and safe water. He further directed that within 90 days of this Judgment the Respondent should provide a play area for the children in phases 1, 2 and 3 separate from the vehicle parking grounds.

7. **Concluding thoughts**
Based on the aforementioned three decisions by Justice James Aaron Makau which I have summarily captured, it is my humble view that he has lived up to the promise of jealously guarding the rights of the child and adhering to the paramountcy principle. To me, he is a perfect testament of a leading light in the fight for children's rights.

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Balance between diplomatic immunities and the duty to respect the local laws under the Vienna Convention on Diplomatic Relations, 1961, (VCDR)

By Job Owiro

Introduction

The concept of diplomatic immunity has been there since the 18th century. However, overtime, the role of diplomats has with time evolved where two states exchange their diplomats. This in essence gives states the right to receive and send diplomats to other states. i.e the sending and receiving state.[1] Kenya is a signatory state of the Vienna Convention on Diplomatic Relations of 1961 (VCDR) which has created different immunities on the person of a diplomat. Having ratified this Convention, article 2(6) of the Constitution of Kenya, 2010 makes it part of the Kenyan laws. Besides, article 2(5) gives this Convention an okay because diplomatic immunity forms part of the general rules of international law that is recognized under the Kenyan law.

The V.C.D.R has created several immunities on the person of a diplomat almost raising them to a godly status deserving of no question but praise and protection. These immunities arise from international custom of ensuring a smooth and efficient performance of their duties in interest of comity and of friendly relations between sovereign states.[2] Other commentators argue that diplomatic immunity is reciprocally done, this is to say that governments are permitted to extend diplomatic immunity and privileges that they were accorded by another state. They expect that their diplomatic personnel are accorded the same treatment.[3]

However, for long this diplomatic immunity has been subject of abuse and therefore needs to be re-thought.

The VCDR stipulates that the premises of diplomats are inviolable, and no agent of the receiving state is allowed to enter this premises without permission of the head of the mission. Besides, the receiving state is under obligation to make sure that no one intrudes these premises or causes disturbance on these premises. These premises are also immune from search.[4]

Yvonne Fletcher Case

On 17th April, 1984, Yvonne Fletcher, a police constable was killed outside the Libyan embassy in London, United States of America. An anti-Gaddafi protest had built up outside the embassy questioning his actions when shots were fired from inside the embassy killing the constable and injuring eleven other people in the process. British government was informed that Libya will not be culpable of any consequences resulting from the protests outside the embassy. A three-day trial held at the Royal Courts of Justice, heard that one Mr. Mabrouk who was one of Gadaffi's aides had taken over the embassy upon receiving orders from Gaddafi. He was linked to the shooting and arrested in 2015. The charges were however dropped in 2017 with the judges citing crucial evidence that could not be used on the grounds of national security.[5]

[1]Ahmad N, Lilienthal G, Asmad A, Abuse of Diplomatic Immunities and Its Consequences Under the Vienna Convention: A Critical Study, at https://www.researchgate.net/publication/355904128

[2]Hart, P, The Function of State and Diplomatic Privileges and Immunities in International Cooperation in Criminal Matters: The Position in Switzerland, *Fordham International Law Journal*, Vol.23. Issue 5, 1999, page 1

[3]Raphael A, Retroactive Diplomatic Immunity, *Duke Law Journal*,2020, page 4

[4]Article 22, Vienna Convention on Diplomatic Relations, 1961

[5]Siddique, H, The Guardian Newspaper, 10th November, 2021

The late Dikko Umaru

This clearly shows how diplomatic immunity shields those culpable from liability since the shot was fired from an individual who was inside the embassy enjoying diplomatic immunity from criminal and civil cases within the jurisdiction of the receiving state.[6]

Article 27 of the VCDR protects the official correspondence of the mission from interference by the receiving state. Official correspondence implies to official communication between the mission and the sending state. This article brought out the aspect of a diplomatic bag from being interfered with in any way.

Dikko Umaru Case

On 5th July,1984, Dikko Umaru, a former Transport minister of Nigeria was kidnapped in London (where he had gone into exile) by the assistance of the Nigerian diplomatic agents. The military government taking over after a coup, was accusing him of corruption in the immediate former government. He was drugged and placed inside a container, which the diplomatic agents arguing that it was a diplomatic bag hence need not be inspected. Dikko's secretary had seen the kidnapping and informed London police officers, leading to an inspection of the container as the Nigerian diplomats failed to provide necessary documentation. The alleged diplomatic bag was not also marked as such.[7] This

Alassane Ba

event led to the expulsion of two members of Nigerian High Commission and the severance of the diplomatic relations between Britain and Nigeria for two years.[8]

Petition 2 of 2015, Supreme Court of Kenya, Karen Njeri Kandie v Alassane Ba and Shelter Afrique

This case clearly shows how much those who enjoy diplomatic immunity abuse it. Mrs Njeri was a finance director at Shelter Afrique, a pan-African finance institution with immunity. She had sued her employer for unfair termination at work after she had raised allegations of Ba and was placed on special leave.[9]

The respondents in this matter raised a preliminary objection that the Industrial Court lack the requisite jurisdiction to entertain a suit whereby the respondent was enjoying immunity. The High Court and Court of Appeal agreed with the position of the respondent, making Kandie to take the matter to Supreme Court.

[6]Article 29, Vienna Convention on Diplomatic Relations, 1961, stipulates that person of a diplomat is inviolable i.e he shall be immune from arrest or detention. The receiving state also has to treat him with due respect and shall take appropriate steps to prevent any attack on his person, freedom or dignity.
[7]Article 27(4), Vienna Convention on Diplomatic Relations, 1961
[8]Mr.Umaru Dikko (Abduction), *Hansard Report of the British Parliament*, HC Deb 6th July 1984, Vol. 63

The Supreme Court made a decision which is considered by many as controversial;

The Convention on the Constituent Charter of Shelter Afrique, a host country agreement that was signed and ratified by Kenya and the Privileges and Immunities Act of Kenya incorporated articles of the Vienna Convention on Diplomatic Relations of 1961(VCDR).[10]

Article 29 of VCDR states that person of a diplomatic agent shall be inviolable. In this case, he is not liable to any form of arrest or detention and the receiving state has to accord him due respect and protect him from any attack that will lower his dignity. Article 31 of the same Convention cements this by providing that a diplomatic agent is immune to any civil, criminal or administrative jurisdiction of the receiving state.

This immunity is not absolute but limited to actions only done in the official capacity of the diplomat. In this case the court argued that Mr.Ba's action was not unofficial because it was part of action done for the benefit of the Shelter Afrique. Unofficial actions will be acts such as professional or commercial activities outside the organization's official functions.

On answering to the question of whether there was a violation of access to justice as per article 48 of the Constitution of Kenya, the Supreme court held that this right was not absolute and the diplomatic immunity was "reasonable and justifiable" limitations for the effective performance of diplomatic functions.

Further, the learned judges argued that there is a societal importance of the government meeting its obligations under international law and that this outweighed Kandie's right to access to justice.

In Jamal Khashoggi case

On 2nd October ,2018, Jamal Khashoggi, a US-based journalist, who was a critic of the Saudi-Arabian government was killed inside Saudi-Arabian consulate in Turkey. He had gone to collect a Saudi document stating that he was now divorced, so that he could proceed to marry his new fiancé. The Saudi government denied involvement in his murder even though later on in 2018, some of the head of the consulate were found culpable of the crime of were dropped off as consuls. Turkey suspended the trials in this case forwarding the same to the Saudi government. The trials were conducted in quite a clandestine way with minimal successes.[11]

Conclusion

Even though diplomatic immunity is a good concept meant to create a cordial relation between states that benefit

Jamal Khashoggi

from each other in different aspects, it has been abused on several occasions and need to be relooked at. The cases that I have mentioned in this piece of research are just a tip of the iceberg. There are several other instances such as Julian Assange case among others. It would be prudent if the well stipulated avenues are pursued to make sure that this is address because it is bad that one can get away with crime on the basis of him or her being a diplomat.

The near absoluteness of the nature of diplomatic immunity has brought all this contention like I have indicated in the Karen Njeri Kandie case where judges argued that Article 48 of the Constitution of Kenya, 2010 does not stipulate that right to access to justice is absolute and that international law obligations have to be met before considering it. This clearly shows how much one's rights can be trampled upon, on the basis of pleasing a state. This needs to be looked thoroughly.

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[10]Kenya Law Reports.

[11]Lamb, W, Rashwan, N, Saudi Court Issues Final Verdicts in Khashoggi Killing, *The New York Times*, 17th July, 2021

The nightmare of equity and equality in education: a commentary

By Motari Leonida

Benjamin Franklin once said that "*an investment in knowledge pays the best interest,*" and indeed education is the cornerstone of economic growth, social development and principal means of improving welfare of individuals. It is considered a key determinant of earnings and an important escape route from poverty for Nelson Mandela said that "*Education is the most powerful weapon which you can use to change the world.*" The Kenyan government is committed to the provision of equal access to quality and relevant education and training opportunities to all Kenyans. The country has embraced education as a basic human right by ratifying and signing of Universal Declaration of Human Rights (1948), the Millennium Development Goal (MDG) and Education for All (EFA) by 2015.

Key measures have been implemented over the last 10 years to democratize education by making schools accessible to everyone, particularly the poorest in society. These measures included the introduction of free primary education in 2003, followed by the abolition of secondary education fees five years later.

The 2010 Constitution of Kenya recognizes that "every person has the right to education"[1] and stipulates that "every child has the right to free and compulsory education."[2] In addition, "every child has the right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment and hazardous or exploitive labor."[3]

Article 54 (1) (b) provides that "a person with any disability is entitled to access educational institutions and facilities for persons with disabilities that are integrated into the society to the extent compatible with the interests of the person." This suggests that each and every person has an equal right to access education. According to the Constitution, the state shall put in place affirmative action programmers to ensure

Benjamin Franklin

that the youth access relevant education and training,[4] and the minorities and marginalized groups are provided special opportunities in education.[5]

The Constitution also established a Teachers Service Commission.[6] In addition, Article 27 guarantees equality and freedom from discrimination. Articles 19 to 25 are general provisions on the Bill of Rights which detail the State's obligations, including as regards the resources allocated to implement the rights of which education is not an exception. Article 22 provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

[1]Article 43 (1) (f), Constitution of Kenya, 2010.
[2]Article 53 (1) (b), Constitution of Kenya, 2010.
[3]Ibid, (1) (d).
[4]Article 55, Constitution of Kenya, 2010.
[5]Article 56, Constitution of Kenya, 2010.
[6]Article 237, Constitution of Kenya, 2010.

Desperate Lawrence Murimi walk to Kangaru High School with a cock for admission due to lack of school fees

It further established a National Human Rights and Equality Commission[7] and provides that "every person has the right to complain to the Commission, alleging that a right or a fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

The Basic Education Act adopted in January 2013 guarantees the implementation of the right to free and compulsory basic education.[8] It provides for the establishment of pre-primary, primary and secondary schools, adult and continuing education center as well as special and integrated schools for learners with disabilities.[9]

Section 29 of the Act provides that "no public school shall charge or cause any parents to pay tuition fees for or on behalf of any pupil in the school." Admission fee is also prohibited.[10] Further Section 30 provides that primary and secondary education is compulsory and a parent who fails to take his or her child to school commits an offence. This lays the basic foundation of this article as learning institutions have commercialized education hence making it difficult for children from poor and humble backgrounds. Television screens have been airing news on students who have been turned away at the gates of schools as they haven't been able to pay school fees in full. To add salt to the wound, that they haven't been able to purchase the school items from the school or the specified suppliers. The prices in the specified suppliers are extremely high and they are forced to buy them because without the evidence that one bought them from the specified suppliers, there is no admission. This has made many low-income parents unable to buy uniform from cheaper shops. Parents have been crying asking for help which is supposed to be given for free by the government. The inability to meet school expenses by low income parents make their children be sent away from school, such frustrations affect academic performance resulting to withdrawal of children from school.

Section 35 of the Basic Education Act, 2013, provides that pupils shall be given appropriate incentives to learn and complete basic education. Similar to this provision is the one in the Children's Act of 2001 which requires the government to undertake all the necessary steps to make available free basic education to every child. Section 7 of the same Act recognizes the right to education as follows: "Every child shall be entitled to education the provision of which shall be the responsibility of the Government and the parents.[11] Every child shall be entitled to free basic education which shall be compulsory in accordance with Article 28 of the United Nations Convention on the Rights of the Child.[12]

The recent story that touched a lot of Kenyans is that of a desperate boy who reported to school with chicken for admission. The boy walked to Kangaru High School with a cock for admission due to lack of school fees. This story will make history. The student, Lawrence Murimi, was admitted at Kangaru School after scoring 313 marks in Kenya Certificate of Primary Education (KCPE). He was to report to school on 4th May, 2022, but due to lack of school fees, he could not report to school till 14 days later. The student woke up on one Wednesday and told his mother Pauline Mukami who is a casual laborer, that he could not continue staying at home when the other students were going on

[7]Article 59, Constitution of Kenya, 2010.
[8]The Basic Education Act, 2013, Part IV.
[9]Ibid, s 28.
[10]Ibid, s 32.
[11]Children's Act, 2001, s 7.
[12]Article 28, United Nations Convention on the Rights of the Child.

with their studies, that is when he decided to use what was at his disposal. He caught the cock, tied it up, dressed on his former primary school uniform and took former primary school text books and urged his mother to accompany him to school. He told the mother that they were going to pass by the county commissioner's office to report that he was going to join the school before the journey started.

According to the student, the cock was to form part of the school fees required by the school. Unfortunately, they were turned away by the school Principal because the boy did not have school fees and personal items while the mother was crying. Later on, they were called back by the school after the school had learnt that the story had caught the media attention. The school staff told the mother to consider taking her son to a secondary day school of which the boy was resistant. The boy went ahead and called upon well- wishers to help him because Kangaru School was his school of choice.

Many are the times when many parents have been seen crying for school fees assistance on television screens as the Kenyan government is quiet and watching. Children from poor and humble backgrounds have lost hope in education. Learning institutions have been manipulating parents. Whatever directions the government gives to schools it does not itself heed to them. The government should make an effort to ensure that learning institutions do not commercialize education as this has disadvantaged many. Parents have cried enough.

The current Kenyan framework and even the present world negotiates with 'papers' and educational qualifications. If one doesn't have them, then they will have to struggle or even lack a place to go. Each and every piece of work requires a person to have skills and be an expert in them. The youths have opted to immorality because of lack of jobs. Jobs which they lack qualifications for because they never acquired education, education which has been commercialized by greedy people in the government and in schools.

It is high time for learning institutions especially public ones to start admitting each and every child regardless of their background. Education is the light of the community. Let all children be educated for education doesn't intimidate that this is rich, and this is poor. 'Education for change,' a cry that has been coming from many who are in leadership but the irony is what is happening.

In conclusion, if leaders and the people of Kenya in general are advocating for 'Education for all,' let it be met. Let no dream and solution be shattered for all lives matter and they are solutions. Let measures be put in place for holding institutions accountable for their expenditure for corruption is the root of all evils.

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Mechanisms to attain 10% forest cover in Kenya as envisaged in the Constitution

The State shall work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya.[1]
Our preoccupation with the integrity of the environment addresses three cardinal issues: prudence in the use of environmental resources to the intent that they may, as the capital base of the economy, not be exhausted; effective control and management of social and economic activities so that they may not generate harmful levels of pollution and waste; and ecological planning and management so as to achieve and maintain an aesthetic and healthful arrangement of the structures, features, assets and resources surrounding us.[2]

By Odhiambo Jerameel Kevins Owuor

Introduction

Kenya has been touted as the 'Land of Splendour', with a rich historical background, great diversity of physical features, pleasant climate, diverse people, and magnificent wilderness areas.[3] Kenya has a total land mass of 580, 367 kilometres squared. This makes Kenya to be the 48th largest country by area. This excludes area under inland water bodies, national claims to continental shelf as well as exclusive economic zones. According to a report from the World Bank agricultural land in Kenya occupies 48.5% of the 580, 367 land mass. Agricultural land alludes to share of land area that is arable, under permanent crops and under permanent pastures.

Kenya is endowed with a wide range of forest ecosystems ranging from montane rainforests, savannah woodlands, dry forests and coastal forests and mangroves. These forests have high species richness and endemism, which has made the country be classified as mega diverse. They rank high as the country's natural asset, due to their environmental, life supporting functions, and the provision of diverse good and services.[4]

Forests play critical ecological, social, cultural, and economic functions. They contribute directly and indirectly to the national and local economies through revenue generation and wealth creation, and it is estimated that forestry contributes to 3.6% of Kenya's GDP, excluding

charcoal and Direct Subsistence Uses. Forests also support most productive and service sectors in the country, particularly agriculture, fisheries, livestock, energy, wildlife, water, tourism, trade and industry that contributes between 33% to 39 % of the country's GDP. Biomass comprises about 80% of all energy used in the country, while they also provide a variety of goods, which support subsistence livelihoods of many communities.[5]

The forestry services provided by the water towers include local climate regulation, water regulation, water purification and waste treatment and water pollution sinks. Other services provided include erosion control, natural hazard and disease regulation. Forest adjacent communities benefit directly through subsistence utilization of the forests.

The Forest cover in Kenya stands at about 36,111 square kilometres squared. This shows a decline in forest cover if

[1]Article 69 (1) (b) of Constitution of Kenya 2010
[2]See Ojwang J B 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development' 92007) Kenya Law Review 19
[3]Ministry of Environment and Natural Resources, Kenya: Land of Splendour 1 (Nairobi: Ministry of Environment and Natural Resources).
[4]National Forest Policy 2015
[5]Ibid

one compares the current statistics and the statistics in 2001. In 2001 the forest cover was at 39,267 square kilometres this was even before the advent of the Constitution of Kenya 2010. The decline of forest in Kenya from 1990 to 2015 was at 25% (824,115 hecatres) or at a rate of 33,000 hectares forest loss per year. Put into context this is the same as losing forest cover equalling the size of 100 football pitches or over 200,000 tree stamps daily. Therefore, this means that there have been deforestation activities that have taken place overtime.

One can argue that courtesy of large population in Kenya there is need for more land for housing and farming. Data from the World Bank shows an interesting feature and that is the land under agricultural over the years has increased overtime. The land under forest cover has continued to shrink overtime majorly out of manmade activities one cannot solely blame the wild fires which occur once in a while as a major reason for a decrease of forest cover in Kenya.

In the era of climate change the place of forests can't be gainsaid. We depend on forests in a myriad of ways for our survival, from the air we breathe to the wood we use. Besides providing habitats for animals and livelihoods for humans, forests also offer watershed protection, prevent soil erosion and mitigate climate change.[6] [7]Forests comprise the country's water towers and catchments, where over 75% of the country's renewable surface water originate, and therefore serve critical water regulation roles which are important for human livelihoods, irrigated agriculture, and production of hydroelectric power. At the same time, deforestation in Kenya is estimated at 50,000 hectares annually, with a consequent yearly loss to the economy of over USD 19 million.

What is saddening is that despite our dependence on forests we are still allowing them to disappear. These green giants are essential for the people, climate and wildlife respectively. This paper contributes to the wider discourse on how to attain the 10% forest cover in Kenya.

Current forest cover vis-à-vis the express demands of the constitution of Kenya, 2010

According to National Environment Management Authority the current forest cover is 7.4 %. This is 3.6% shy of the requirement of the Constitution of Kenya of 10% forest cover. I have argued that the implementation of the ten percent forest cover seems like some wild dream which will not be achieved unless there is political goodwill and the state is sure to enhance the same.[8]

Forest destroyed by illegal loggers.

The National Environment Management Authority recently noted why it has been herculean to achieve the ten percent forest cover. The authority stated:

> *Past attempts to increase forest cover and address the problem of deforestation and forest degradation in the country have not been very successful. This can be attributed to among other factors; increasing demand for land for agriculture, urbanization and other developments, high energy demand and inadequate funding to support investments in the forestry sector. Unresponsive policy and poor governance in the forestry sector have often in the past compounded these problems. to achieve the ten percent forest cover.*

The report from the authority highlights reasons as to why Kenya has not attained the ten percent tree cover since 2010 to date. Perhaps other drivers of tree cover loss include; weak forest governance, coordination and collaboration in the management of public, community and private forests; inadequate land and forest tenure security to support conservation and forest investments especially in community and private forests; conversion of forest land to agriculture, settlements and infrastructure development arising from lack of implementation of national and spatial plans; wastage in wood utilization especially in timber conversion and charcoal production; climate change and associated impacts, forest and grassland fires and overgrazing in forest reserves, national parks, game reserves, community and private forests and lastly increasing population and overreliance on forests for production of

[6]Forest resources in our country are valuable natural endowment that must be sustainably managed for present and future generations. They offer a range of benefits and opportunities for local and national economic development, improved livelihoods and provision of environmental goods and services such as watershed protection, ecosystem services and carbon sequestration.

[7]Supra

[8]Odhiambo Jerameel Kevins, '10% Forest Cover in Kenya: Still a Pipedream Eleven Years after Promulgation of the Constitution? Kenyan Case Study' (2021) The Platform for Law, Justice and Society. Available at https://theplatform.co.ke/issue-70-november-2021/ Accessed on 9th March 2022

wood energy especially for charcoal.[9] The gap between supply and demand for wood is estimated at 13 million cubic metres.

It is imperative to note that the obligation on the state imposed by Article 69 has no time frame on it (a deadline) for the implementation. This seems to have made the relevant agencies to relax and not work on achieving the 10% forest cover in a shorter duration. Ideally eleven years after the promulgation of the new Constitution was enough even to have made efforts to attain the 10% forest cover. To me the relevant government agencies have made a mockery of the Constitution.[10]

The promulgation of the Constitution 2010 was a result of Kenyans decree unto them for change to happen in the governance of the country. Professor Willy Mutunga perhaps puts it better he notes:

> ***'In 2010 Kenya adopted a new modern transformative constitution that replaced both the I969 Constitution and the post-Colonial Constitution of 1963. This was the culmination of almost five decades of struggles that sought to fundamentally transform the backward economic, social, political, and cultural developments in the country.***
>
> ***The making of the Constitution Kenyan 2010 is a story of ordinary citizens striving and succeeding to overthrow the existing social order and to define a new social, economic, cultural, and political order for themselves. There is no doubt that the Constitution is a radical document that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism and 50 years of independence.***
>
> ***In their own wisdom the Kenyan people decreed their past so as to reflect a status quo that was unacceptable and unsustainable through: provisions on the democratization and decentralization of the Executive; devolution; the strengthening of institutions; the creation of institutions that provide democratic checks and balances; decreeing values in the public service; giving ultimate authority to the people of Kenya that they delegate to institutions that must serve them and not enslave them; prioritizing integrity in public leadership, a modern Bill of Rights that provide for economic, social and cultural rights to reinforce the political and civil rights giving the whole gamut of human rights the power to radically mitigate the status quo and signal the creation of a human rights state in Kenya, mitigating the status quo in land that has been the country's Achilles heel in its economic and democratic development among others reflect the will and deep commitment of Kenyans for fundamental and radical changes through the implementation of the Constitution .'***[11]

The Constitution by virtue of it being the supreme law has vouchsafed the provision on the required forest cover in Kenya. To be precise Article 69 of the Constitution speaks to that. It provides that:

> *1. The State shall*
> *a. ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;*[12]
> *b. work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya ;*[13]
> *c. protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;*[14]
> *d. encourage public participation in the management, protection and conservation of the environment;*[15]
> *e. protect genetic resources and biological diversity;*[16]
> *f. establish systems of environmental impact assessment, environmental audit and monitoring of the environment;*[17]
> *g. eliminate processes and activities that are likely to endanger the environment*[18]*; and*
> *h.* [19]*utilise the environment and natural resources for the benefit of the people of Kenya.*

[9]Forest conservation and management continues to face a number of challenges. These include increasing demand for land and forest resources resulting in deforestation and forest degradation, governance challenges and inadequate funding that constrains the provision of public services. These challenges have undermined sustainable forest management efforts.
[10]Ibid
[11]Willy Mutunga, The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions, University of Fort Hare Inaugural Distinguished Lecture Series, October 16, 2014
[12]Article 69 (1) (a) of the Constitution of Kenya 2010
[13]Article 69 (1) (b) of the Constitution of Kenya 2010
[14]Article 69 (1) (c) of the Constitution of Kenya 2010
[15]Article 69 (1) (d) of the Constitution of Kenya 2010
[16]Article 69 (1) (e) of the Constitution of Kenya 2010
[17]Article 69 (1) (f) of the Constitution of Kenya 2010
[18]Article 69 (1) (g) of the Constitution of Kenya 2010
[19]Article 69 (1) (h) of the Constitution of Kenya 2010

Article 69 (1) (b) vouchsafes for at least 10% tree cover of the land in Kenya. This article is in line with sustainable development goals to make sure that the future generation also benefit from the environment just as we are benefitting. Moreover the article as well gives a remedy for mitigating climate change which is a global crisis.[20] While commenting on Article 69 of the Constitution Dr. Kariuki Muigua observed as follows:

> *These measures are long-term, preventive and precautionary, anticipating the likelihood of environmental harm and thus aimed at countering potential causes of environmental harm. This is part of the appropriate policy, legal, administrative and regulatory measures that the government will have to pursue to enhance and guarantee the enjoyment of the right to a clean and healthy environment in Kenya[21].*

The provision for legal and institutional mechanisms is one of the basic conceptual tools for environmental management[22]. Further, considering that the environment supports life, it requires protection that is stable and can only be changed, if necessary, by a special and substantial majority. This protection is provided by the constitution, which is the highest legal order in any country or society.[23]

Constitutional provisions for environmental management are not new, and already exist in other countries.[24] Environmental provisions were outlined, albeit superficially, in the previous constitution of Kenya. The current constitution's innovation is the presentation, in greater detail, of obligations in respect of specific natural resources, as well as the human aspects of environmental management.

It is imperative to note that the former Constitution did not enshrine of the percentage of forest cover in the country. The radical shift of the Constitution of Kenya 2010 was aimed at ensuring that environmental conservation is put at check. The government was thus obligated with the noble role to ensure that the ten percent forest cover remains a reality and not a pipe dream[25] as the government has made it to become overtime.

Kariuki Muigua

Other legal framework and policies to achieve the ten percent forest cover in Kenya

1. The Kenya Vision 2030

The Vision places the environmental sector in the social pillar and emphasizes the need to conserve natural resources to support economic growth. For forests, the goal is to increase area under forest to 10% by 2030 and sustainably manage natural forest resources for environmental protection and enhanced economic growth.[26]

2. Medium Term Plan III (2018-2022)

Under the Medium Term III, the government has committed to protect natural forests in the water towers and continued rehabilitation of landscapes to increase and sustain water flow and ecological integrity.[27]

3. Forest Conservation and Management Act 2016

Section 6(3)(a)(iii) highlights the need to develop "programmes for achievement and maintenance of tree cover of at least 10% of the land area of Kenya".[28] Section

[20]Odhiambo Jerameel Kevins, '10% Forest Cover in Kenya: Still a Pipedream Eleven Years after Promulgation of the Constitution? Kenyan Case Study' (2021) The Platform for Law, Justice and Society. Available at https://theplatform.co.ke/issue-70-november-2021/ Accessed on 9th March 2022

[21]Kariuki Muigua, Safeguarding Environmental Rights in Kenya (8th August 2018) Available at http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Safeguarding-Environmental-Rights-in-Kenya.pdf Accessed on 9th March 2022

[22]Institute for Law & Environmental Governance (ILEG), Constitutional Review Process, available at http:// www.ilegkenya.org/research/constitution.html and International Institute for Democracy & Electoral Assistance (International IDEA) & Interpeace, Constitutional History of Kenya, available at http:// www.constitutionnet.org/en/country/constitutionalhistory-kenya Accessed on 9th March 2021

[23]Angela Mwenda and Thomas N. Kibutu, 'Implications of the New Constitution on Environmental Management in Kenya', 8/1 Law, Environment and Development Journal (2012), p. 76, Available at http://www.lead-journal.org/content/12076.pdf Accessed on 9th March 2022

[24]C. O. Okidi, Environmental Rights and Duties in the Context of Management of Natural Resources (Nairobi: Constitution of Kenya Review Commission, 2003)

[25]Ibid (11)

[26]Vision 2030

[27]Medium Term Plan III (2018-2022)

[28]Section 6(3)(a)(iii) of Forest Conservation and Management Act 2016

Tree planting activities in different parts of the country to ensure restoration and rehabilitation of forest areas and also in a bid to increase forest cover in the country.

37(1) requires every County Government to, establish and maintain arboreta, green zones or recreational parks for use by persons residing within its area of jurisdiction. In this regard, every County shall cause housing estate developers within its jurisdiction to make provision for the establishment of green zones at the rate of at least 5% of the total land area of any housing estate intended to be developed[29].

4. Environmental Management and Coordination CAP 387 and (Amendment) Act,2015

The Act Provides for protection of forests and environmental impact assessments of forest related developments. Section 9(2)(r) of the Act requires NEMA to work with other lead agencies to issue guidelines and prescribe measures to achieve and maintain a tree cover of at least 10% of the land area of Kenya. Section 44 of the Act requires that NEMA in consultation with other relevant lead agencies, develop, issue and implement regulations, procedures, guidelines and measures for sustainable management of hilltops, hillsides and wetlands.

5. Agriculture (Farm Forestry) Rules 2009

These Rules shall apply for the purposes of promoting and maintaining farm forest cover of at least 10% of every agricultural land holding and to preserve and sustain the environment in combating climate change and global warming. Part II Section 6 of the Rules specifically deals with the maintenance of 10% tree cover[30].

Strategies to achieve the ten percent forest cover in Kenya

The Constitutional demand for ten percent forest cover is not a mere demand that can be trampled on. By all means it must be achieved not only for our generation but even for the future generations for we owe them that duty. The government has come up with elaborate plans so as to ensure that this Constitutional aspiration is achieved. Needless to say the government has been coming up with good looking documents at the face value but the bane of our country has to do with implementation of the same. There was the 2015 National Forest Policy which never bore fruits. Recently the government came up with another policy akin to the 2015 one. A key person will be able to note that the 2015 policy has been lifted and then replaced by the wordings 2020. The similarity in the documents shows that what the government did not achieve by the former policy it has shown interest to achieve it by all means.

Doctor Kariuki Muigua while noting on how Kenya can achieve the ten percent forest cover observes that:

> *It has rightly been argued that forest and landscape restoration is about more than just trees. It goes beyond afforestation, reforestation, and ecological restoration to improve both human livelihoods and ecological integrity. Key characteristics include the following: Local stakeholders are actively engaged in decision making, collaboration, and implementation; whole landscapes are restored, not just individual sites, so that trade-offs among conflicting interests can be made and minimized within a wider context; landscapes are restored and managed to provide for an agreed, balanced combination of ecosystem services and goods, not only for increased forest cover; a wide range of restoration strategies are considered, from managed natural regeneration to tree planting; and continuous monitoring, learning, and adaptation are central. Further, a restored landscape can accommodate a mosaic of land uses such as agriculture, protected reserves, ecological corridors, regenerating forests, well-managed plantations, agroforestry systems, and riparian plantings to protect waterways*[31].

The 2020 policy seeks to achieve a number of objectives which include: to maintain environmental stability and conserve biodiversity through preservation and conservation of indigenous forests; reverse forest

[29]Section 37(1) of Forest Conservation and Management Act 2016

[30]Agriculture (Farm Forestry) Rules 2009

[31]Kariuki Muigua, How to Achieve Ten (10%) Percent Forest Cover in Kenya (6th March 2022) Available at https://thelawyer.africa/2022/03/06/10-percent-forest-cover-in-kenya/ Accessed on 11th March 2022. See also, Muigua, K., "Securing Our Destiny through Effective Management of the Environment," (2020) Journal of Conflict Management and Sustainable Development Volume 4(3), p. 1. Restoration must complement and enhance food production and not cause natural forests to be converted into plantations. Principle 8(a) of the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (the Forest Principles of the United Nations Conference on Environment and Development (UNCED) provide that efforts should be undertaken towards the greening of the world. Furthermore, Draft National Forest Policy, 2015 provides for a framework for improved forest governance, resource allocation, partnerships and collaboration with the state and non-state actors to enable the sector contribute in meeting the country's growth and poverty alleviation goals within a sustainable environment. The overall goal of the Policy is sustainable development, management, utilization and conservation of forest resources and equitable sharing of accrued benefits for the present and future generations of the people of Kenya.

degradation and deforestation by rehabilitating forests without compromising the natural profile of the forest; increase substantially and maintain forest cover of at least ten percent of the land area of Kenya through afforestation and reforestation programmes on all denuded and degraded forest lands and areas outside forests; incentivize the establishment of forest plantations, agroforestry and farm forestry and promote public, private and community participation and partnerships in forest sector development; improve livelihoods for people based on sustainable use of ecosystem services; contribute towards achieving Kenya's Nationally Determined Contribution (NDCs) Targets; safeguard forest land by exercising strict restraint on non-forestry land uses in forests, and strict oversight over enforcement of and compliance with the conditions; maintain healthy forests for augmenting water supplies through recharge of underground aquifers and regulation of surface water flows; check denudation and soil erosion in water catchments through integrated forest management techniques and practices; enhance management of forest resources for conservation of soil, water, biodiversity, environmental stability and enriching other ecosystem services.

Conserve and sustainably manage mountain, dry land and coastal forests to ensure continuous flow of ecosystem services, including watershed, biodiversity, cultural and spiritual services to people living in or adjacent to the forests; integrate valuation of ecosystem services, natural resource capital and green accounting and climate change concerns into forest planning and management; integrate climate change mitigation and adaptation measures in forest management through REDD+(Reducing Emissions from Deforestation and Forest Degradation plus) mechanisms to minimize the impacts of climate change; incentivize sustainability in private and community owned and managed forests by promoting investment in commercial tree growing, forest industry and trade and facilitate assured returns, with enabling regulations; manage and expand green spaces in urban and peri-urban areas to enhance citizens' wellbeing; promote devolution of forest planning and management; support forestry research, education, training, information generation and dissemination, and technology transfer and use for sustainable development; ensure effective translation of this policy into action through an implementation framework with periodic review; establishing a credible measuring, monitoring and evaluation framework; ensuring good governance through an enabling legislative and institutional framework; and providing commensurate financial support for the development of the forest sector.

Trees are an essential part of diversified farm production, providing both subsistence products and incomes while contributing to soil fertility and soil and water conservation. Products such as fuel wood or fodder from trees, shrubs or grass contribute significantly to the economies of the rural population. Given the growing population, it is not possible

Agroforestry describes a wide range of practices that integrate trees, forests, and agricultural production.

to meet all the demands of forest products from state forests and the main alternative source of these products is private lands. Planting of trees on the farms has several positive environmental effects, which include watershed protection, enhancement of the microclimate and carbon sequestration. Forests under private ownership play a significant role in the provision of forest goods and services to supplement supply from state forests while also generating substantial incomes to the households. To achieve the national forest cover target of 10% of land area, the major afforestation effort will have to be in community and private lands.

Agroforestry, the interaction of agriculture and trees, including the agricultural use of trees and farm forestry and the management of trees for timber yields by farmers, are important for enhancing tree cover outside forests. It involves growing timber trees alongside keeping animals, growing crops or other trees for purposes other than timber production. Farm forestry can comprise small or large scale forest plantations. Farm forestry has potential to produce quality timber products, increase farm incomes and support community development through employment and other environmental benefits.

The government in line with this can; support agroforestry and farm forestry through a National Strategy and Action Plan to guide investment by government and all key stakeholders; create awareness of and encourage private and community land owners to invest in agroforestry and farm forestry as viable land uses; provide a coordination mechanism for development of agroforestry and farm forestry to avoid duplication and ensure sustainable utilization of available resources; align this Policy with agricultural policies to promote agroforestry and farm forestry for private and community owners or occupiers of agricultural land; promote agroforestry and farm forestry through partnerships with private and community landowners to increase on-farm tree cover and to reduce pressure on reserved forests; provide economic and non-economic incentives for investment in agroforestry and farm forestry; promote on-farm tree species diversification

and systems for certification of improved planting material; facilitate inclusion of agroforestry and farm forestry in the agricultural crop insurance scheme; promote development of forest-based enterprises and facilitate pre-production agreements between the farmers and the forest-based industries.

Sustainable forest management and conservation requires adequate financial resources. Funding of forest activities has mainly been from the central government and development partners. Forestry development is an investment involving the establishment of trees, conservation and protection of forest ecosystems over long periods of time. This requires long-term funding. There is also a need to commercialize the forestry sector and explore innovative methods of financing.

The forestry sector faces challenges in building capacity for sustainable utilization and management. Formal and informal training in forestry is needed to build the human resources required for afforestation, management, utilization, protection, research and training. Curricula used in forestry studies need to adequately respond to emerging issues and technologies in the sector. Vocational training and continuous professional development should take advantage of emerging technologies. Awareness creation and information availability is important for effective participation of communities and other stakeholders in forestry conservation and management. This calls for a robust forestry extension, communication, information and awareness strategy to educate and share information with the public on forest technologies, potentials, opportunities and management techniques relevant for the sector.

Forestry in Kenya can be improved through research on productivity, improved conversion efficiency and value addition. Investment in research and development focusing on basic forestry disciplines such as productivity, health, crop diversification, processing, value addition, intellectual property rights and indigenous knowledge is critical for improved performance of the sector. Further, global needs for certification require research in suitable criteria and indicators. Mechanisms are needed for engaging county governments in forestry research and development.

A vibrant and proactive forest sector requires a strong forestry research strategy for technology development and transfer. Appropriate tree technologies will be generated for different sites across the country and production of sufficient planting materials, efficient technologies for conversion and processing of forest products, methods of value addition and best management practices among others. This will ensure that sectoral activities are premised on a strong scientific base.

Pressures and demands imposed on forest ecosystems and resources are often caused or influenced by factors outside the forest sector, regional and international agreements and treaties. The forest sector is closely linked to wildlife, agriculture, housing, national security, water, tourism, industry, energy, education among others. In addition, the sector is closely intertwined with climate and is influenced by the private sector, communities, individuals

and civil society. To achieve the goals of sustainable forest management and conservation, a framework of public policies and strategies is needed, which incorporates national forest objectives in order to mainstream forestry in the national accounts system and the National Climate Change Adaptation Plan. Cross-sectoral linkages between the forest sector and other related sectors need to be continuously strengthened to generate synergy in the broad environment sector for growth and development including stakeholder participation.

The government also should manage trees outside forests. Trees outside the forests (TOF) include trees in cities, on farms, along roads and in many other locations which are by definition not a forest. All trees make a contribution to the environment and to the social and economic well-being of humankind. Trees outside forests are important and need to be sustainably managed. A large number of these trees consist of planted or domesticated trees in urban areas, along roads, on farms and in agroforestry systems. Trees are an essential part of diversified farm production, providing both subsistence products and incomes while contributing to soil fertility and soil and water conservation. Products such as fuel wood or fodder from trees, shrubs or grass contribute significantly to the economies of the rural population. Given the growing population, it is not possible to meet all the demands of forest products from public forests and the main alternative source of these products is private lands.

Planting of trees on the farms has several positive environmental effects, which include watershed protection, enhancement of the microclimate and carbon sequestration. Forests under private ownership play a significant role in the provision of forest goods and services to supplement supply from public forests while also generating substantial incomes to the households. To achieve the national forest cover target of 10% of land area, the major afforestation effort will have to be in community and private lands. At present tree cover on farms is increasing, especially in more densely populated with higher agricultural potential areas. This demonstrates that farmers recognize the benefits of tree growing in improving land productivity. While challenges in tree growing are greater in the lower rainfall areas, a variety of species have the potential to make tree growing in these areas profitable.

Establishment of arboreta, roadside tree planting, botanical gardens, urban forests, recreational parks and mini-forests enhances environmental, social, and economic values. Trees provide a cool and serene environment, act as natural filters and contribute to the general well-being of society besides improving the microclimate of cities and towns. Trees planted along the boundaries of road reserves are important for aesthetic and shade effects to travellers along the highways and other public roads. A belt of amenity trees planted at the interface of road and private lands will improve the scenery on road reserves contributing to carbon sequestration and marking the road reserve boundaries. The measure the government can put in place to make this a reality includes; promoting the conservation and sustainable management of existing trees in urban areas and along road reserves; promoting the establishment and management of urban forests and roadside tree planting to enhance optimal urban forest cover and to nurture and sustain urban health, clean air and related benefits; promoting the establishment and management of amenity belts of appropriate tree species along road reserves; establishing and maintain arboreta, green zones, botanical gardens, recreational parks and urban

forests for aesthetic and recreational values; preparing and implement management plans in consonance with the development plans of urban areas; promoting the planting of suitable tree species during the development of plots in urban areas.

The private sector, civil society, communities, private sector and other non-state actors play a vital role in forest management and conservation. Communities are responsible for community forests, which include forestland lawfully held, managed or used by specific communities; forestland lawfully held as trust land by the county governments and ancestral forestland traditionally occupied by indigenous and local communities. Private forests on the other hand include forestland held by any person under any freehold or leasehold tenure and any forest owned privately by an individual, institution or body corporate for commercial or non-commercial purposes. To ensure that all forests are sustainably managed and contribute to the attainment of the goal of 10 per cent tree and forest cover, comprehensive institutional reforms are needed to assign and clarify the roles and responsibilities of different players in the forestry sector.

Non-state actors have the advantage of being more independent of political pressures than governmental agencies and play a leading role in agenda setting, policy development and resolution of resource conflicts at the local level. Professional societies established to advance the science, technology; education and practice of professional forestry enhance the professionalism and the formulation and implementation of forestry policies and practices. Participatory forest management and sound conservation practice has potential to improve forest protection, management and growth by involving relevant non-state actors and local communities in planning and implementation.

The government in achieving the 10% forest cover should: strengthen the policy, oversight, reporting and public sensitization function of the Ministry responsible for forestry; re-engineer forestry governance by putting in place a framework for restructuring Kenya Forest Service as recommended by the Taskforce on Illegal Logging and institutionalizing contemporary management processes such as results based management in the forest sector; establish a framework for inter-agency cooperation and stakeholder engagement for sustainable forestry management in Kenya to ensure that they effectively deliver their mandate; clarify institutional mandates of the lead government ministries and agencies such as Ministries responsible for environment, forestry, agriculture, livestock and cooperatives, National Environment Management Authority, Kenya Forest Service , Kenya Water Tower Agency and Kenya Wildlife Service for better cross-sectoral and intersectoral coordination and policy integration in the forestry sector.

In addition to; creating linkages between KFS, National Lands Commission and County Governments to ensure sustainable management of public forests; require NLC to investigate present and historical land injustices in gazetted forests and recommend appropriate redress; device ways of accommodating indigenous communities' livelihoods dependent on forests while sustainably conserving and managing forests; ensure equity and inclusivity in terms of ownership, control and access to forest resources, land

and credit for vulnerable groups; put in place mechanisms to ensure the involvement of women, youth, marginalised communities and persons with special needs in sustainable forest management and adopt approaches that ensure all Kenyans participate in decision making and have agency in designing and implementing forest management interventions'; enhance resource and human capacities in forest governance institutions; establish and support forestry management institutions at national, conservancy and ecosystem levels including local communities, landowners and other stakeholders; strengthen institutional linkages between forestry research, education, administration and resource owners; improve institutional knowledge management capacity and cooperation on issues of interest to forest management, such as REDD+; devolve KFS structures to correspond to the county structure operationalized under the Constitution of Kenya, 2010.

Coastal forests are of critical importance to Kenya and provide a basis for economic activity for local, national and international consumption. Local communities use them for spiritual and cultural rites. They are also important water catchment areas and provide habitat for threatened and endemic species of flora and fauna. Most coastal forests are protected but the level of protection is weak. Some of the forests are managed by different bodies and are under diverse regulatory regimes raising the possibility of conflicts and ineffective management. The government is to: promote sustainable management of coastland forestry; support rehabilitation of degraded coastal forests and encourage tree planting in coastal areas; promote development of forest management plans for all coastal forests with the participation of local communities and ensure implementation of the plans; promote commercial tree growing of suitable tree species in coastal areas; promote commercial production of non-timber forest products such as honey and the development of sustainable tourism in coastal forests; create a conducive environment for the establishment of forest-based enterprises; promote the conservation of genetic resources in coastal forests.

Over two thirds of Kenya's total land surface is arid and semi-arid, hosts about a quarter of the population and is unique in nature. This area requires special attention to strengthen both the economic base of its inhabitants and the national economy. It is also rich in biodiversity and has the potential to supply marketable commodities on a sustainable basis. The woody vegetation provides useful cover to the fragile and highly erodible soils, shelter for people and livestock and habitat for wildlife. Population pressure in the country has resulted in migration into the dry land areas leading to forest degradation. Improvement in the livelihoods of people living in the arid and semi-arid depends on alignment of land rights with the use of the land, availability of processing technologies and markets for the non-wood forest products and the provision of sufficient economic incentives tailored to the context.

To increase the dry land forest cover the government can: promote sustainable management of dry land forestry in arid and semi-arid areas; support rehabilitation of degraded dry land forests and encourage tree planting in arid and semiarid areas; promote the development of management plans for dry land forests with the participation of local communities and ensure implementation of the plans; promote commercial tree growing of suitable tree species in dry land areas; promote sustainable production of charcoal; promote commercial production of non-timber forest products such as essential oils, silk, edible oils fruits and honey in dry land forests; create a conducive environment for the establishment of forest-based enterprises; promote the conservation of genetic resources in dry land forests.

Forest plantations supply industrial wood and also play a crucial role in conserving biodiversity, providing habitat for wildlife, conserving soils and regulating water supplies and sequestering carbon dioxide. Apart from supplying wood products, forest plantations play an important role in reducing pressure on the indigenous forests.

All forest plantations on public, private and community lands are managed with the primary objective of production of high-quality wood for industrial purposes. They also contribute to investment and business. Recognizing the narrow species range in forest plantations today, there is need to diversify the species and genetic base to improve ecological resilience and product diversification. In addition, areas reserved for plantation development in public forest reserves need to be zoned and mapped. In order to encourage investments in public forest plantations, there is need to establish long-term management arrangements such as concessions and joint management agreements and promote public/private sector partnerships in plantation development.

Indigenous forests represent some of the most diverse ecosystems found in the country. They supply important economic, environmental, recreational, scientific, social, cultural and spiritual benefits. However, many of these forests have been subjected to land use changes such as conversion to farmlands, urban centres and settlements, reducing their ability to supply forest products and serve as water catchments, biodiversity conservation reservoirs, wildlife habitats and carbon sinks.

The sustainable multiple use management and utilization of forests including biodiversity conservation, water-catchment functions together with ecotourism development and production of tangible benefits for forest adjacent communities is critical. Where appropriate, forest management should include adequate provisions for wildlife conservation.

Revenues accrued through commercial forest activities, wildlife conservation, ecotourism, climate change and other innovative financing should support the management and conservation of indigenous forests. The Government will manage all indigenous forests for water and soil conservation, provision of forest goods, and services and for biodiversity conservation.

All the non-gazetted public forests which include; community forests, green spaces and urban forests are managed by county governments. County governments are required to implement specific national policies on forestry which include; provision of forest extension services to communities, farmers and private land owners. According to National Strategy to achieve 10% tree cover the county governments are expected among things to: the Ministry of planning and County Governments to integrate spatial development plans into County Integrated Development Plans (CIDPs) to identify areas for forestry and tree development; to develop policies and legislation to implement the devolved forestry functions as detailed in the Transition Implementation Plans (TIPs); the National Environmental Management Authority to implement the National action plan for restoration of degraded sites in Arid and Semi-Arid Lands; the Ministry of Agriculture and County Governments to implement the Climate Smart Agriculture Strategy ; Kenya Forest Service and County Governments to implement the Forest Act 2016 requirement for establishment of Arboreta in urban centres and the Forest (Charcoal) Rules, 2009; the Ministry of Tourism and Wildlife and Kenya Wildlife Service to implement the National Wildlife Conservation Strategy 2030 which calls for protection, rehabilitation and restoration of wildlife habitats, including forests, savannahs and mountains; Ministry of Agriculture, Kenya Forest Service, and County Governments to implement Agriculture (Farm Forestry) Rules, 2009; County Governments to implement the physical planning rules that require 5% of all residential premises are covered by appropriate tree species.

The constitution provides for the conservation and protection of ecologically sensitive areas, utilization of the environment and natural resources for the benefit of the people of Kenya, the right to a clean and a healthy environment including the right to have the environment protected for the benefit of the present and future generation through legislative and working towards achieving and maintaining at least 10% tree cover and its maintenance.

Over the years, the forest sector has undergone continuous reforms leading to the establishment of a semi-autonomous agency responsible for forest administration, development and management following the enactment of the Forests Conservation and Management Act, 2016. There is a need to continuously review relevant laws to ensure that the constitutional threshold of forest is achieved. To achieve this government should: revise the Forests Conservation and Management Act, 2016 to implement national forest policy; harmonize the forest law with other sectoral laws in order to achieve national development objectives; regularly review forest legislation to ensure inclusion of emerging issues and to enhance sustainable management of forests; create awareness on forest policy and legislation among stakeholders; harmonise sectoral legislations on sustainable forest management between various sectors, and the two levels of government; clearly define the holders of legal rights to carbon rights/ REDD+ benefits; develop a coherent and coordinated regulatory framework for sustainable forest management with rules for establishing and implementing Forest Management Agreements between KFS and other actors; put in place mechanisms for resolving conflicts between different actors in the forestry sector.

Concluding observations

As revealed in this article one of the major cause of tree loss is weak forest governance, coordination and collaboration in the management of public, community and private forests. Not forgetting the other causes. Reduced water levels in rivers and dams, declining economic activities arising from water rationing, loss of wildlife habitats, conflicts over water and pasture and increased soil and water erosion in catchment areas are major manifestation of deforestation and landscape degradation. Strengthening of institutional capacities of Kenya Forest Service and County Governments to enable them implement their respective mandates, and providing incentives to catalyse community and private sector investment in tree growing and conservation efforts are critical in halting deforestation and forest degradation and driving positive transformation in the forest sector. In sum the government should spear head the attainment of at least 10% forest cover as soon as possible. The government should collaborate with other relevant stakeholders to achieve this noble constitutional demand.

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The nexus between international governance and security: assessing the status, rights and duties of private military corporations under international humanitarian law

By Kirianki Lennox Kimathi

Robert Beckman describes international law as a body of rules and principles to be applied generally in matters dealing with the conduct of States and in their relations with one another and with private individuals, minority groups and transnational companies.[1]

International law and its state centric nature of governance

From the definition by Beckman above, it is evident that the state was and still is, the most important or central actor in international relations. State policy is the prime object of analysis and research in matters international relations. States decide to go to war. They erect trade barriers or sanctions. They choose whether to establish environmental standards or not. It is solely at the discretion of the state to decide to enter into international relations or not. Specific states choose whether to abide by their provisions, or not.

International relations as a discipline is chiefly concerned with what states do on the world stage and, in turn, how their actions consequently affect other states.[2] A state is purported to always act with the best interests of its citizens at heart. It is therefore solely at its discretion to decide on what international laws to ratify. Ratification is described by the Vienna Convention of 1969 as a mutual act of consent between states signifying their binding to a treaty.[3] It goes on to emphasize that the institution of ratification grants states the necessary timeframe to seek the required approval for the treaty on the domestic level and to prescribe and enact legislation that agrees with the treaty. For this reason, it is imperative to acknowledge that it is only the laws that a state ratifies that bind it. Therefore, a state will choose what treaty to accent to and what not to. On the premise of this

line of argument, the state centric nature of international law is thus brought to light. A state will choose what binds it and neglect other guidelines on its own accord with its own interests in mind.

'Law neither makes the sovereign, nor limits his authority; it is might that makes the sovereign and law is merely what he commands.'[4] This gives effect to a statement by Hobbes on International Humanitarian Law that "In the composition of international law, the sovereign will of the state is the ultimate authority. The primary function of international law is to govern state behavior. Despite the fact that there is substantial literature on the sources of international law and the elements that impact what international law represents, it will be claimed that the state has undeniable supremacy."

On the basis of the foregoing discussion, I argue that international law reflects state -sovereignty by analysing the concepts of consent and ratification. With a particular emphasis on the state's penultimate function and subsequent enforcement measures, it becomes clear that power ultimately resides with the individual state.

[1]Robert Beckman and Dagmar Butte, Introduction to International Law, Page 1. https://www.ilsa.org/Jessup/Jessup%20Competitor%20Resources/intlawintro.pdf
[2]David A. Lake, The Oxford Handbook of International Relations, 2008. *(Christian Reus-Smitt and Duncan Snidal)* https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199219322.001.0001/oxfordhb-9780199219322-e-2
[3]Article 2, Vienna Convention on the Law of Treaties 1969.
[4]R. Tuck (1991) *Leviathan* (ed.) Cambridge, Cambridge University Press.

The right of consent enables a state to make self-binding decisions about doctrines advocated by various International Law Instruments in the end. As an example, as previously noted, the state can refuse to ratify a specific treaty. Accession, exchange of instruments, ratification, or appending signatures are all ways to agree to a treaty. These mechanisms, on the other hand, are reliant on the willingness of states to accept the conditions of a certain treaty.

States can show permission in three ways, according to Niels Petersen, with regards to international doctrines promoted by International Law. One of such is legal accent by activities such as repeal of domestic statutes to align with the doctrine. Secondly, they can refrain from some state-controlled actions. Notably though, they still have the ability to deny the rule altogether. The domestic constitutional structure and spirit of the sovereign state therefore lies in the hands of the state. The state should make decisions pertaining International Law with keen focus on national interest.[5] Because states maintain decision-making powers, sovereignty still lies with them.

Opting into treaties is regarded as a state decision, made at will, not because of International Law's superiority but because it is in the best interest of the state to do so.[6] One perfect example of the state centric nature of International Law dates back to January 2016 when the president of Russia, Vladimir Putin, accented to a law that gave supremacy to Russia's constitutional sovereignty over any international law and specifically targeting decisions on Human Rights. Essentially this gave Russia the power to still cooperate in international law, but choose when to. Putin's ease in separating Russia from the legal obligation to follow international law exemplifies the power that a sovereign state wields over international law. As a result, most governments see International Law Treaties as decisions they must make on their own time and at their own expense.

Another ideal example is the United States of America, which voted against the Rome Statute because it feared being probed for earlier crimes after spending a lot of money to establish the International Criminal Court as an overall jurisdictional body over war crimes.

Reciprocity is yet another evidence of international law's state centrism. Reciprocity is worth mentioning because it is commonly used to describe a mechanism of enforcement to ensure working relations between states bound by a certain international law. States bound by a treaty are required to create mutual trading or economic links so that they can effectively engage with one another. Reciprocity, according to James Craig Barker, "encourages cooperation on the

basis of the highest common denominator." The need for good relations between states is a clear indicator of state-sovereignty. The fundamental determinant motivating nations to maintain and build a plethora of bilateral relationships is national interest.

On the pegging of the foregoing considerations, it is only reasonable to conclude that sovereignty remains within the state through processes such as consent and reciprocity. It is therefore affirmed that as it stands, International Law is state-centric.

Historical and other reasons for this governance structure

Of key importance is analysis on the reasons for the state – centric governance structure applied in International Law. Since time immemorial, the societal set-up has been one that promoted interstate relations as it was believed that no specific state or man for that matter was self- sufficient. No one could generate all they needed from the comfort of their boundaries. In the African Sahara for example, the salt mining states depended on the gold mining ones for ornaments in silent exchange for the additive taste value of their salt. These relations had silent rules of engagement where the normal order was maintained despite language barrier. Everyone knew what was expected of them and acted accordingly provided it was not detrimental to their end of the bargain.

Chiefdoms and kingdoms also had the sole duty of maintaining and expanding their boundaries particularly through raids for territorial expansion and so on and so forth. Clearly, it has been at the discretion of individual states to determine what relations they want to engage in with other states, of course with chief interest being their national interest or will I say, interests of the chiefdom or kingdom.

Following the fall of the Western Roman Empire in the 5th century, Europe saw over 500 years of constant warfare.

[5]J. Klabbers, A. Peters and G. Ulfstein (2009) *The Constitutionalisation of International Law*, Oxford, Oxford University Press, p. 58.
[6]Ibid, p.301.

Eventually, a collection of nation-states arose, upsetting the status quo, and a number of supranational sets of rules were developed to govern interstate relations, including canon-law, the law of the merchant which governed trade, and various codes of maritime law like the Rolls of Oléron.[7] Emergence of strong states in the periods of extensive agrarian development, economic growth and technological advancement necessitated a system of set rules to govern their relations. The traditional divine right of kings gave way constitutionally to parliamentary or representative forms of government which promoted state-sovereignty and competition among states as was the case with kingdoms and chiefdoms. Sovereignty has also taken on a new meaning in the context of a system of competing nation-states, referring to independence within a system of competing nation-states.

One of the chief reasons for state – centrism of the International Law was to create autonomy in a post-colonialism world which had witnessed massive humanitarian injustices. The governance system was thus a way of stamping independence and autonomy to the post-colonialism states by giving them the ultimate power of making decisions affecting their state. This was the reasoning behind it which was however overpowered by egocentric European notions with the prime introduction of veto powers.

Secondly, realism, institutional liberalism, and constructivism are all state-centered. This implies that the state is seen as the primary unit of analysis and actor in international relations. State policies and actions, as a result, have an impact on global politics. There are historical grounds for state centrism that can be explored within the context of international relations. Despite their differences, the three major IR theories, realism, institutional-liberalism, and constructivism, all agree that states play a role in events and policies that shape global politics, such as World Wars and the Cold War, the institutionalization of cooperation, and determining what constitutes an intersubjective understanding of security. The balance of power thinking on the Treaty of Westphalia (1648) influences the realist version's progression that states will battle for domination.

Furthermore, theorists in international legal theory have always had conflicting opinions about the roots of international law. Many of these differences stem from international attorneys' proclivity to apply domestic categories or concepts to sources in domestic jurisprudence to the international domain. As a result, it's no wonder that some of the arising disputes on sources in international law have mirrored domestic debates. The issues that arise when domestic law categories are translated into international law are well-known, and it is sufficient to describe a few of them here. To begin with, disputes have arisen because major sections of international law are still formulated around the assumption that States are the chief players in International Law. In addition, the international law-making process does not follow the same procedure followed by the states domestically.

Second, international law sources apply concurrently and are not organized in any hierarchical order. Third, not all sources of international law are universal, and the vast majority give rise to relative responsibilities, provoking Prosper Weil's famous critique of "relative normativity" in international law. Leaving aside the issue of source comparability between domestic and international law, the largest theoretical challenge is likely to be the reality that there are as many theories of international law sources and functions as there are conceptions of international law. Some of the jurisprudential debates over international law's origins are explained by this divergence in theoretical approaches to sources.[8] These disagreements on the source of the law primarily catalyze a state-centric nature of governance with regards to International Law in order to enable every state to make its own decision on what laws to ratify that will be binding within its boundaries. It however has the discretion to opt out and leave the laws altogether.

It is also worth noting that international law was traditionally thought to create rights and obligations only for states. According to this view international law was a law by and for states, in which the rights of individuals had no place.

The state-centric governance structure of International Law embraces a very broad definition of state sovereignty and foregoes any external intrusion of the specific state policies and principles.

[7]Studocu.com https://www.studocu.com/in/document/guru-gobind-singh-indraprastha-university/bba-llb/unit-1-international-law-e-notes-llb-304-ggsipu/23399057/
[8]Matthias Goldmann, Chapter 21. Sources of International Law.

The rise of non-state actors

Non state actors are **organizations and individuals that are not affiliated with, directed by, or funded through the government.** These have mushroomed over time initially with an oversight role of complementing the states in their international obligations and also coming in where the states left unfilled gaps. The role and position of non-state actors in international law is the subject of a long-standing and intensive scholarly debate. Non state actors possess significant de facto economic, financial and institutional power yet the lack any corresponding legal responsibility. This disproportionateness between power and responsibility has been the chief bone of contention for a while now. Non state actors include, but are not limited to, non-governmental organizations (NGOs), but equally so multinational corporations, private military organizations, media outlets, terrorist groups, organized ethnic groups, academic institutions, lobby groups, criminal organizations, labor unions or social movements, and others.

Non-state actors and transnational relations have proliferated, posing a danger to the international system, which is controlled by states. As a result, the nature of international relations has changed. The role of nation-states as international participants has been impacted by these considerations.

Non-state actors' existence and activities are increasingly impacting nation-state policies, decisions, and actions. These actors have evolved as powerful contributors to the current world position.[9] These serve as connectors through which one nation's policies become sensitive to the policies of another, assisting in the development and broadening of national decision-makers' foreign policy objectives. Non-state actors, on the other hand, pursue their goals largely outside the direct control of nation-states. Governments, on the other hand, are frequently involved in specific problems as a result of their operations. Non-state entities have played an important role in encouraging international cooperation and collaborations, but they remain a constant source of conflict and conflicts. Multinational corporations, for example, have essentially become instruments of neocolonial rich-poor dominance. Third-world governments are increasingly prepared to limit the ability of multinational corporations to play such a role. NGOs working in different parts of the world are periodically involved in competitive and conflictual activities. Non-state actors have had a significant impact on the international system of nation-states. In this age of interconnection, these have proven critical in strengthening international interdependence and relationships, as well as structuring and growing relations. In various ways, these have overpowered and continue to overshadow the role of the nation-state. As a result of the expansion of varied economic and functional non-state entities, notably multinational corporations, low politics (economic relations) has become more relevant in international relations.

Non-state actors are unquestionably a product of the modern era, which is marked by technology advancements and infrastructure development. The majority of these non-state entities began and exist because nation-states recognized their significance.

International institutions such as the United Nations and a plethora of other international entities exist to serve the

[9]Yourarticlelibrary.com. https://www.yourarticlelibrary.com/international-politics/role-of-non-state-actors-in-international-relations/48520

interests of nation-states. The nation state still holds a near-monopoly on the use of coercive force in the international system. It continues to shape non-state actors' activities more than they shape it.

Along with the above-mentioned positives, the emergence of non-state entities has brought its own set of drawbacks.[10] For example, they have exacerbated the complexity and intricacy of international interactions. These are mostly to blame for the diminished relevance of political connections in the international system. Some of them have served as harbingers of international peace and security, while others have served as agents of neocolonialism and dependency for developing nations.

These factors have aided the spread of internationalism and the diluting of nationalism in favour of it. This could jeopardize a state's interests at the expense of senior states with more resources.[11]

Unique focus on PMCs

Private Military Corporations (PMCs) are an example of arising non-state actors in international governance. They are private companies that provide armed combat or security services for financial gain. "Security contractors" or "private military contractors" are the terms used by PMCs to describe their operationally deployed personnel.

PMCs provide services and skills that are similar to those provided by government security, military, or police organizations, but on a smaller scale. PMCs are frequently used by governments to train or reinforce official armed forces, but they can also be used by private firms to provide bodyguards for key personnel or to safeguard company property, particularly in difficult environments. Contractors who employ military force in a warzone, on the other hand, may be deemed unlawful combatants, as defined by the Geneva Conventions and explicitly stated by the 2006 American Military Commissions Act.[12]

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Non-state actors are unquestionably a product of the modern era, which is marked by technology advancements and infrastructure development. The majority of these non-state entities began and exist because nation-states recognized their significance.[13] According to a 2003 study, the industry was then worth over $100 billion a year.[14]

Private contractors make up 29 percent of the workforce in the US Intelligence Community, according to a 2008 report by the Office of the Director of National Intelligence. They cost the equivalent of 49% of their personnel budgets.[15]

The first PMC was Watchguard International formed by David Stirling and John Woodhouse, ex-special air service, in 1965.[16] As earlier discussed, the provision of logistics, communication, and security services, the protection of convoys and personnel for multinational companies, the staffing of checkpoints, and, in some cases, even the interrogation of prisoners, the gathering of intelligence, and direct participation in combat operations have all been among the functions of PMCs. Their ubiquitous presence in conflict zones like Iraq has raised a slew of legal, ethical, and logistical concerns. One common viewpoint is that these people are glorified mercenaries whose actions are in violation of a number of international and regional agreements.

Combatants in international armed conflicts, unlike civilians, enjoy a so-called combatant's privilege. They have

[10] www.reserchgate.com/non state actors.
[11] Cedric Ryngaert. Non-state Actors in International Law. Professor, Professor of Public International Law, Utrecht University, Utrecht, The Netherlands
[12] *Barnes, Julian E. (October 15, 2007). "America's own unlawful combatants?". Los Angeles Times.*
[13] Vieira, Constanza (July 17, 2007). "COLOMBIA-ECUADOR: Coca Spraying Makes for Toxic Relations"
[14] Yeoman, Barry (June 1, 2003). "Soldiers of Good Fortune". *Mother Jones*. Archived
[15] *Priest, Dana (2011). Top Secret America: The Rise of the New American Security State. Little, Brown and Company. p. 320. ISBN 978-0-316-18221-8.*
[16] Crowell, William P; Contos, Brian T; DeRodeff, Colby; Dunkel, Dan (2011). *Physical and Logical Security Convergence: Powered By Enterprise Security Management: Powered By Enterprise Security Management.* Syngress. ISBN 9780080558783.

the right to participate in hostilities, to combat "enemy forces," and to be lawful targets. According to supplementary protocol 1, Article 50, of the Geneva Conventions, PMCs agents are generally referred to as mercenaries and are deprived of any belligerent status by International Humanitarian Law.

Since the conclusion of the Cold War, the reconfiguration of state military policy and budget, accompanied by a wider trend of economic privatization, has resulted in the emergence of a significant and profitable international security private sector. As a result, the growth of private military firms (PMCs) and private security companies (PSCs) must be viewed in the context of States' privatization of governmental activities like security and defense.

Dangers entry of PMCs pose to the governance structure
One of the chief dangers PMCs pose to the governance structure is compromised state sovereignty. Some scholars have argued that privatization of security tend to undermine and or compromise state sovereignty. This to them, flows from the social contract theory where it is argued that the citizens surrendered to state the responsibility to protect them and that this should not be delegated to anyone or any organ.

In holding that military functions should not be delegated to private agents, some of the impacts thereof include:

i. Allowing private military companies to execute national security and military activities jeopardizes state sovereignty and removes security from the realm of public responsibility, legitimacy, and control. The use of private military companies, which are difficult to hold accountable under national or international law, does not guarantee moral military conduct.
ii. Regulations and explicit rules of engagement from the state are required because when Private Military Companies are left to their own devices or market pressures, they will undoubtedly engage in unregulated excesses.
iii. Using Private Military Companies to build internal state capabilities is not a long-term solution. It does not strive to re-establish the state-citizen social contract, address core causes of instability, or engage in dispute resolution through negotiation.[17]

Also, PMCs might lead to increased violence in the society. Whether their operations have resulted in the militarization of society and increased the possibility of violent conflict in the areas where they have operated is a significant question. There are clearly examples of private security firms contributing to the militarization of society through the transfer of guns and military training. Although the proliferation of guns is not an issue in and of itself, there is a growing body of evidence that suggests that the availability and abuse of small arms, in particular, makes conflict more lethal and violent. Private security firms have also worked as arms brokers for the passage of weapons into conflict zones on numerous occasions. This fuels conflicts and offers unfair disadvantages at the battle fronts.

While private military corporations' services may lead to more professional and efficient armed forces in recipient countries, the opposite may also occur if necessary restrictions are not in place.

What can be done?
In order to ensure co-existence of the state and non-state actors in governmental governance and particularly in matters Private Military Corporations, effective regulatory measures need to be implemented to ensure that the power and operations of Private Military Corporations are limited and checked via the various states' legislations.

A system of incorporation of skilled combatants into the states military can also be schemed where the various PMC agents can be incorporated into the state army in a bid to safeguard and secure the crucial responsibility of national security.

Licensing of arms should also be reinforced to ensure that only licensed fire-arm holders in the PMCs are allowed to handle weaponry. This is in a bid to regulate the number of people particularly trigger-happy ex -servicemen with firearms.

Stringent measures should also be installed both as a precautionary measure and regulatory measure to refrain PMCs from exceeding their permissible actions.

It is worth noting that despite having their demerits, PMCs also have a fair share of pros. These include promotion of competition which leads to more efficient services and many more. For this reason, it is imperative that we incorporate them to our system of governance for the maximum benefit of the society in matters peace. In the words of Laini Taylor, ''Peace is more than the absence of way. Peace is accord. Harmony.'' Peace is a gift among ourselves as human beings. Everyone should play their role as we operate in unison to promote serenity, tranquility and peace in our society. PEACE!

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[17] https://gsdrc.org/document-library/privatisation-of-security-and-military-functions-and-the-demise-of-the-modern-nation-state-in-africa/ (accessed on 30.4.2022)

The truest weighing of black tongues: where the Kenyan learned friends attend the funeral of their indigenous languages tearless

By Bonface Isaboke Nyamweya

Abstract
Today, if litigant A in a court proceeding, spices his/her submissions in English with phrases like: *mutatis mutandis or modus operandi* among others in Latin, French, German, or Spanish; the litigant will mostly be acclaimed as the guru of law and the Lord of language. However, if litigant B in a court proceeding, spices his/her submissions in English with some phrases of his/her indigenous language, regardless of the fact that a translator is around, the litigant will be considered as not meriting to join the bar. The Kenya School of Law Act of 2012 in the Second Schedule and the Kenya School of Law (Amendment) Bill of 2022, Second Schedule, regarding admission requirements to pursue law, put excellence in English as a top requirement. As a baseline, English has been made Kenya's key litigation and scholarly language. Pursuant to the Asmara Declaration of 2000, in article 5, all African children have the inalienable right to attend school and learn in their mother tongues. The Constitution of Kenya 2010, statutes, case law, and other sources of the Kenyan law are in English with no efforts to have them in the vernacular languages to foster legal knowledge dispensation. This work delves into the weight of a black tongue, the legal framework of language in litigation in Kenya, the taproot of the linguistic alienation in Kenya, recommendations on Kenyan indigenous languages in litigation, challenges and the conclusion.

Keywords: Indigenous Languages, Kiswahili, English, Alienation, Instruction Language, Litigation Language.

Introduction

In a nation where the laws are written in a foreign language and such hinders the compact majority of the natives from understanding them, it is not wise to term those people as ignorant. Moreover, if the litigants in such a nation flaunt to be learned just by the mere usage of foreign languages at the expense of suffocating their indigenous ones, such is not a symptom of wisdom either. It is an act of bad faith since it butchers the native culture while perpetuating the superimposed alien values whose intention is to intimidate the natives as less capable and ignorant. In Kenya, the 'local' languages are taught only in lower classes. Perhaps because they are conceived to be insignificant in their 'localness'. This is a form of neo-colonialism because each people have their cultural backdrop that enshrines their mode of communication. Bringing to extinction a people's language hence culture in the name of superimposing an alien one is a cruel form of alienation.

The weight of a black tongue

Today, if litigant say A in a court proceeding, spices his/her submissions in English with phrases like: *mutatis mutandis, sui generis, prima facie, or modus operandi* among others in Latin, French, German, or Spanish; the litigant will mostly be acclaimed as the guru of law and the Lord of language. However, if litigant B in a court proceeding, spices his/her submissions in English with some phrases of his/her indigenous language, regardless of the fact that a translator is around, the immediate reaction from the typical Kenyans would be: *Ameanza kukoroga* (he/she has switched to mother-tongue). The term '*kukoroga*' is a Kiswahili word that means 'to mix'. Hence, the indigenous languages are seen as a point of confusion, but this is not the case for the foreign languages as aforementioned. If this person mispronounces say an English word because of his/her indigenous language influence, many will laugh and conclude that this person does not deserve to join the bar. As a baseline, English has been made Kenya's key litigation and scholarly language.

The education of the persons in the legal photosphere is dramatic on this issue. The Advocates Act of 1989 [Rev 2012] in section 13 (1) (a) and (b) talks of the education qualification for one to be an advocate in Kenya and one of them is having a degree in law (LLB) from a recognized university in Kenya.[1] The Kenya School of Law Act of 2012 in the Second Schedule[2] and the Kenya School of

[1]Advocates Act, 1989 [Rev 2012], section 13 (1) (a) and (b).

Law (Amendment) Bill, 2022, Second Schedule, regarding admission requirements, sounds a trumpet that for a person to be admitted to any university in Kenya to pursue a degree in law, such a person must have:

> (ii) obtained a minimum grade B (plain) in English Language or Kiswahili and a mean grade of C (plus) in the Kenya Certificate of Secondary Education or its equivalent;
> (b) Admission Requirements in the Para-Legal Programme;
> (1) Must have a mean grade of C (C plain) in the Kenya Certificate of Secondary Education (KCSE) (or equivalent examination) and a minimum grade C+ (C plus) in English.[3]

There is no doubt that the rationale behind this linguistic requirement is that a Kenyan student doing a law degree ought to comprehend the laws and be critical, both of which are therefore assumed to be possible only in English and not in any of the native languages. One is trained to imitate the likes of Lord Denning and forget about the 'local' Councils of Elders like the *Njuri Ncheke* (the Ameru Councils of Elders forming their traditional judicial system).[4] Section 6 of the Law Society of Kenya 2014 spells out its guiding principles by stating that:

> (1) In carrying out its functions and in the exercise of its powers under this Act, the Society shall have regard to the following principles—
> (a) the maintenance and advancement of constitutionalism, justice and the rule of law;
> (b) the facilitation of access to justice;
> (c) the protection of public interest;
> (d) the maintenance of integrity and professionalism; and
> (e) the promotion of cross border legal practice, inclusivity and equity.[5]

The aspect of language is fundamental in the maintenance and advancement of constitutionalism, justice and the rule of law because it is the basis of clarity and understanding in litigation. As such, it facilitates access to justice, protection of public interest, and the promotion of cross border legal practice, inclusivity and equity. The Asmara Declaration of 2000, in article 5, spells out the Pan African resolution of protecting the indigenous languages by stating that all African children have the inalienable right to attend school and learn in their mother tongues.[6] It is unfortunate that

pursuant to the Legal Education Act 2012 in sections 22, 23, and the Second Schedule where it talks of the legal education courses,[7] none of them is offered in Kiswahili or any of the Kenyan indigenous languages.

To emphasize on the importance of language in litigation, the Vetting for Judges and Magistrates Act 2011 points out in section 18 (2) (b) on the relevant considerations for one to be a judge where it notes that one must have written and oral communication skills, the elements of which shall include: (i) the ability to communicate orally and in writing; (ii) the ability to discuss factual and legal issues in clear, logical and accurate legal writing; (iii) and effectiveness in communicating orally in a way that will readily be understood and respected by people from all walks of life.[8] To this end, we wonder why our Constitution of Kenya 2010 has not been provided in Kiswahili and the Kenyan indigenous languages as a way of fostering the legal knowledge dispensation to all. If Kenyans are sovereign (as surely they are) as claimed in article 1 of the Constitution of Kenya 2010[9], then they deserve to have their laws in a language that they best understand. This is why we need to have a look at the legal framework of language in litigation in Kenya.

The legal framework of language in litigation in Kenya

Language expresses a people's culture. The preamble of the Constitution of Kenya 2010 enunciates that, "We the people of Kenya...Proud of our ethnics, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation...Adopt, enact and give this Constitution to ourselves and to our future generations."[10] More accurately, article 7 (1) dictates that the national language of Kenya is Kiswahili. In sub-article (2), it adds that the official languages of Kenya are Kiswahili and

[2]Kenya School of Law Act, 2012, Second Schedule.
[3]Bill for Introduction into the National Assembly, *The Kenya School of Law (Amendment) Bill*, 2022.
[4]Joseph Bindloss, Tom Parkinson, Matt Fletcher, *Lonely Planet Kenya*, (Lonely Planet: 2003), p.35.
[5]Law Society of Kenya Act, 2014, section 6.
[6]Asmara Declaration, 2000, article 5.
[7]Legal Education Act, 2012, sections 22, 23, and the Second Schedule.
[8]Vetting for Judges and Magistrates Act, 2011, section 18 (2) (b).
[9]Constitution of Kenya, 2010, 1.
[10]Constitution of Kenya, 2010, preamble.

English. Sub-article (3) (a) mandates the state the role of promoting and protecting the diversity of language of the people of Kenya and (b) promote the development and use of indigenous languages. Article 27 (4), inter alia prohibits discrimination on the basis of language.[11]

Article 44 (1) says that every person has the right to use the language of his/her choice. Sub-article (2) notes that a person belonging to a cultural or linguistic community has the right with other community members of that community to enjoy the person's culture and use the person's language or to form, join and maintain cultural and linguistic associations.[12]

Article 120 (1) is emphatic that the official languages of Parliament shall be Kiswahili, English and Kenyan sign language and the business of Parliament may be conducted in English, Kiswahili and Kenyan sign language. In sub-article (2), it adds that in case of a conflict between different language versions of an Act of Parliament, the version signed by the President shall prevail.[13] Order 77 (1) of the National Assembly Standing Orders (4th ed.) dictates that, "All proceedings of the House shall be conducted in Kiswahili, English or Kenyan sign language. (2) A member who begins a speech in any of the languages provided for under paragraph (1) shall continue in the same language until the conclusion of the Member's speech."[14] Order 223 adds that, "A petition shall be in the form set out in the Third Schedule and shall- (b) be in English or Kiswahili and be written in respectable, decorous and temperate language."[15]

The Civil Procedure Code [Rev 2012] in section 86 (1) illuminates that English shall be the language of the High Court and of the Court of Appeal. For the subordinate courts, it postulates English or Kiswahili.[16] Sub-article (3) points out that "written applications to the High Court and to the Court of Appeal shall be in English and to the Subordinate Courts in English or Kiswahili." However, the Constitution of Kenya 2010 in article 50 (2) (m) notes that the person on trial "shall have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial. (3) If this Article requires information to be given to a person, the information shall be given in language that the person understands."[17]
The Criminal Procedure Code [Rev 2012] in section 137 talks of the rules for framing charges and information. In sub-section (a) (ii), it states that the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence.[18] Further, in subsection (a) (iii), it highlights that "after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary."[19] This aspect of 'ordinary language' is still echoed in subsection (c) (i) and (f).

In addition, section 169 (1) claims that every judgement shall, except as otherwise provided by the Code, be written by or under the discretion of the presiding officer of the court in the language of the court.[20] Section 170 illustrates that on the application of the accused person, a copy of the judgement or when he so desires, a translation in his own language, if practicable, shall be given to him without delay.[21] Moreover, section 197 talks of the manner of recording evidence before the court.[22] In subsection (1) (a), it pinpoints that the evidence of each witness shall be taken down in writing or on a typewriter in the language of the court by the magistrate, or in his presence and hearing and under his personal direction and superintendence. Subsection (3) insists that if a witness asks that his evidence be read over to him, the magistrate shall cause that evidence to be read out to him in a language which he understands.[23] To add more weight on this, section 198 explains on the interpretation of evidence to the accused or his advocate. It notes in subsection (1) that whenever any evidence is given in a language not understood by the accused, and he

[11]Constitution of Kenya, 2010, articles 7 (1), (2), (3), and 27 (4).
[12]Constitution of Kenya, 2010, article 44 (1) and (2).
[13]Constitution of Kenya, 2010, 120 (1) and (2).
[14]National Assembly Standing Orders (4th ed.), order 77 (1) and (2).
[15]National Assembly Standing Orders (4th ed.), order 223.
[16]Civil Procedure Code [Rev 2012], section 86 (1) and (3).
[17]Constitution of Kenya, 2010, article 50 (2) (m) and (3).
[18]Criminal Procedure Code, [Rev 2012], section 137 (a) (ii).
[19]Criminal Procedure Code, [Rev 2012], section 137 (a) (iii).
[20]Criminal Procedure Code, [Rev 2012], section 169 (1).
[21]Criminal Procedure Code, [Rev 2012], section 170.
[22]Criminal Procedure Code, [Rev 2012], section 197 (1) (a).
[23]Criminal Procedure Code, [Rev 2012], section 197 (3).

is present in person, it shall be interpreted to him in open Court in a language which he understands.[24] Subsection (2) further notes that, "If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English. (4) The language of the High Court shall be English, and the language of a subordinate court shall be English or Kiswahili."[25]

The Evidence Act of 1963 [Rev 2014] in section 60 observes that the meaning of English words is among the facts which the court shall take judicial notice of.[26] Furthermore, section 99 states that regarding the evidence to explain a patent ambiguity when the language used in a document is on the face of it ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.[27] Section 100 adds on evidence to show inapplicability where it says that, "When language used in a document is plain, and it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts."[28] Additionally, section 101 notes that when the language used in a document is plain, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a particular sense.[29]

Section 102 talks of evidence of application to one of several subjects where it explicates that, "When the facts are such that the language used in a document might have been meant to apply to any one, and could not have been meant to apply to more than one of several persons or things, evidence may be given of facts which show to which of those persons or things it was intended to apply."[30] Section 103 adds that when the language used in a document applies partly to one set of existing facts, and partly to another, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.[31] Section 104 sets forth to inform us that, "Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and, provincial expressions, of abbreviations and of words used in a peculiar sense."[32] This culminates the legal framework of language in Kenya.

Deductions from the legal framework of language in litigation in Kenya

1. The Kenyan legal system esteems English and somehow Kiswahili, with a minute platform for the indigenous languages, save where the involved litigant is sufficiently ignorant of English and Kiswahili hence the need to have a translator.
2. The language of law studies in Kenya is solely English. This implicitly means that the indigenous Kenyan languages are ontologically deficient of the law concepts that can be invoked in any legal discourse. Hence, it is absolutely necessary to 'borrow' English and use it solely in the comprehension and appraisal of the Kenyan law studies.
3. English is the supreme language of litigation. This is evident from it being made the official language of the superior courts while Kiswahili is given as an option in the subordinate courts, with no official place of any of the Kenyan indigenous languages like Kikuyu, Meru, Kamba, Luo, etc.
4. No provision for the translation of the Constitution of Kenya 2010, Statutes, Kenya Gazettes, Kenya Gazette Notices, Legal Notices, Corrigendum, Case Law, Bills, among other sources of the Kenyan law, formally and consistently, into the Kenyan indigenous languages as a way of enhancing the understanding of the law by the compact majority of the native persons.
5. Indigenous Kenyan languages are only coated with the word 'significant' but they are mocked at as inferior and constantly butchered at will by the intentional abandonment of the elites as aforementioned hence at the verge of extinction because even the superior courts import the official symbols of communication (the English language), with an option of Kiswahili in the subordinate courts, yet with no official dignity being accorded to any of the indigenous languages like is the case for especially the English language.

[24]Criminal Procedure Code, [Rev 2012], section 198 (1).
[25]Criminal Procedure Code, [Rev 2012], section 198 (2) and (4).
[26]Evidence Act, 1963 [Rev 2014], section 60.
[27]Evidence Act, 1963 [Rev 2014], section 99.
[28]Evidence Act 1963 [Rev 2014], section 100.
[29]Evidence Act 1963 [Rev 2014], section 101.
[30]Evidence Act 1963 [Rev 2014], section 102.
[31]Evidence Act 1963 [Rev 2014], section 103.
[32]Evidence Act 1963 [Rev 2014], section 104.

Indeed, this situation is embarrassing. For a Kenyan who desires to go and practice litigation say in China, it is mandatory for such a person to learn Chinese because there, people use their Chinese language in education and everything. This is the same for Russia, Italy, France, UK, Germany, just to mention a few. A Kenyan going to any of these countries will need to be transformed and be like one of them as far as the linguistic dimension hence culture is concerned. Paradoxically however, if a person say from London comes to Kenya, it is like going to an extension of 'England' because the person will encounter English speaking Kenyans and marvel at even how he/she can use his/her mother-tongue in a foreign land to sue any of the natives in the alien superior courts where his/her mother-tongue has been over-glorified as the official language. This is alienation of the Kenyans. The big question that reverberates our eardrums regards the taproot of all these ills.

The taproot of the linguistic alienation in Kenya

The anomaly of English being worshipped by the legal niche among other areas of learning and professions, demands a historical analysis of the Kenyan linguistic phenomenon in order to establish the cause of this instilled inferiority complex upon the Kenyan indigenous languages. The indubitable truth remains that:

> [Kenya] is [a] multilingual [state], with over 70 different indigenous languages and dialects in addition to Kiswahili and other foreign languages such as English, French, German, Chinese, Hindi, and Italian, which are spoken by a small number of people. The country comprises three linguistic groups, namely, the Bantu, the Cushites and the Nilotes.[33]

As such, the aspect of language shall be examined as presented in the colonial era and in the post-colonial epoch for the sake of highlighting the touchstones of the massacre of the indigenous languages in Kenya. A few established commissions shall be dissected for the sake of unfolding this problem's growth; for example, the United Missionary Conference in Kenya of 1909, the Phelps Stoke Commission of 1924, the Beecher Report of 1949, the Prator-Hutasoit Commission of 1952, the Binns Commission of Education (1952), and those in the post-colonial period as well.

The linguistic crisis in the colonial epoch

(a) The United Missionary Conference in Kenya of 1909

In this conference, the importance of mother tongue in evangelization through education was delved into. Precisely, the "role of the mother tongue, Kiswahili and English in the domain of education was discussed. The Conference adopted the use of mother tongue in the first three classes in primary school, Kiswahili in two of the middle classes in primary, while English was used in the rest of the classes up to university."[34] The spreading of the gospel to the 'primitive tribes' gave an impetus to this conference. The United Missionary Conference at Maseno (January 4-8, 1909) bore some fruits regarding the aspect of language. Strictly:

> In the area of language, efforts were made to translate the Ten Commandments, the Lord's Prayer, the Apostles' Creed, and the hymns which were in current usage in the various Missions working in western Kenya. With regard to education, three decisions were made. First, the conference took steps to appoint two of its members to represent the constituent groups from western Kenya on the Missionary Education Board for Kenya. Second, it was passed that Kiswahili be used in schools for advanced education, but the wider issue of a common language in schools was forwarded to the Missionary Education Board for discussion and decision. [35]

This means that the indigenous languages were embraced by the missionaries through the translations made. Kiswahili was somehow elevated to be used in schools for advanced education. However, the big issue of a common language in schools was left to the Missionary Education Board to discuss and decide.

(b) The Phelps Stoke Commission of 1924

This Commission highlighted that the appeal to the native mind could not be effectively made without the adequate use of the native languages. In fact, this Commission "recognised the great role of indigenous languages in the development of character and acquisition of life skills in agriculture."[36] For this reason, the Commission recommended that "the languages of instruction should be

[33]Lucy Mandillah, *Kenyan Curriculum Reforms and Mother Tongue Education: Issues, Challenges and Implementation Strategies* (Unisa Press Journal, 2019, volume 23), 2.
[34]Martin C. Njoroge and Moses Gatambuki Gathigia, *The Treatment of Indigenous Languages in Kenya's Pre- and Post-Independent Education Commissions and in the Constitution of 2010* (Advances in Language and Literary Studies: December 30, 2017, Volume 8, Issue 6), 77.
[35]Watson A. Omulokoli, *The Early History of Church Cooperation and Unity in Kenya* (Africa Journal of Evangelical Theology 23.2 2004), 151.
[36]Lucy Mandillah, op. cit., 2.

the native language in early primary classes, while English was to be taught from upper primary up to the university."[37] More importantly:

> Schools were urged to make all possible provision for instruction in the native language. However, the Commission recommended that Kiswahili be dropped in the education curriculum, except in areas where it was the first language. Kiswahili's elimination from the curriculum was partly aimed at forestalling its growth and spread, on which Kenyans freedom struggle was coalescing.[38]

It is this last part that betrays the Commission's aim to amputate the African languages' growth. While the recommendation to instruct children in their mother tongue in the early primary classes sounds plausible, it inherently presents the indigenous languages as inferior for solid academic pursuit since they are only used for beginners. English is made the scholarly language since it picks from upper primary school to university level. Fundamentally therefore, the serious materials are to be in English and even the discourses at school and later at work. If this Commission never intended to establish a linguistic hierarchy, then it ought not to have abolished Kiswahili from the curriculum nor less to have dwarfed the growth of the indigenous languages at the nascent stage of learning.

(c) The Beecher Report of 1949

The toxic appetite to westernize the Kenyan elites after the WW II through linguistic alienation is vivid in the shift of the colonial language policy that dehydrated the indigenous languages. "This was because the British colonialists started a campaign to create some Westernized educated elites in Kenya when self-rule was imminent following the freedom struggle."[39] This was a form of dominating them since these westernized elites served the interests of the colonizer. Moreover:

> In 1950-1951, the Education Department Reports which included Beecher's (1949), Binns (1952) and the Drogheda Commission of 1952 pointed out that it was inappropriate to teach three languages at the primary school. Consequently, the reports recommended that English be introduced in the lower primary to be taught alongside the mother tongue and called for the dropping of Kiswahili in the curriculum, except in areas where it was the mother tongue. The implementation of this policy started in 1953-1955. Thus, the Beecher Committee of 1949 was mandated to examine the scope, content, methods, administration and financing of African education.[40]

As a corollary, "...the African view of the report was that it was to lead to Europeanization rather than Africanization of education and it sought to maintain the status quo of keeping Africans in low wage positions."[41] In other words, it was a tool of alienation and intimidation. This is a pity because domination of a people's language is basically domination of the people's culture and life.

(d) The Prator-Hutasoit Commission of 1952

Here, English was endorsed as the only language of instruction in all school grades at the expense of suffocating the indigenous languages. This Commission "heralded the New Primary Approach (NPA) also known as the English-Medium Scheme. To implement the new curriculum, teachers were to be trained in English, while their mother tongues were viewed as a premium in teaching the lower primary schools."[42] To be frank, this Commission was inherent of some racial discrimination to the extent of paying a blind eye to the Kenyan indigenous languages.

(e) The Binns Commission of Education (1952)

This Commission was sponsored by the Secretary of State for the Colonies and the Nuffield Foundation to examine educational policy and practice in British Tropical African territories.[43] "The commission recommended that English be introduced in the lower primary to be taught alongside the mother tongue and called for the dropping of Kiswahili in the curriculum, except in areas where it was the mother tongue." However:

> ...the commission met criticisms from Africans because of its advocacy for racial education, inability to address social and cultural goals and its

[37]Martin C. Njoroge and Moses Gatambuki Gathigia, op. cit., 77.
[38]Martin C. Njoroge and Moses Gatambuki Gathigia, ibid.
[39]Martin C. Njoroge and Moses Gatambuki Gathigia, ibid.
[40]Martin C. Njoroge and Moses Gatambuki Gathigia, ibid.
[41]Martin C. Njoroge and Moses Gatambuki Gathigia, ibid.
[42]Martin C. Njoroge and Moses Gatambuki Gathigia, 78.
[43]Martin C. Njoroge and Moses Gatambuki Gathigia, ibid.

> emphasis on keeping Africans on native reserves. The state of emergency of 1952 rendered the implementation process of both the Beecher and Binns reports difficult. In summary, the Beecher's Report (1949), Binns Report (1952) and Drogheda Commission of 1952 recommended that English be introduced in lower primary and taught alongside the recommended mother tongue in early primary classes, while English to be taught from upper primary to university. Although these commissions recognized the importance of vernacular languages, their role was confined to lower primary classes.[44]

The pre-colonial period is thus characterized with the colonizers imposing the English language in the education system of Kenyans as a form of conditioning them some inferiority complex. English, as aforementioned is glorified to be the language of instruction in primary school, secondary school, and the university. Kiswahili is threatened and glimmers only as a weakened option with minimum platform in the scholarly arena in Kenya. The indigenous languages are assumed to be only fit for the beginners but not for serious academic endeavor.

The linguistic crisis in the post-colonial era

In 1963 as Kenya became independent, many expected an authentic dynamic self-governance that would promote, among other things, the formerly stifled indigenous languages. However, "When Kenya attained self-rule in 1963, English was declared the official language. English was to be used in all important governmental sectors. This policy, unfortunately, only re-emphasized what was already in place as a result of the colonial language policy."[45] Consequently, a number of Commissions have been established to study this phenomenon. We shall evaluate some of them.

(a) The Kenya Education Commission of 1964 (Ominde Commission)

This was mandated with the role of surveying the existing educational resources and advise the government on the formation and implementation of the required national policies for education. "...the commission noted that most Kenyans wanted a trilingual approach to education. That is, mother tongue was preferred for verbal communication especially in rural areas, while English and Kiswahili were preferred for education from lower primary to the university."[46] Additionally, "Kiswahili was recommended as a compulsory subject in primary schools and was especially favored in education for purposes of national and regional unity."[47] However:

> ...unlike English, Kiswahili was not anchored into the school curriculum, and for a long time, it remained an optional subject. The Commission supported English and argued that it would expedite learning in all subjects by ensuring smooth transitions from "vernaculars". Thus, English was introduced in beginners' classes in primary schools through the New Primary Approach (NPA), in which its learning was heavily emphasized. In addition, the commission recommended that schools include a daily period for story-telling in the vernacular up to class 3. Unfortunately, despite its noble objectives, the recommendations of the Ominde Commission were not implemented in full, a blunder that has had significant effects on education.[48]

This means that the dominance of English over Kiswahili and the Kenyan indigenous languages continued to dog the Kenyan education system even after independence. Worse of it were the reasons behind the over-glorification of English over the native languages. Indeed:

> The justification offered by the commission for elevating English and relegating, vernaculars and Kiswahili to the background was often wanting. Here are a few examples: (i) That English provides a better medium for learning languages and literacy than the vernaculars. Does this assertion imply that African languages lacked the capacity to carry literacy, or that literacy imparted in these languages would be inferior to that carried through English? The claim makes no linguistic sense at all. (ii) That English would provide a more systematic and quicker development in all other subjects of study. (iii) That the foundation laid in the first formative years of schooling would be

[44]Martin C. Njoroge and Moses Gatambuki Gathigia, ibid.
[45]Martin C. Njoroge and Moses Gatambuki Gathigia, ibid.
[46]Martin C. Njoroge and Moses Gatambuki Gathigia, ibid.
[47]Martin C. Njoroge and Moses Gatambuki Gathigia, ibid.
[48]Martin C. Njoroge and Moses Gatambuki Gathigia, ibid.

more scientifically conceived and solidified if offered in English as opposed to the vernaculars. (iv) That the transition from vernaculars to English medium was difficult and unnecessary.[49]

(b) The Bessey Report of 1972

The Bessey Report stressed that the use of the indigenous Kenyan languages as the medium of instruction could yield significant developmental benefits to the children and the community since it could efface the ugly shock of confronting an alien language like English. "The report recommended the use of mother tongue, English and Kiswahili in schools. The report saw the ideal language situation as every Kenyan being able to enjoy a good command of his or her mother tongue, competence in Kiswahili and competence in English."[50] This however never sufficed in extinguishing the linguistic hierarchy whereby English was championed in academia than the rest.

(c) The National Committee on Educational Objectives and Policy of 1976 (Gachathi Report)

The Gachathi Report advised that the language of instruction ought to be the predominant language spoken in the school's catchment area for the three fundamental years of primary education. "English was recommended to be taught as a subject from standard one and then as a language of instruction from the fourth grade in primary school to the university."[51] Despite the declaration of Kiswahili as a significant language by this report, nonetheless, it received a very weak status incommensurable with English in the school curriculum. The dominance of English glittered in the forty hours per week; whereby, it took the lion's share of 8-10 periods while Kiswahili relished just three hours.[52]

(d) The Presidential Working Party on the Second University of 1981 (Mackay Commission)

The Mackay Commission is renowned for the introduction of the 8-4-4 education system in January 1985. "The report also placed a lot of premium on Mathematics, English and vocational subjects. Further, the report advocated for a practical curriculum that would offer a wide range of employment opportunities and equitable distribution of educational resources."[53] This report perpetuated the language policy proposed in Gachathi Report of 1976. As such:

> First, the commission proposed making Kiswahili a compulsory and examinable subject in primary and secondary tiers. Second, the commission recommended that English remains the language of instruction, while Kiswahili was made a compulsory subject in both primary and secondary education. This policy led to the production of Kiswahili books to meet the increased demands of both students and teachers. The Mackay Commission further advised that the mother tongue be used in lower grades of primary schools, in areas where this was possible.[54]

Consequently, the indigenous languages occupying the least status in the Kenyan education system was sustained. Although Kiswahili was made a compulsory subject in both primary and secondary school, this never glorified it to the level of English that is the language of instruction. Hence, the aspect of linguistic hence cultural alienation was well nested in the Mackay Commission.

(e) The Presidential Working Party on Education and Manpower of 1988 ((Kamunge Report)

This Commission suggested English to be used as the medium of instruction. "The commission noted that in order to improve the learners' proficiency in English and to ensure development of good reading habits, primary school libraries should be established in all schools and properly stocked for this purpose."[55] Yet, the Commission was not eloquent nor clear on the role of the Kenyan indigenous languages in the promotion of education in the Kenyan schools.

[49]G Kitula King'ei, *Pitfalls in Kenya's Postcolonial Language Policy: Ambivalence in Choice and Development* (Per Linguam: 2001, 17(1)), 39.
[50]Martin C. Njoroge and Moses Gatambuki Gathigia, op. cit.
[51]Martin C. Njoroge and Moses Gatambuki Gathigia, 79.
[52]Martin C. Njoroge and Moses Gatambuki Gathigia, ibid.
[53]Martin C. Njoroge and Moses Gatambuki Gathigia, ibid.
[54]Martin C. Njoroge and Moses Gatambuki Gathigia, ibid.
[55]Martin C. Njoroge and Moses Gatambuki Gathigia, ibid.

Education CS George Magoha witnesing a CBC assessment tests

(f) The Commission of Inquiry into the Education System of Kenya of 1999 (Koech Commission).

This Commission was geared towards making careful suggestions on how the quality of the Kenyan education could be improved. "One of the recommendations was that the medium of instruction in lower primary be the learner's mother tongue or the dominant language within the schools' catchment area and in urban centers (where population is made up of people from different ethnic groups), Kiswahili be the medium of instruction."[56] This Commission therefore basically "recommended the need for a child to be taught using the language of the school's catchment area and for Kiswahili to be used only in schools with a heterogeneous population."[57] The key benefits of the learner using mother tongue is that it enhances concept formation and articulation in linguistic communication[58]. Additionally:

> ...the commission recommended that English and Kiswahili should be taught vigorously as subjects, but English be used as the medium of instruction throughout the country in upper primary. Moreover, the commission recommended that the ministry responsible for education works out modalities for ensuring the publication of instructional materials in all the local languages in the country. This was a step in the right direction as far as indigenous languages are concerned. However, the Ministry of Education argued that the report was not implementable and cited cost, structural, and institutional limitations.[59]

Still, the mockery of the indigenous languages is evident in the manifest over-glorification of English as the language of instruction. Although this Commission suggested the publication of instructional materials in all local languages, nonetheless, this was still limited to lower primary school because it had already specified that English would be the language of instruction for upper primary school henceforth. The belittled dignity of the indigenous languages remained clear here.

(g) The Taskforce on the Re-alignment of the Education Sector to the Constitution of Kenya 2010 (Odhiambo's Task Force of 2012).

The Odhiambo's taskforce was of the idea that the use of the language a school's catchment area in lower primary school be maintained.[60] As the Ministry of Education Sessional Paper No. 1 of 2019 notes, "Swahili is the national language of Kenya and the first official language, spoken by nearly the whole population."[61] In the Odhiambo's taskforce, English and Kiswahili were suggested to be taught as subjects in the lower primary to enhance the switching to English at primary class 4.[62] Moreover, English was presented as the language of instruction from class 4 onwards. "In addition, the taskforce proposed the introduction of international languages especially Chinese in the curriculum."[63] It is absurd that the indigenous languages still remain at the basic level of instruction as English is given the highest rank in the pyramid of seniority of instruction in the Kenyan education. Despite these efforts to over-glorify English and annihilate the indigenous languages:

> [The] Uwezo (2010) report on a study conducted on levels of basic literacy and numeracy in the country revealed that 85 per cent of the children in Class 2 could not read a passage in English, 25 per cent in Class 5 could not read the same passage, and four per cent in Class 8 could not read the passage, meaning that they leave primary school without the ability to read in English.[64]

Obviously, if these children continue in the same linguistic trajectory, none of them can pursue law because we

[56]Martin C. Njoroge and Moses Gatambuki Gathigia, ibid.
[57]Lucy Mandillah, op. cit., 2.
[58]Martin C. Njoroge and Moses Gatambuki Gathigia, op. cit.
[59]Martin C. Njoroge and Moses Gatambuki Gathigia, ibid.
[60]Martin C. Njoroge and Moses Gatambuki Gathigia, ibid.
[61]Ministry of Education Sessional Paper No. 1 of 2019, 7.
[62]Martin C. Njoroge and Moses Gatambuki Gathigia, ibid.
[63]Martin C. Njoroge and Moses Gatambuki Gathigia, ibid.
[64]Lucy Mandillah, op. cit., 5.

already noted that excellence in English language is a necessary requirement before admission to take law courses. But failure in English does not amount to failure in understanding or strictly, being an intellectual dwarf. It simply means that the means of communication in this case are foreign hence alien to comprehend. Today, the Kenyan education system (8-4-4) is shifting to the Competence Based Curriculum (CBC), also called a 2-6-3-3-3 system. We learn that:

> The CBC places more emphasis on learners' mental ability to process issues and proposes a practical framework that nurtures competencies of learners based on their passions and talents. The language policy for the early years states that the language of instruction (LoI) in pre-primary (PP1 and PP2) and grades 1–3 (G1, G2 and G3) shall be the language of the school's catchment area until Grade 4, after which English shall be the main LoI.[65]

Despite CBC's target of making education responsive to the imperatives of Vision 2030 and the SDGs, it also falls in the same trap like the other systems before as discussed that have glorified English as the instruction language while burying the indigenous languages in the ever downtrodden ground of beginners in the lower primary school. "Countries like Japan and China are good evidence to the fact that sustainable technological, economical, social as well as political development can only thrive in an environment where the peoples' language is acknowledged and given its rightful place and not excessive reliance on foreign languages."[66] This is because language and culture are connatural and in some way coterminous in relation to active knowledge understanding and development. Therefore, "A lesson learned from such nations (by multilingual African nations) is the need to rethink about the place given to their indigenous languages in matters of national development."[67] Kenyan indigenous languages are therefore not 'local' in the sense of ontological inferiority rather in the sense of nearness to us for our easiest understanding. English and the other languages are not 'international' to mean better than the 'local' languages rather they are simply foreign and secondary as compared to the Kenyan indigenous languages. Respect must be given to the indigenous languages in academia, precisely as the languages of instruction beyond the lower classes.

Recommendations on Kenyan indigenous languages in litigation

1. The language of instruction in primary, secondary and tertiary institutions should be the indigenous languages of each catchment area with Kiswahili and English as optional languages of study. Therefore, the Legal Education Act of 2012 in sections 22, 23, and the Second Schedule where it talks of the legal education courses should include the information that these courses shall be offered mainly in the Kenyan indigenous languages, with some optional provisions in Kiswahili and English.
2. The Kenya School of Law Act of 2012 should be amended by replacing the Second Schedule's section a (1) (ii) on admission requirements into the advocates training programme and b (1) on admission requirements in the Para-Legal Programme with:
   a (1) A person shall be admitted to the School if -(ii) he/she has obtained a minimum grade B (plain) in any of the Kenyan indigenous languages or Kiswahili and English as last resort options and a mean grade of C (plus) in the Kenya Certificate of Secondary Education or its equivalent;
   (b) Admission Requirements in the Para-Legal Programme;
   (1) Must have a mean grade of C (C plain) in the Kenya Certificate of Secondary Education (KCSE) (or equivalent examination) and a minimum grade C+ (C plus) in any of the Kenyan indigenous languages or Kiswahili and English as last resort options.
3. In the practise of law, the government should empower the National Council for Law Reporting so that they can facilitate the translation of the Constitution of Kenya 2010, the Legal Notices, Statutes, Case Law, Kenya Gazettes, Kenya Gazette Supplements, and all other sources of the Kenyan law into the Kenyan indigenous languages as a way of enhancing their engagement in promoting legal clarity to all.
4. The Constitution of Kenya 2010 should be amended in article 7 (1) by replacing the word 'Kiswahili' with 'Kiswahili and the Kenyan indigenous languages'. In sub-article (2), 'Kiswahili and English' should be replaced with 'Kiswahili and the Kenyan indigenous languages.' This will suffice in eradicating the current linguistic hierarchy and alienation.
5. Article 120 (1) shall be amended by making the Kenyan indigenous languages, Kiswahili and English the official languages of Parliament and the business of Parliament to be conducted in these languages, notwithstanding Kenyan sign language.
6. Order 77 (1) of the National Assembly Standing Orders (4th ed.) should be amended by replacing it with:
   77 (1) All proceedings of the House shall be conducted in Kiswahili, or the Kenyan indigenous languages (with simultaneous translations to Kiswahili and English) or Kenyan sign language.
7. The Civil Procedure Code [Rev 2012] in section 86 (1) should have the word English replaced with 'Kiswahili or

[65]Lucy Mandillah, 5.
[66]Mary, K. Lonyangapuo, *The Linguistic Factor and the Millennium Development Goals: A Lesson for Future Sustainable Development in Kenya* (International Journal of Language and Linguistics Vol. 4, No. 4, December 2017), 134.
[67]Mary, K. Lonyangapuo, ibid.

any of the Kenyan indigenous languages with Kiswahili or English translations'. Sub-article (3) should be replaced with:
Written applications to the High Court, Court of Appeal or Subordinate Courts shall be in Kiswahili or any of the Kenyan indigenous languages with Kiswahili or English translations.

8. The Criminal Procedure Code, [Rev 2012], section 198 (4) should be amended by replacing it with:
The language of the High Court or a subordinate court shall be Kiswahili or any of the Kenyan indigenous languages with Kiswahili or English translations.

Some crucial challenges on the Kenyan indigenous languages

Bearing in mind of the deeply established inferiority complex of the Kenyan indigenous languages, it will take time for the Kenyans to truly appreciate their diminishing indigenous languages in the area of academia hence instruction and even at the places of work in everywhere in Kenya.

The multiplicity of the Kenyan indigenous languages may ruin the national cohesion and integration if some of these indigenous languages are charged with some political and superiority elements. However, the benefit of cultural heritage is noble and worth the destruction of the linguistic hierarchy and cultural alienation experienced in Kenya currently.

Most of the Kenyan indigenous languages lack a standardized orthography. This means that there will be a problem in interpreting the means of submissions say in court if several translators use different orthographies on the same piece of interpretation. Standardization of the indigenous languages orthographies is therefore necessary.

There are few learning materials in mother tongue and almost none at all in the high learning institutions. Translations should be made into these languages and Kenyan experts can still be advised to write works first in the Kenyan indigenous languages then translate them into Kiswahili and English as a way of conserving them for academic endeavors.

Conclusion

To this end, it is evident that the Kenyan indigenous languages are belittled in the education sector where English has been constantly elevated as the language of instruction. Kiswahili peeps as an option but with very little platform, just for partial fulfilment of representation. The indigenous languages are pushed to the lower primary school and not at all in solid academia. In litigation, English language is still supreme. In Parliamentary sessions, English is still glorified. This is a form of alienation and intimidation. Kenyans deserve to grasp their laws in a language that is theirs. The Kenyan law sources need to be translated into the Kenyan indigenous languages as a way of enhancing the dissemination of knowledge to all Kenyans in a language that they best grasp.

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Works Cited

Joseph Bindloss, Tom Parkinson, and Matt Fletcher. (2003). *Lonely Planet Kenya*. Lonely Planet.

King'ei, G. K. (2001). Pitfalls in Kenya's Postcolonial Language Policy: Ambivalence in Choice and Development. *Per Linguam*, 17(1), 36-47.

Lonyangapuo, M. K. (2017, December). The Linguistic Factor and the Millennium Development Goals: A Lesson for Future Sustainable Development in Kenya. *International Journal of Language and Linguistics*, 4(4), 133-146.

Mandillah, L. (2019). Kenyan Curriculum Reforms and Mother Tongue Education: Issues, Challenges and Implementation Strategies. *Unisa Press Journal*, 23, 1-18.

Martin C. Njoroge and Moses Gatambuki Gathigia. (2017). The Treatment of Indigenous Languages in Kenya's Pre- and Post-Independent Education Commissions and in the Constitution of 2010. *Advances in Languages and Literary Studies*, 8(6), 76-82. Retrieved May 16, 2022, from http://dx.doi.org/10.7575/aiac.alls.v.8n.6

Ministry of Education Sessional Paper No. 1 of 2019.

Omulokoli, W. A. (2004). The Early History of Church Cooperation and Unity in Kenya. *Africa Journal of Evangelical Theology*, 23(2), 145-159. Retrieved May 16, 2022

Statutory Instruments:

Advocates Act, 1989 [Rev 2012].
Asmara Declaration, 2000.
Civil Procedure Code [Rev 2012].
Constitution of Kenya, 2010.
Criminal Procedure Code, [Rev 2012].
Evidence Act, 1963 [Rev 2014].
Kenya School of Law (Amendment) Bill, 2022.
Kenya School of Law Act, 2012.
Law Society of Kenya Act, 2014.
Legal Education Act, 2012.
National Assembly Standing Orders (4th ed.), [2018].
Vetting for Judges and Magistrates Act, 2011.

Want to run for office in Kenya? Here's how much it'll cost you

By Karuti Kanyinga

Kenya's constitution provides for election of the president and 47 governors to head the executive organs at national and county levels, respectively. Also, to be elected are legislators: 47 senators, 290 MPs and 1,450 members of county assemblies. There is fierce competition for these posts, not just between parties but between individuals within a party; and the more a candidate spends, the higher the chances of winning a seat. Karuti Kanyinga is a governance and development expert. We asked him how much it costs to run for office, and what the high-cost signals for Kenya's participatory democracy.

How much does it cost to win a legislative seat?
The Election Campaigns Financing Act recognises a number of campaign-related expenses that may arise, from party primaries to general elections. These include venue hiring, publicity material, advertising, campaign personnel and transportation. Candidates may also incur social costs, like contributing medical assistance and school fees to communities.

Our study – based on discussions and interviews with key informants from across the country – estimates that a candidate will this year spend about 39 million Kenya shillings (roughly US$390,000) on average to win a senate seat in the 9 August polls. The amount does not include support that a candidate may get from the sponsoring political party.

It took an average of US$350,000 to win a similar seat in the 2017. The 12.3% cost difference between 2017 and 2022 is attributed to the increasing cost of living, and inflation in general. Kenya has 47 counties, implying successful senators will spend a total of 1.8 billion shillings (US$18 million) to win their seats.

To successfully run for the Woman Representative seat, an aspirant needs US$240,000 this year – 4.8% higher than the US$228,000 that a successful candidate spent five years ago. Kenya's parliament has 47 such representatives, implying total spending in excess of US$11 million by the successful candidates.

An MP will require an average of US$222,000 to win in the August polls, up from $182,000 in 2017. The parliament has 290 elected MPs, implying a collective US$64.4 million (KSh6.4 billion) to fill the seats.

The least expensive political seat in Kenya is that of Member of County Assembly, at US$31,000 this year, or a total of US$45 million (KSh4.5bn) for the 1,450 electable seats. Candidates interviewed for this study said voters generally viewed them as moneybags every time they organised meetings in their constituencies. The demands for money increased in tandem with approaching elections.

For Ghana, which returned to multiparty elections in 1992 – the same year as Kenya – the cost of election increased by 59% between 2012 and 2016. But the US$85,000 that a candidate required to win a parliamentary seat in the 2016 general election was only 46.7% of what a Kenyan counterpart would spend a year later, in 2017, to clinch a similar seat. Within East Africa, a 2020 study in Uganda found that candidates spent between US$43,000 and US$143,000 to be elected to parliament in the 2016 general election.

What drives these costs?
The first driver is the allure of elective office. Kenya pays an MP a monthly package of at least US$10,000 – including basic allowances. Over 36% of Kenya's population live below the poverty line, earning less than US$1.9 per day or US$57 monthly.

The second driver is patronage and connections, that have also been linked to theft of public resources. Upon

winning election, a patron-client network chain ensues that connects the politician to higher levels of the state and senior politicians to the grassroots. This enables the politician to draw development resources and also provides an opportunity for self-enrichment through contracts with public institutions.

Third, pressure from voters demanding handouts also drives up the cost of politics in Kenya. In many of the interviews, respondents pointed out that voters openly demand money from candidates before agreeing to attend their meetings. Voters demand payment because some of those elected rarely engage with voters after elections.

The fourth driver of cost has to do with wrong perceptions of roles. In the past, voters judged elected leaders on the basis of the development projects initiated or number of people helped to access government jobs. The current constitution casts the roles of elected leaders as oversight of the executive; making laws; and representation of the people. But voters still demand the "development record" of aspiring MPs. To prove their worth, the aspirant is compelled to contribute to projects and assistance funds. Fifth, some candidates are willing to outspend others during the primaries of dominant parties or coalitions in order to secure a ticket. Getting a ticket of dominant party reduces the chances of losing the election.

Lastly, there is limited oversight of election financing. The Election Campaign Financing Act restricts the sources of campaign funds but doesn't place caps on them. Last year, MPs rejected an attempt by the Independent Electoral and Boundaries Commission to change the law and introduce spending caps.

What's the impact of high costs?

Capable candidates who lack access to sizeable resources get excluded from politics. Our study shows Woman Representative candidates who won their race spent almost three times as much as those who were unsuccessful. Similarly, victorious senators spent more than double what losers spent. In the race for National Assembly, successful candidates spent 50% more than those who did not win. High costs have also led to a non-functioning representative democracy. Political seats mostly go to those who lead in contributions to development projects, donations to groups, and raising funds for individuals in need. The transactional nature of politics reduces opportunities for debate and dialogue between elected officials and their constituents. Once the heavy spenders win elections, they turn to the executive and to the public sector institutions for contracts and rent-seeking opportunities. The use of an electoral seat as a source of patronage in the constituency is linked to national level patronage networks, which in turn is the basis for corruption in the public sector. These networks help to entrench abuse of office, especially because political actors have to continue amassing resources for their support bases. High costs also lead politicians to neglect their functions. Re-election bids begin almost immediately after elections as leaders, without seeking opinions of their constituents, initiate "development projects" aimed at boosting their visibility at campaign time.

A final impact of money politics is that elected officials do not always provide effective oversight of the use of resources by the executive at the national and county level. This would be an exercise in futility, given that some intend to access those resources for personal or political gain.

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