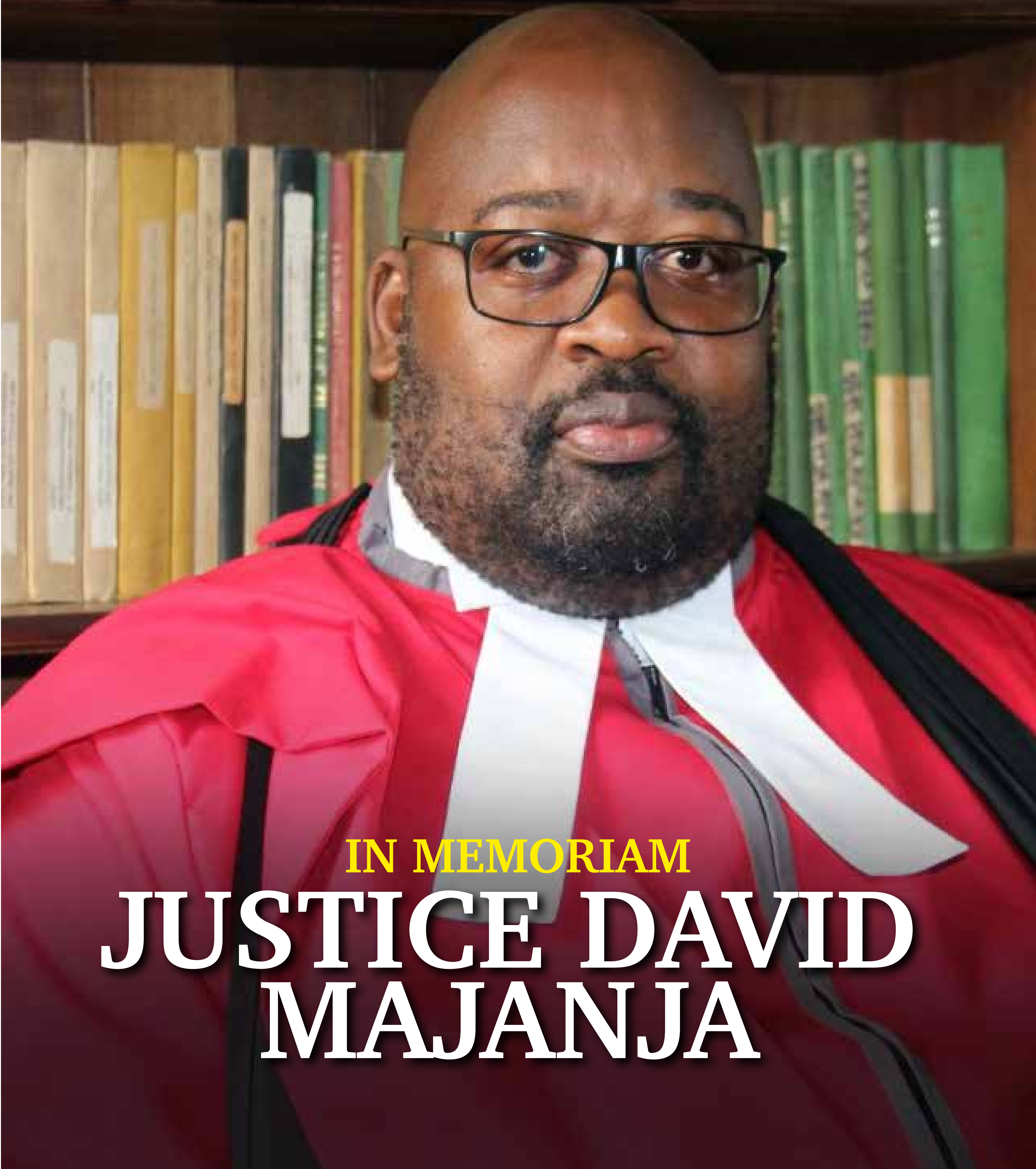
THE PLATFORM

NUMBER 103, AUGUST 2024

FOR LAW, JUSTICE & SOCIETY



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Platform Publishers Kenya Limited
The Platform for Law, Justice and Society is published monthly by Platform Publishers Kenya Ltd
Fatima Court, 2nd Floor Suite 148
Junction at Marcus Garvey/Argwings Kodhek Road, Opposite Studio House
Kilimani, P.O.Box 53234-00200
Nairobi, Kenya

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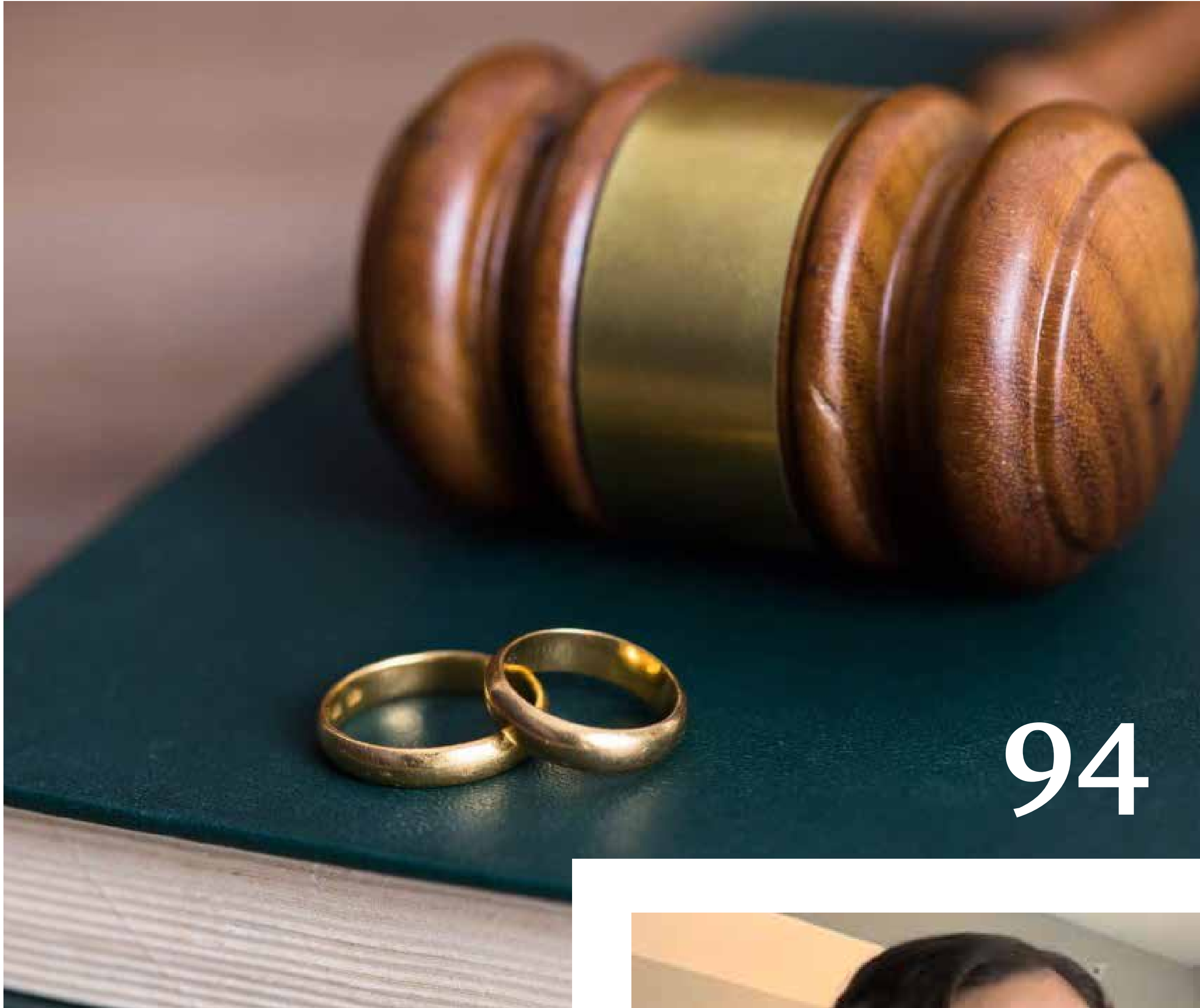

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EDITORIAL

Extrajudicial killings: A blatant violation of constitutional and human rights

Addressing extrajudicial killings requires a multifaceted approach, including strengthening legal frameworks, improving law enforcement practices, ensuring accountability, and fostering a culture of respect for human rights.

Extrajudicial killings—acts where individuals are unlawfully executed without judicial proceedings—represent one of the most egregious violations of both constitutional norms and human rights. These killings undermine the very foundations of justice, equality, and the rule of law, leading to a pervasive climate of fear in societies. As we explore this devastating issue, it is vital to understand its implications on constitutional rights and human dignity.

The chilling discovery of hacked bodies in the Kware area of Embakasi, Nairobi, on July 12th sent shockwaves through the community and beyond. This gruesome scene, marked by brutality and desolation, mirrors a haunting pattern that has emerged across the country. In recent months, similar horrors have surfaced, with bodies retrieved from the Ngong and Yala rivers, concealed in dense forests and thickets, each case sending tremors of fear and revulsion rippling through society.

As news broke, the citizens of Kware were enveloped in a cloud of disbelief and outrage. How could such an atrocity occur in their midst? The stark reality of

violence had once again intruded into the lives of ordinary people, igniting questions about safety, justice, and the state of human rights. Families, once filled with hope and resilience, found themselves grappling with a new, unsettling reality—a world where the sanctity of life seemed more fragile than ever.

In the wake of these horrific events, the community's calls for justice grew louder. Local leaders and activists united, demanding accountability from the authorities, who had often been criticised for their inaction in addressing the escalating violence and crime. The image of the murdered individuals became a catalyst for broader discussions about extrajudicial killings, impunity, and the desperate need for effective law enforcement that respects human rights.

This pattern of violence, which has seen innocent lives end in such gruesome fashion, stands as a stark reminder of the fragility of human dignity. Each hacked body tells a story cut short—a life extinguished too soon, leaving behind grieving families and unanswered questions. As fear takes root in the hearts of those who live in the shadow of these tragedies, the urgent call for justice and protection intensifies.

Communities rally together, seeking to reclaim their safety and dignity, demanding that such heinous acts never be normalised or brushed aside. The specter of violence looms large, but amid the sorrow and outrage, there remains a flicker of hope—a resilient spirit that refuses to be silenced. In their pursuit of justice, the people of Kware and beyond echo a collective demand: no more bodies should be left to rot in silence, and no more lives should be taken without consequence.

The constitutional framework

At the core of most democratic Constitutions lies the principle of due process—a safeguard intended to ensure fairness and protect individuals from arbitrary state action. This guarantees that every person has the right to be heard and to defend themselves in a court of law before facing severe penalties, including capital

Efforts to reform the Kenya police service and improve accountability mechanisms have been proposed, including changes to the legal framework and increased oversight. However, implementing these reforms effectively remains a significant challenge due to issues like corruption, lack of political will, and systemic weaknesses within the justice system.

punishment. Extrajudicial killings bypass this essential legal process, stripping individuals of their rights and protections, and eroding the rule of law.

Furthermore, the Kenyan Constitution enshrines the right to life as inviolable. The Universal Declaration of Human Rights, which serves as a global benchmark, states unequivocally, "Everyone has the right to life, liberty, and security of person". When state actors engage in extrajudicial killings, they not only violate domestic laws but also contravene international human rights norms that countries are obliged to uphold.

Implications for human rights

Extrajudicial killings create a culture of impunity, wherein those who commit such acts face little to no consequences. This impunity emboldens further violence and abuse, perpetuating a cycle that often targets marginalised communities, activists, and dissenters. The chilling effect on civil liberties is profound—individuals may refrain from exercising their rights to free speech, assembly, and protest for fear of retribution. The resultant environment is one where the state's enforcement of law instils terror rather than safety.

Moreover, extrajudicial killings frequently violate the principle of non-discrimination. Marginalised groups such as ethnic minorities, the poor, and political dissenters are disproportionately affected, revealing systemic biases and often discriminatory state practices. This exacerbates existing societal inequalities and undermines trust between citizens and their governments.

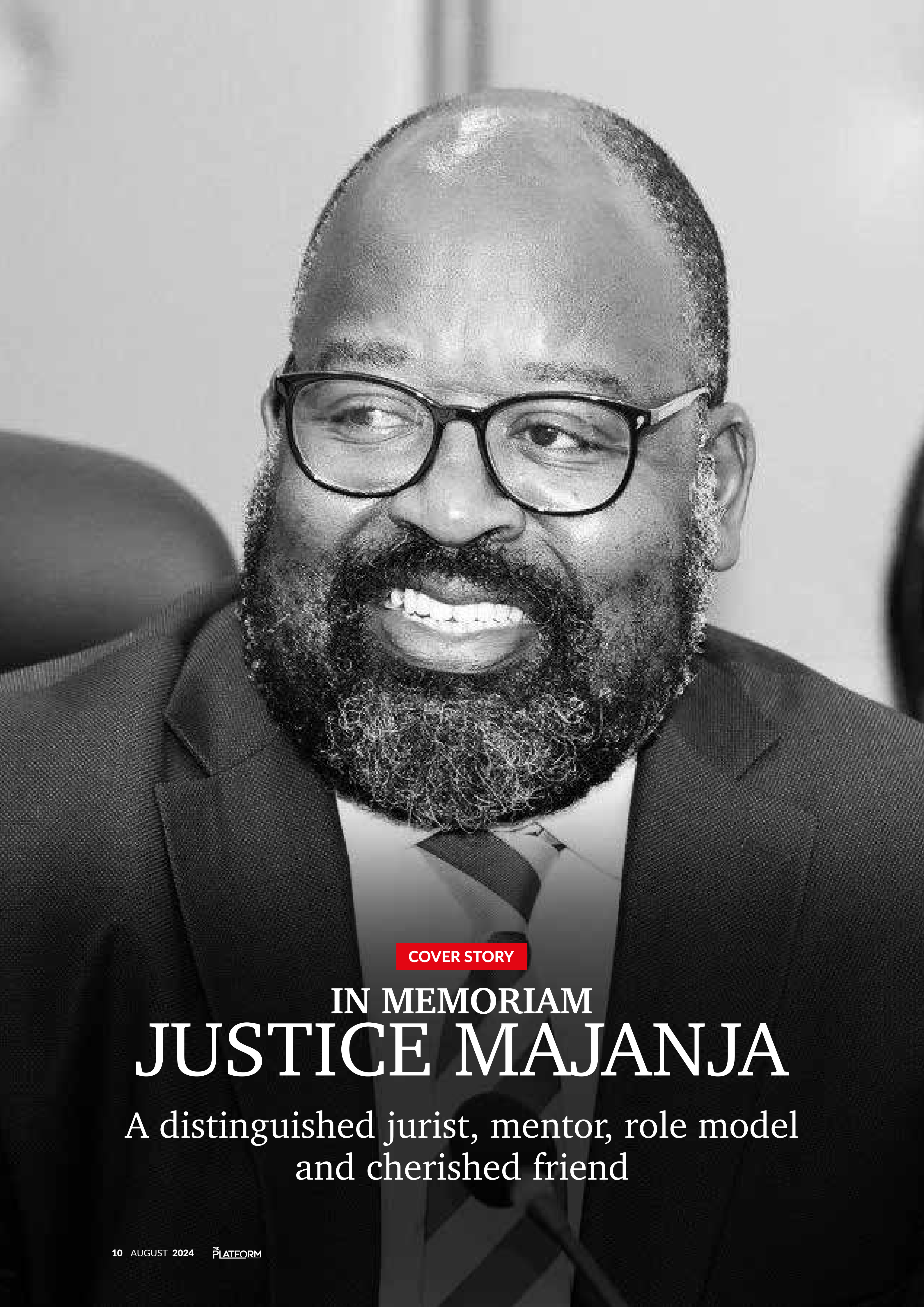
The role of the international community

The international community has a fundamental role in addressing and condemning extrajudicial killings in Kenya. Through diplomatic pressure, economic sanctions, and international legal frameworks, global actors can hold the Kenyan government accountable for human rights abuses. The establishment of independent inquiries into alleged extrajudicial killings is crucial to ensure transparency and accountability.

Human rights organisations, too, play an essential role in denouncing these practices and advocating for the victims. Their documentation and reporting can galvanise public opinion and mobilise action. In a world interconnected by information, the exposure of such violations can no longer remain hidden from view.

Extrajudicial killings strike at the heart of justice, legality, and human rights. They reflect a stark failure of the state to uphold its fundamental obligations to protect and respect human life. As we advocate for a more just and humane society, we must reaffirm our commitment to the principles of due process and the inviolability of human rights. The fight against extrajudicial killings is not just a legal battle but a moral imperative that demands the collective action of citizens, governments, and the international community. Only through vigilance and advocacy can we protect the sanctity of life and the principles enshrined in our constitutions and human rights frameworks.

In light of the recent tragedies in Kware and the unwarranted killings of protestors, it is imperative that justice prevails.
We authoritatively demand that those responsible for these heinous acts be held accountable for their actions. Accountability is not just a legal requirement but a moral imperative to ensure that such atrocities are not repeated. It is crucial that the perpetrators face the full force of the law, and that justice is served for the victims and their families. By doing so, we reaffirm our commitment to upholding the rule of law and protecting the fundamental rights of all citizens. Let this be a solemn reminder that in our pursuit of justice, no one is above the law, and impunity will not be tolerated.



COVER STORY

IN MEMORIAM
JUSTICE MAJANJA

A distinguished jurist, mentor, role model and cherished friend

By Miracle Okumu Mudeyi

O Justice! My Justice!
O Justice! My Justice! Our guide and our star,
The courts are quiet, though your light was far,
The gavel rests, the echoes fade,
In halls where your wisdom ever stayed.

The case was set, the trial long,
And through the storm, your judgments strong,
You faced the storm with a righteous heart,
In Wanjiku's plea, you played your part.

O Justice! My Justice! The scales you did weigh,
With courage and truth, you paved the way,
When rules were harsh, and fairness strained,
You spoke of rights, and justice gained.

The banners flew, the people cheered,
For in your rulings, they held dear,
A beacon bright in darkest night,
Guiding us all with steadfast light.

O Justice! Our Justice! We mourn your name,
Yet celebrate the truths you claim,
In times of doubt and legal test,
You stood for what is right and best.

Rest now, O Justice! Your work is done,
The battles fought, the victories won,
Your legacy, a guiding call,
For justice stands, where you did fall."

1. In Memory of a Unique and Cherished Jurist

To have known Justice David Amilcar Shikomera Majanja and experienced his friendship was a rare and precious gift. A man of singular brilliance and profound warmth, Justice Majanja seamlessly blended intellectual rigour with a generous spirit,

The late Justice David Amilcar Shikomera Majanja

infusing his interactions with kindness, humour, and character. His zest for life was palpable, whether in his dedication to his work, his passion for research, or his love for food. Engaging in conversation with him was always an adventure: he could captivate with an insightful observation one moment and delight with his wry humour the next. While he possessed a noble and serious approach to his work, he never took himself too seriously, a balance that endeared him to all who knew him.

Justice Majanja's untimely passing on 10 July 2024, at the age of 51, leaves an indelible void. It is almost inconceivable that he is no longer among us, yet we remain forever grateful for the time he shared with us and the indelible mark he left on our community. Our deepest condolences go out to his family, friends, and the entire legal fraternity, who have lost not only a remarkable jurist but also a cherished companion.

This piece aims to remember Justice Majanja as both a friend and a mentor, celebrating the remarkable individual he was. His intellect and judgements were not only impressive but also innovative, capable

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The author has drawn inspiration from Walt Whitman's "O Captain My Captain"

of envisioning new pathways in the legal field. His work drew on a broad spectrum of experiences, incorporating insights from various disciplines and demonstrating a keen eye for emerging trends. Justice Majanja's sensitivity to the practical applications of his research extended beyond academia, offering tangible benefits to the broader community.

While we can only speculate on the further contributions he might have made with more time, we choose to honour and celebrate the many accomplishments and contributions he achieved in his distinguished career. Justice Majanja's legacy is one of brilliance, warmth, and a tireless pursuit of justice and knowledge, and it is with deep respect and admiration that we pay tribute to him.

1.1 The Legacy of Justice David Amilcar Shikomera Majanja

"Without a judiciary which can and will administer law fairly and fearlessly between parties, no other guarantee given to the litigants by the law is likely to be of value." This adage highlights the indispensable role of a judge's character and principles. Throughout history, from ancient philosophy to contemporary legal frameworks, the attributes of an ideal judge have been extolled. Socrates said "Four things belong to a judge: to listen courteously, to answer wisely, to consider soberly and to decide impartially".[1]

In the book of Exodus, Jethro advises Moses to establish a judicial system to distribute the burden of resolving legal disputes, which had become overwhelming for him to handle alone.. Jethro advises Moses to seek out "able men, such as fear God, men of truth, hating covetousness".

Modern judicial standards, such as the Bangalore Principles of Judicial Conduct established in 2002, distill these timeless virtues into six core tenets: judicial independence, impartiality, integrity, propriety and the appearance of propriety, equality of treatment to all before the courts, and competence and diligence. These principles are the bedrock of judicial conduct and have been pivotal in shaping the judiciary's role in society. Justice David Amilcar Shikomera Majanja epitomized these virtues. His progressive judicial philosophy and landmark decisions reflected his unwavering commitment to fairness, courage, and integrity. Through his work, Justice Majanja not only upheld these values but also set a benchmark for judicial excellence. His legacy serves as a powerful reminder of the critical importance of these principles in maintaining justice and equity within the legal system.

2. A Deeper Exploration of Justice Majanja's Jurisprudence

Justice Majanja has made a profound impact on Kenyan jurisprudence, influencing both teachers and students of the law, as well as those directly affected by the rule of law. His numerous decisions, characterized by their clarity and deep understanding of legal principles, spanned a wide array of substantive legal areas. I will capture some of those aspects in exploring his public law thought through his decisions.

2.1 The Public Law Legacy of Justice Majanja at the High Court

Champion of Constitutional Integrity

Justice David Amilcar Shikomera Majanja was more than a jurist; he was a beacon of progressive thought in the Kenyan judiciary.

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[1]The origin of this quotation is unknown, yet it is frequently cited in judicial literature.

Justice Majanja presided over numerous cases that have had a considerable impact on Kenyan law and governance. His judgments are often cited for their adherence to constitutional principles and human rights.

His tenure on the bench was marked by a thoughtful commitment to justice and the protection of constitutional rights. A fundamental moment that encapsulates Majanja's judicial philosophy is his decision in ***Wanjiku & another v Attorney General & another***.[2] In this case, he scrutinized Order 22 rule 7 of the Civil Procedure Rules, which allowed for the immediate arrest of a judgment-debtor within court precincts upon an oral application by the judgment-creditor. Majanja astutely recognized this provision as a potential threat to due process, as it deprived the debtor of adequate notice and the opportunity to settle the debt, even if they had the means. By declaring the rule unconstitutional, Majanja not only safeguarded individual rights but also reinforced the judiciary's role as a protector of justice against procedural overreach.

Majanja's judicial pragmatism

In ***Okoiti & 15 others v Attorney General & 7 others***,[3] Justice David Amilcar Shikomera Majanja's tenure exemplified a commitment to upholding the Constitution of Kenya, 2010. The bench's decision in this case were grounded in the principles of leadership and integrity as enshrined in Chapter Six of the Constitution. The court recognized that the people of Kenya, through this Constitution, sought to depart from a history marred by endemic corruption and the misuse and abuse of public office by their leaders, both elected and appointed. This

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[2]See Wanjiku & another v Attorney General & another; Muna & another (Interested Parties) (Petition 190 of 2011) [2012] KEHC 5410 (KLR) (Constitutional and Human Rights).
[3]See Okoiti & 15 others v Attorney General & 7 others; Commission on Administrative Justice & 15 others (Interested Parties) (Constitutional Petition E090,E168,E221,E230,E234,E249, E017,E109 & E010 of 2022 (Consolidated)) [2022] KEHC 3209 (KLR) (Constitutional and Human Rights).

vision necessitated an interpretation of the Constitution that was aligned with its purposes and principles, promoted the rule of law, fundamental rights, and freedoms, and contributed to good governance. Article 259(1) of the Constitution guided this interpretative approach, ensuring that Chapter Six and the provisions governing the electoral process were read in a cohesive manner that fully realized the Constitution's objectives.

The court's pronouncement on the jurisdiction of the High Court was particularly significant. It affirmed that the High Court possessed a broad mandate to adjudicate matters concerning the Constitution, allowing any person to bring forth questions regarding its interpretation. This expansive jurisdiction underscored the court's role as a guardian of constitutional fidelity and a forum for addressing grievances related to constitutional breaches. However, the court also delineated clear boundaries for its role, emphasizing that its function was to resolve actual disputes rather than engage in academic or abstract discourse. This limitation stemmed from the Constitution's deliberate exclusion of advisory jurisdiction from the High Court's remit, ensuring that the court's resources were dedicated to tangible conflicts requiring judicial intervention.

Justice Majanja's bench further rejected the notion of creating a 'harmonization jurisdiction,' which would enable the court to reconcile conflicting decisions in the absence of a live dispute. The court held that harmonization should only occur in the context of an existing and active case with concrete facts, specific allegations of wrongdoing, and identifiable respondents. This decision reinforced the principle that courts are forums for resolving real conflicts, not hypothetical or generalized issues, thus maintaining the integrity and practical relevance of judicial proceedings. Additionally, the court addressed the procedural aspects of pre-election disputes, such as the suitability and eligibility for the nomination of candidates. It affirmed that these matters fell within the primary jurisdiction of the Independent Electoral and Boundaries Commission (IEBC). The High Court's jurisdiction would only be invoked after the IEBC had rendered a decision, ensuring a structured and orderly process for resolving electoral disputes. This delineation of roles between the IEBC and the High Court highlighted a respect for institutional competencies and procedural efficiency.

Justice Majanja's contributions in *Okoiti & 15 others v Attorney General & 7 others* epitomized a judicial philosophy that valued constitutional adherence, institutional respect, and the pragmatic resolution of disputes. His interpretations and decisions provided a robust framework for promoting integrity, accountability, and good governance in Kenya's public sphere. The bench's decision in this case reflected a deep understanding of the Constitution's transformative intent and an unwavering commitment to fostering a just and equitable society. Justice Majanja's legacy in this case, and others like it, remains a testament to his progressive judicial approach and dedication to the rule of law.

Championing Human Dignity: Justice Majanja's Progressive Decision in Republic v S O M

In ***Republic v S O M [2018] eKLR***,[4] Justice Majanja once again underscored his commitment to upholding the principles of public law and human dignity. In this landmark decision, Majanja J. articulated the constitutional imperative of protecting

[4]*Republic v S O M [2018] eKLR.*

High Court Principal Judge Eric Ogola congratulates JSC Commissioner and High Court Judge the late David Majanja for being awarded Judge of the Year by LSK Nairobi Branch for espousing excellence in legal adjudication.

the rights of persons with disabilities, a tenet that is enshrined in Article 28 of the Constitution, which guarantees the right to be treated with dignity. Further reinforcing this right, Article 54(1)(a) stipulates that individuals with disabilities must be treated with respect and addressed in a manner that is not demeaning. Majanja's decision was not only grounded in national constitutional provisions but also aligned with Kenya's international obligations under the Convention on the Rights of Persons with Disabilities, incorporated into domestic law by Article 2(6) of the Constitution.

Majanja J. critically analyzed the provisions of section 166 of the Criminal Procedure Code (CPC), which mandates that after a special verdict, the court's duty concludes with the accused's detention pending the President's decision. Drawing on the precedent set by Mativo J. in *AOO and 6 Others v Attorney General*, Majanja J. emphasized that the imposition of punishment in criminal matters, including the assessment of its severity, is inherently a judicial function, not an executive one. This principle was further supported by the Supreme Court's decision in the *Muruatetu* case, which stressed the judiciary's exclusive role in determining the guilt of the accused and the terms of their sentence.

Majanja J. found the vesting of discretion in the President regarding the treatment of the accused post-conviction to be fundamentally inconsistent with the judiciary's constitutional mandate. This discretion, he argued, undermines the judiciary's role and violates the right to a fair trial as protected under Article 25 of the Constitution. Article 2 of the Constitution invalidates any law inconsistent with the Constitution to the extent of the inconsistency, and section 7(1) of the Sixth Schedule empowers courts to modify existing laws to conform with constitutional standards.

In his decision, Majanja J. declared section 166 of the CPC unconstitutional, to the

extent that it transfers the judicial function of determining the nature and consequence of the sentence to the executive. To remedy this constitutional defect, he directed that references to "the President" in section 166 should be read as "the Court." This modification ensures that the court, not the President, periodically reviews the detention of the accused, taking into account expert evidence and other relevant factors before making appropriate orders within a defined period of detention.

Majanja J. recognized the antiquated foundations of section 166, rooted in 18th-century legal perspectives on mental health. He acknowledged the advancements in modern psychiatry and human rights standards that have significantly improved the treatment of persons with mental disabilities within the criminal justice system. By declaring section 166 unconstitutional and mandating judicial oversight for periodic reviews, Majanja J. not only aligned the law with contemporary human rights standards but also reinforced the judiciary's pivotal role in the administration of justice. His decision in Republic v S O M [2018] eKLR stands as a testament to his progressive judicial philosophy and unwavering dedication to upholding constitutional principles and human dignity.

Balancing Privacy and Public Duty: Justice Majanja's Landmark Surrogacy Judgment

In the landmark case of ***JLN & 2 others v Director of Children Services & 2 others; Kenya National Human Rights Commission & another***,[5] Justice Majanja delivered a seminal judgment that underscored his deep commitment to the interplay between individual rights and public duties. Majanja upheld the notion that the right to privacy, while fundamental, is not absolute. This principle was particularly relevant in the context of patient confidentiality. Justice Majanja articulated that the right to privacy protects personal and family information from unnecessary disclosure, yet it can be overridden under certain circumstances, especially when public safety is at stake. The case illustrated this balance as he delineated clear principles under which a doctor could disclose confidential information: a real and serious risk to public safety, disclosure to a person with a legitimate interest, and limiting the disclosure to what is strictly necessary.

At the heart of the case was the legal conundrum surrounding the registration of a child born through surrogacy, a matter complicated by the absence of a specific legal framework in Kenya at the time. The petitioners, intending for the second and third petitioners to be recognized as parents, clashed with the hospital's statutory duty to record the first petitioner, the birth mother, as the parent under the Births and Deaths Registration Act. Justice Majanja's interpretation was meticulous, grounding his decision in the statutory definitions and duties. He affirmed that the hospital acted within the law, recognizing the birth mother as the immediate custodian and responsible party for the child, in the absence of surrogacy legislation.

In a society increasingly turning to surrogacy, Majanja's decision emphasized the urgent need for legal structures to address the complexities of such arrangements. He acknowledged the distress caused by the Director of Children Services' actions, which, in attempting to navigate the legal vacuum, resulted in the violation of the petitioners' and children's rights.

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[5] JLN & 2 others v Director of Children Services & 2 others; Kenya National Human Rights Commission & another (Interested Parties) (Petition 78 of 2014) [2014] KEHC 7491 (KLR) (Constitutional and Human Rights).

Justice Majanja was also known for his engagement with the public and various stakeholders on legal issues, often participating in forums and discussions aimed at enhancing legal understanding and promoting justice.

The Director's failure to act in the best interest of the children, as mandated by the Children Act, was a significant point of critique. Justice Majanja asserted that even in the absence of explicit laws on surrogacy, decisions should be made based on the constitutional principle of the best interests of the child, as enshrined in Article 57 of the Constitution.

Moreover, Majanja's judgment highlighted the international legal standards protecting children's rights, referencing the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. These instruments underscore every child's right to certainty of parentage, family, a name, and freedom from discrimination. Justice Majanja's decision thus called for the state to establish a legal framework for surrogacy to safeguard these fundamental rights. In sum, Justice Majanja's decision in this case is a testament to his judicious balancing of rights and duties, and his forward-thinking approach to evolving societal norms. His decision not only resolved the immediate legal issues but also laid the groundwork for future legislative developments in Kenya, ensuring that children's rights and the dignity of all involved are upheld.

A Beacon of Justice: Striking Down Barriers to Access to Justice

Justice David Majanja's obligation to public law principles was vividly illustrated in the landmark case of ***Okenyo Omwansa George & Another v Attorney General & 2 Others [2012] eKLR***. Here, Justice Majanja reaffirmed the Constitution's preamble, which envisions a government founded on human rights, equality, freedom, democracy, social justice, and the rule of law. These aspirations are concretized in Article 10 and the Bill of Rights, demanding an accessible and informed legal system. Justice Majanja astutely observed that

for Kenya to realize a just society, legal services must be both accessible and comprehensible to the populace. He posited that the prohibition on advocates' advertising impedes these constitutional objectives. Advocates, he emphasized, serve as crucial conduits between the citizenry and the law, facilitating the understanding and exercise of legal rights and obligations. This role is fundamental to justice, enabling individuals to navigate legal complexities in personal and professional spheres. By restricting advocates from disseminating information about their services, Rule 2 of the Advocates (Practice) Rules effectively curtails access to justice. Justice Majanja found this restriction inimical to the constitutional mandate of ensuring that every Kenyan has the necessary information to access legal services. He declared that such a ban undermines the rights enshrined in Articles 35(b), 46, and 48 of the Constitution, which guarantee the right to information, consumer rights, and access to justice, respectively. Therefore, Justice Majanja ruled that Rule 2's complete ban on advertising was unconstitutional. This decision not only struck down an archaic regulation but also underscored the essential role of legal practitioners in democratizing legal knowledge and safeguarding the public's right to justice. It was a profound affirmation of the principle that access to legal information is a cornerstone of a fair and just society.

Upholding Constitutional Integrity: Justice Majanja's Stern Reprimand to the Office of the Attorney General

Justice Majanja's unwavering commitment to constitutionalism is vividly illustrated in his decision in ***Joseph Ihugo Mwaura & 82 Others v Attorney General & 2 Others [2012] eKLR***. In this decision, Justice Majanja meticulously critiqued the Office of the Attorney General for neglecting its constitutional duties, emphasizing the paramount importance of the rule of law. He criticized the Attorney General for failing to fulfill his duty to notify relevant state agencies of court decisions and orders affecting them.[6]

He stated, ***"In my view, the Office of the Attorney General bears great responsibility in ensuring that the rule of law is not undermined. Article 156 of the Constitution imposes on that office and all those officers who serve under it a specific obligation. Article 156(6) is clear that, "the Attorney General shall promote, protect and uphold the rule of law and defend public interest." Clearly by permitting the demolition to proceed in light of a clear court order, the office of the Attorney General did not live up to its responsibilities and failure to live up to its responsibilities has undermined the rule of law and the petitioners' rights under Article 43. I would hold that it is the unconditional obligation of the Office of the Attorney General and those who act under it, to inform the every State organ, department, state organisation or any public officer affected by an existing of a court order immediately it is made or known and ensure compliance therewith. This is the duty cast upon by Article 156(6) and it cannot be avoided by trick or device."***

Furthermore, Justice Majanja expressed himself strongly in ***Kenya Bus Service Ltd & Anor v Minister For Transport & 2 Others [2012]eKLR as, " Before I sign off this judgment I must deprecate the conduct of the office of the Attorney General which I have alluded to at paragraph 8 and 9 of this judgment. The Office of Attorney***

[6]See Jill Cottrell and Yash P Ghai, The Legal Profession and the New Constitutional Order in Kenya (Strathmore University Press 2014) 161.

General is a constitutional office with special responsibilities under Article 156(4) particularly representing the national government in court. By virtue of Article 156(6), the Attorney General is required to promote, protect and uphold the rule of law and public interest. It is imperative that in proceedings such these that the voice of the Attorney General is asserted in order to assist the court. Failure to take this responsibility seriously by that office and its officers is a dereliction of duty. I shall say no more."

The Sovereignty of the People: Majanja J's Vision of Public Participation in Kenya's Constitutional Framework

One of the most invigorating aspects of the Constitution lies in its deep-seated commitment to national values and principles of governance, vividly captured in Article 10. This article embodies the Constitution's ambitious vision for transformative governance. In his jurisprudence, Justice Majanja skillfully illuminated these foundational principles, placing them at the heart of Kenya's democratic evolution. His judgment in ***Association of Gaming Operations Kenya & 41 Others v. Attorney General & 4 Others*** stands as a testament to this approach.[7] Majanja J eloquently asserted that public participation is not merely a procedural formality but a fundamental expression of the people's sovereignty, as enshrined in Article 1. He articulated that Article 10, which elevates public participation to a national value, is intrinsically linked to this sovereignty. He stated, ***"Public participation as a national value is an expression of the sovereignty of the people articulated in Article 1 of the Constitution. The golden thread running through the Constitution is one of sovereignty of the people of Kenya and Article 10 that makes public participation a national value is a form of expression of that sovereignty."*** Thus, Majanja J's interpretation underscored the Constitution's pivotal role in fostering genuine and participatory governance.

Redefining Jurisdiction: Justice Majanja's Pioneering Decision on the Industrial Court's Role in Constitutional Rights

Determining jurisdiction over the enforcement of rights and fundamental freedoms has frequently presented a complex challenge, especially when contrasting the roles of the High Court with those of the equal-status courts in the post-2010 Constitutional law dispensation. In ***United States International University v Attorney General & 2 Others (2012) eKLR***, Justice Majanja made a groundbreaking determination on the jurisdictional boundaries of the then newly established Industrial Court.This was one of the pioneering judgments in this area that came from the Constitutional division of the High Court, where the question of the Industrial Court's jurisdiction was critically examined.

Justice Majanja, addressed the issue of whether the Industrial Court possessed the authority not only to adjudicate labour rights enshrined in Article 41 of the Constitution but also to extend its jurisdiction to all fundamental rights incidental to employment and labour relations. His decision is notable for its interpretation of the constitutional framework, emphasizing that the Industrial Court, upon its establishment, should be empowered to enforce a comprehensive range of rights that intersect with employment law. Justice Majanja's decision was a significant departure from conventional interpretations, establishing that the Industrial Court was not just a venue for labor disputes but also had the

[7] Association of Gaming Operators-Kenya & 41 others v Attorney General & 4 others [2014] eKLR.

Majanja's contributions to the legal field will forever be a beacon of judicial integrity, ensuring that the principles of fairness, accountability, and transparency remain at the forefront of administrative law in Kenya.

authority to address broader constitutional issues related to employment.
The High Court, following this decision, undertook the task of transferring employment and labour relations matters that were previously filed under its jurisdiction to the newly established Industrial Court. This procedural shift was grounded in the constitutional stipulations of Articles 162(2) and 165(5), which delineate the jurisdictional boundaries of various courts. The contention highlighted a critical debate: whether the High Court could transfer such matters, given that it retained constitutional responsibilities under Article 162(2) related to fundamental rights enforcement.

Justice Majanja's analysis was profoundly influential in shaping this discourse. He noted that both the Industrial Court Act, 2011, and Article 165 of the Constitution did not explicitly address the jurisdictional scope of the Industrial Court concerning constitutional interpretation and fundamental rights enforcement.
He argued for a holistic view of the Constitution, asserting that its provisions should be interpreted in a cohesive manner to avoid fragmentary applications. According to Majanja, the jurisdiction of the High Court under Article 165 did not necessarily preclude the Industrial Court from addressing issues of constitutional interpretation and rights enforcement. The Judge posited that limiting the Industrial Court's jurisdiction to purely labour and employment matters could result in a fragmented legal landscape, fostering parallel jurisdictions between the High Court and the Industrial Court. Such

fragmentation, he warned, would not only encourage forum shopping but also undermine the consistency and stability essential for the fair administration of employment and labour law. Justice Majanja's ruling underscored the necessity of a unified approach to the enforcement of rights and freedoms within the ambit of employment law. By affirming the Industrial Court's broad jurisdiction, the judgment paved the way for a more coherent and predictable legal framework, ensuring that all related rights and constitutional interpretations were handled within a singular, competent forum. This approach reinforced the principles of legal certainty and integrity, fundamental to the effective administration of justice.

Justice Majanja's Legacy in Public and Tax Law

In ***Ndirangu t/a Ndirangu Hardware v Commissioner of Domestic Taxes (Tax Appeal E070 of 2021***,[8] the Justice Majanja's decision highlighted his deep understanding of the intersection between public law and tax law. He found that the Commissioner's failure to provide reasons for rejecting the appellant's objection was more than a procedural misstep; it was a stark violation of the principles enshrined in Article 47 of the Constitution. Justice Majanja's decision was a thorough examination of the constitutional mandate that administrative actions must be expeditious, efficient, lawful, reasonable, and procedurally fair. He articulated that the duty to give reasons, as mandated by section 51(10) of the Tax Procedures Act, is a cornerstone of fair administrative practice, embedded in our constitutional framework. His decision highlighted that administrative decisions devoid of reasons are not only procedurally defective but also constitutionally infirm, drawing a clear line between mere administrative convenience and the imperatives of justice and transparency. Justice Majanja's decision resonated through the legal corridors, drawing from cases like *Total Kenya Ltd v Kenya Revenue Authority and Suchan Investment Limited v Ministry of National Heritage and Culture*, thereby reinforcing the judiciary's role in curbing arbitrary administrative actions. In setting aside the Commissioner's decision, Justice Majanja did not just correct an administrative wrong; he strengthened the jurisprudence that mandates accountability and transparency in public administration. His insistence that administrative bodies must provide cogent reasons for their decisions is a testament to his commitment to upholding constitutional rights, ensuring that every administrative action stands the test of legality and reasonableness. This case stands as an example of his judicial philosophy that administrative power must be exercised within the bounds of fairness and justice. Justice Majanja's legacy is etched in his relentless pursuit of justice, his sharp legal acumen, and his unwavering dedication to protecting the rights of individuals against the excesses of administrative power. His decisions in tax law and public law are not mere judgments; they are enduring principles that continue to guide and inspire the legal fraternity. Justice Majanja's contributions to the legal field will forever be a beacon of judicial integrity, ensuring that the principles of fairness, accountability, and transparency remain at the forefront of administrative law in Kenya.

3. Concluding Thoughts

I have highlighted some of the most notable judicial contributions made by Justice David Amilcar Shikomera Majanja during his 13-year tenure. These contributions reflect his significant impact on the legal landscape and his unwavering commitment to justice.

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[8]Ndirangu t/a Ndirangu Hardware v Commissioner of Domestic Taxes (Tax Appeal E070 of 2021) [2023] KEHC 19357 (KLR).

Justice Majanja's work will continue to be a significant part of Kenya's evolving legal landscape, contributing to the country's efforts to strengthen the rule of law and uphold justice.

Simply listing these achievements without context would not fully convey the depth of Justice Majanja's influence.

Justice Majanja's rulings and judgements were more than just legal decisions; they represented key moments in advancing constitutional rights and maintaining judicial integrity. His time on the bench was characterized by a strong commitment to fairness and a deep respect for legal principles. Through his landmark judgments and forward-thinking interpretations, he not only resolved individual cases but also contributed to the broader evolution of the law.

Considering his legacy, it is evident that Justice Majanja's impact extends beyond his judicial decisions. His work has set a high standard for judicial conduct and has inspired many within the legal field. The true significance of his contributions is not found in a mere list of cases but in the lasting effect his decisions have had on the justice system.

Overall, the importance of Justice Majanja's contributions is clear. His judicial career serves as a compelling example of how thoughtful and principled adjudication can shape the pursuit of justice. His legacy, firmly established in our legal history, continues to guide and inspire those who are committed to upholding the rule of law.

Miracle Okoth Okumu Mudeyi is a lawyer, currently studying at the Kenya School of Law, and serves as an Editorial Researcher for this publication.

An Ode to Maj

By Hon. Justice (Prof.)
Joel Ngugi

To me, You were simply - Maj. Since 1987.
At the Junior Quadrangle.
Brilliant. Almost illegally so.
Yet unassuming.

You could play the piano; as good as you could
solve the complex problems in Abbot; and as well as
you could recall theBolshevik Revolution.

Almost forced to do medicine, you found your
way to our law class two weeks in.
And became the towering legal mind you have
always been. You raged into law school.
And onto legal practice where you raged
into trial advocacy fame.

Through it all, keeping your heart clean; your
soul pristine; your conscience loud; your roaring
laughter near. Before finally scripting history as a
towering Judge Kenya's very finest.

You raged into judicial history in your remarkable
jurisprudence and brilliant judge-craft;
Always ideologically progressive even in the
mundane, the quotidian, and the routinised;
Spying the political stakes in law where most saw
only blackletter rules.

But now, you are no more.
And I must ask you, Maj: Did you rage into the night?
Against the dying light*?
Please assure me that you did;
For that will be my only salve in this darkly
inconsolable and obsidian night.

**Culled from Dylan Thomas, Do not go gentle
into that good night.*

**Hon. Justice (Prof.) Joel Ngugi is a
Judge of the Court of Appeal in Kenya**

Tribute to Justice David Majanja

By Hon. Justice Martha K. Koome

Justice Majanja lived by a mantra you will find pinned on his X (formerly Twitter) handle @kenyanjurist: "Law is my Life: Justice is my Blood." This mantra epitomised his distinguished career as a legal practitioner, his years of service as a Judge of the High Court, and his tenure as a Commissioner of the JSC. It reflects his commitment to upholding the rule of law and ensuring the fair administration of justice. He dedicated his life to these principles, applying the law impartially to ensure equal justice for all.

Justice Majanja made significant contributions to the administration of justice and the development of our jurisprudence. Among his numerous landmark decisions, two stand out for their emphasis on access to justice and the rule of law. In **Kenya Bus Service Ltd & Another vs. Minister for Transport & 2 others (2012)**, he held that the mandatory 30-day notice of intention to sue the government violated the right of access to justice and constituted an unjustified limitation in a democratic society. He poignantly noted: "By incorporating the right of access to justice, the Constitution requires us to look beyond the dry letter of the law. The right of access to justice is a reaction to and a protection against legal formalism and dogmatism.… Where the state is at the front, left and center of the citizen's life, the law should not impose hurdles on accountability of the Government through the courts."

In **Samura Engineering Ltd & Others vs. Kenya Revenue Authority (2012)**, Justice Majanja acknowledged the new dawn of a rule of law-based state and society brought by the 2010 Constitution. He notably observed: "By placing the values of rule of law, good governance, transparency, and accountability at the center of the Constitution, we must now embrace the culture of justification which requires that every official act must find its locus in the law and underpinning in the Constitution."

Justice Majanja was a diligent and hard-working judge. Despite his duties as a Commissioner at the JSC, he consistently delivered judgments on time and was frequently among the judges with the highest number of judgments delivered in the Judiciary.

At the JSC, he played a pivotal role in developing various policies and programmes. He was passionately committed to institution-building initiatives aimed at making both the JSC and the Judiciary efficient and responsive to the justice needs of the Kenyan people. Justice Majanja was a devoted servant of our nation, and his death leaves an irreplaceable void. His profound impact on our justice institutions and the rule of law is indelible. We have been privileged to witness his intense, abiding devotion to both.

We extend our prayers and sincere condolences to his family, friends, colleagues, and the Judiciary and JSC family.

Hon. Martha K. Koome is the Chief Justice and President of the Supreme Court of Kenya

Tribute to the late

Hon. Justice Daniel Ogembo Ogola

By Hon. Justice Martha K. Koome

On behalf of the Judiciary and the Judicial Service Commission, it is with profound sadness that I announce the sudden passing of Hon. Justice Daniel Ogembo Ogola, Judge of the High Court of Kenya.

Justice Ogembo joined the Judiciary as a Magistrate in 2004 and was subsequently appointed Judge of the High Court in 2016. At the time of his passing, he was the Presiding Judge at the Siaya Law Courts.

We received the news as we were paying our final respects to Hon. Justice Majanja at the Friends International Centre, Ngong Road. The untimely passing of Hon. Justice Ogembo comes at a trying time for the Judiciary, Judicial Service Commission and the nation at large.

This is a deep blow to the Judiciary family, the legal fraternity and our country. We are all devastated.

Hon. Justice Martha K. Koome, EGH is the Chief Justice and Chairperson of the Judicial Service Commission

Tribute in memory of

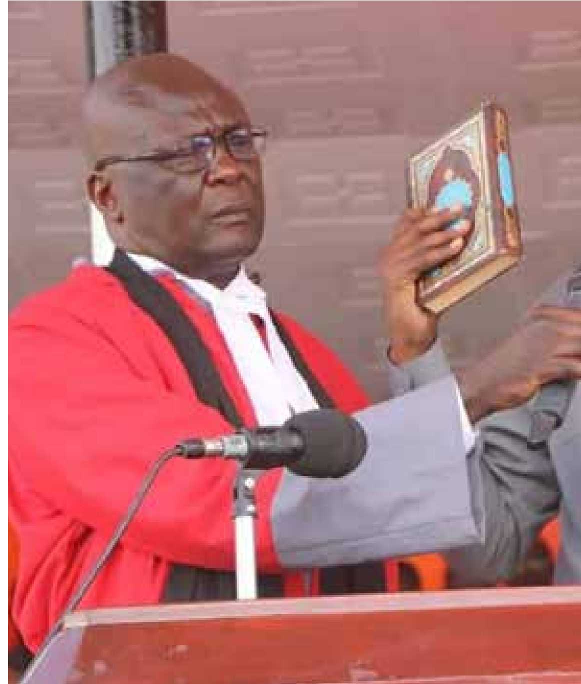
Hon. Justice Daniel Ogembo Ogola

Hon. Justice Martha Koome, EGH

1. The philosopher Socrates once said, "Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially". Justice Daniel Ogembo Ogola epitomised these virtues, embodying the very essence of a model judge. His demeanour was calm and humble, and his respect for others profound. He was not only a keen listener but also an astute thinker whose jurisprudential contributions will continue to enrich our legal landscape especially in the area of criminal law where he delivered numerous path-charting decisions while serving as a Judge at Eldoret Law Court, the Milimani Criminal Division and as the Presiding Judge at Siaya High Court at the time of his untimely passing.

2. Justice Ogola's journey in the Judiciary began in 2004 when he joined as a Senior Resident Magistrate. Through sheer hard work and dedication, he quickly rose through the ranks, becoming a Chief Magistrate and eventually a Judge of the High Court in 2016. His ascent was a testament to his commitment and passion for justice.

3. During my visit to Siaya in June 2023 to launch the Siaya Law Court, I witnessed firsthand his exceptional ability to work collaboratively with stakeholders. He brought together stakeholders in the justice sector, fostering coordination and collaboration to ensure the seamless delivery of justice. His dedication to this cause was evident in every interaction.



The late Hon. Justice Daniel Ogembo Ogola

4. Another thing that struck me during my visit to Siaya was Justice Ogola's unwavering commitment to ensuring access to justice for the vulnerable. His dedication to survivors of gender-based violence led to the establishment of a Special Gender-Based Violence Court at the Siaya Law Court. Furthermore, under his leadership, Siaya developed one of the most vibrant Children's Court Users' Committees in the country, prioritizing children's issues and concerns within the justice system. His compassion knew no bounds.

5. We extend our deepest condolences to his family, friends, and colleagues within the Judiciary. The loss of Justice Ogola is felt profoundly by all who knew him and by those who benefited from his wisdom and compassion.

May his soul rest in eternal peace.

Celebrating the life and legacy of JSC Commissioner Hon. Justice David Majanja

The untimely death of Commissioner Justice David Majanja has left an immeasurable void in the Judicial Service Commission. We are deeply devastated by the loss of a key pillar whose wisdom, dedication and unwavering commitment registered towering achievements in the administration of justice in Kenya. During his tenure as a Member of the JSC which lasted over half a decade, Commissioner Justice Majanja rendered exemplary service to the commission and the nation. His tenure was characterised by a relentless pursuit of excellence, a profound understanding of the law, and a genuine passion for ensuring justice for all. He was compassionate, a fountain of wisdom and a mentor to many. Commissioner Justice Majanja was a colleague who inspired through his actions, and a Judge whose decisions reflected his deep sense of justice and equity. His legacy will continue to influence and inspire the commission and the administration of Justice for years to come. His re-election to the commission on 25th May 2024 served as a testament to the trust and respect he commanded within the judicial community and the recognition of his past contributions and a hopeful anticipation of further positive changes he was poised to bring. Commissioner Justice Majanja was a giant of justice and has left behind a legacy that will continue to have a lasting impact on the administration of justice in Kenya. As we mourn his passing, we also celebrate a life dedicated to the noble cause of justice. Fare thee well Commissioner Justice David Majanja.

The late Justice David Amilcar Shikomera Majanja

The Judicial Service Commission is established under Article Article 171(1) of the 2010 Constitution of Kenya to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice.

The life and legacy of Justice David A. S. Majanja: The grand master of Kenya's jurisprudential transformation project

By Tioko Emmanuel Ekiru

1.0 Introduction

On July 11, 2024, the Kenyan people, and indeed the world at large, were plunged into mourning following the sad news of the demise of a deeply revered jurist of the Kenyan High Court and a member of the Judicial Service Commission (JSC), Justice David Amilcar Shikomera Majanja. To his countless admirers, and with a flood of goodwill messages and tributes, Justice David Majanja was seen as a visionary advocate for social justice, a principled workaholic, and an idealistic jurist with a remarkable combination of humility and brilliance, graced with a solid understanding of the law.

He was a devoted friend to many, a mentor, a father, a husband, a patriot, a cherished oracle of the law, and a historic figure who served on the Kenyan bench during the significant period following the enactment of the 2010 Constitution. Chief Justice Martha Koome, in her eulogy for Justice Majanja, described him as a towering figure in the development of Kenya's transformative post-2010 jurisprudence and a crucial pillar in the institution-building of the JSC and the Judiciary. The Reverend Dr. Martin Luther King Jr. once said that the arc of the moral universe bends towards justice. Justice David Majanja exemplified this belief through his steadfast commitment to the rule of law and the Constitution. As one of the first-generation judges to serve during the critical post-2010 constitutional period, Justice Majanja will be remembered for his meticulous application of the law, always striving to do what was right. Even under extremely difficult circumstances, he preserved the edifice of the rule of law, constitutionalism, and equal access to justice. He interpreted statutes in conformity with the Constitution, thereby expanding access to justice for all, regardless of social status. He embodied the adage of Justice Oliver Wendell Holmes Jr. that it is possible for a man—or a woman, as he might have said—to live greatly in the law.[1]

This essay is divided into three parts. The first part is an introduction. The second part constitutes a non-exhaustive biography of Justice David Majanja, highlighting his life, experience and career trajectory before and after his appointment to the judiciary to the period he passed on. The second part surveys Justice Majanja's jurisprudential philosophy and how it has shaped Kenya's transformative project.

2.0 Background and context: Justice David Majanja's profile

Justice David Amilcar Shikomera Majanja was born in Kisumu on 7 April 1973 to the

[1]See Oliver Wendell Holmes, Jr., The Profession of Law, in SPEECHES 22, 23 (1891).

family of Gerishom and Bilha Majanja. He attended Hill School in Eldoret and Alliance High School before attaining his Bachelor of Laws (LLB) degree at the University of Nairobi in 1996. he completed a postgraduate diploma in law at the Kenya School of Law and was subsequently admitted to the bar in 1998. He later earned a Master of Laws (LLM) degree in International Trade and Investment Law in Africa from the University of Pretoria, South Africa, in 2005.

Justice Majanja began his legal career as an Advocate, venturing into private practice and specialising in civil and commercial law. He worked for Mohammed and Muigai Advocates and Onyango and Ohaga Advocates before founding Majanja Luseno and Company Advocates in 2007. He also served as assisting counsel in public interest litigation cases, including the Commission of Inquiry into the Post-Election Violence in Kenya (Waki Commission).

Following his successful and distinguished career in private practice, Justice Majanja was appointed to the High Court in 2011. He served during a significant period of the Kenyan post-2010 dispensation alongside colleagues such as Justice Daniel Musinga (as he then was), Justice Mumbi Ngugi (as she then was), Justice Isaac Lenaola (as he was), the late Justice Louis Onguto, and Justice Aggrey Muchelule.

Given his commitment to justice, he was deployed to various court stations across the country, including the Homa Bay, Migori, Kisumu, and Kisii High Courts, the Constitutional and Human Rights Division, the Commercial and Tax Divisions, and the Milimani High Court Civil Division, where he served until his untimely demise.
Justice Majanja held several leadership positions within the judiciary. He was first elected to be a commissioner representing the Kenyan Magistrate and Judges Association at the JSC on May 14, 2019, for a five-year term following the end of Judge Aggrey Muchelule's tenure as JSC male representative. After completing his term, he was re-elected for a second term and sworn in as a member (commissioner) of the JSC on May 28, 2024.

Justice Majanja also served in other significant positions, including Chair of the Human Resource Management Committee of the JSC, member of the Audit, Governance, and Risk Management Committee, and the Learning and Development Committee.
He was a member of the Judiciary Rules Committee and served as the Vice-chairperson of the Judiciary Working Committee on Election Preparations (JWCEP) and the Presiding Judge at the Homa Bay High Court and Migori High Court.

3.0 Understanding Justice David Majanja's contribution to Kenyan jurisprudence and legal thought

Serving the judiciary during the profound period of Kenya's post-2010 constitutional order, Justice Majanja's decisions, whether as part of a multi-member bench or as a single judge, have had significant ramifications for both the current and future generations. This section examines how Justice Majanja's jurisprudence played a pivotal role in shaping the post-2010 constitutional order.

3.1 Constitutionalised administrative actions should be justified in compliance with the law

Since the widely acclaimed jurist and scholar Etienne Mureinik coined the phrase "*culture of justification*," it has gained global momentum and is seen by leading thinkers and constitutional theorists as an apt depiction of limiting and policing state power.[2] Mureinik described a culture

[2]see Walter Khobe, 'commentary on Mr. Justice Mativo: *Lion of the Constitution*', the Platform for Law, Justice and Society pp.14-22.

of justification as "*a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defense of its decision, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.*"

With this understanding, Justice Majanja, in *Samura Engineering Ltd & Others v. Kenya Revenue Authority*,[3] underscored the importance of justifying the exercise of public power. This case concerns the statutory powers of search and seizure exercised by officers of the Kenya Revenue Authority in executing their mandate and whether this exercise violated the petitioners' rights and fundamental freedoms. In determining the case, Justice Majanja recognised that the 2010 Constitution had constitutionalised administrative actions, requiring that all exercises of public power be justified as being in compliance with the law. He further emphasized that by placing the values of the rule of law, good governance, transparency, and accountability at the center of the Constitution, we must embrace a culture of justification, which requires that every official act must find its basis in the law and underpinning in the Constitution.

This decision by Justice David Majanja is important for two reasons. First, it underscored the necessity for tax authorities to strictly adhere to all legal procedures in a sound and transparent manner. Second, the decision signifies the moral regeneration of a new culture and discourse of administrative law that is legally sound and lies at the heart of the post-2010 constitutional order.

3.2 The right of access to justice as a reaction to and protection against legal formalism and dogmatism

Article 20(4)(a) of the Constitution of Kenya provides that, in interpreting the Bill of Rights, the court should promote the values underlying an open and democratic society based on human dignity, equality, equity, and freedom. Additionally, Article 21(3) requires the court to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious, or cultural communities.

Furthermore, to ensure equality and non-discrimination for all individuals, regardless of their status in society, the Constitution, by virtue of Article 27(6), obligates the State to fully realise the right to equality and freedom from discrimination. This includes taking legislative and other measures, such as affirmative action programs and policies, designed to redress any disadvantages suffered by individuals or groups due to past discrimination.

In this regard, Justice Majanja recognised, in the case of *Kenya Bus Service Ltd & Another v minister for Transport & 2 Others*[4], the place of social justice and access to justice in adjudication in the post-2010 era as follows:

> *"By incorporating the right of access to justice, the Constitution requires us to look beyond the dry letter of the law. The right of access to justice is a reaction to and a protection against legal formalism and dogmatism. (See "Law and Practical Programme for Reforms" (1992) 109 SALJ 22) Article 48 must be located within the constitutional imperative that recognises the Bill of Rights as the framework for social, economic and cultural policies. Without access to justice the objects of the Constitution which is to build a society*

[3] [2012]eKLR.
[4] [2012]eKLR.

founded upon the rule of law, dignity, social justice and democracy cannot be realised for it is within the legal processes that the rights and fundamental freedoms are realised. Article 48 therefore invites the court to consider the conditions which clog and fetter the right of persons to seek the assistance of courts of law."

In the above excerpt, Justice Majanja addressed all consumers of justice, urging them to move beyond their traditional roles to effect justice for all, including underprivileged members of society such as women, older adults, persons with disabilities, children, youth, and members of minority or marginalised communities, to enable them to lead dignified lives. The case underscores and emphasises the essential nature of access to justice as a fundamental human rights pillar in a functioning democracy like ours.

3.3 Detention of persons with mental health at the pleasure of the President is unlawful

Like the Criminal Procedure Code (CPC), the Penal Code has colonial origins, though it has undergone some reforms to comply with the 2010 Constitution. Similarly, the Penal Code uses derogatory language when referring to persons with intellectual and psychosocial disabilities. For instance, in Republic v SOM, Justice David Majanja lamented the use of words such as 'lunacy,' noting they reflect the 18th-century foundations of the current law.

While the protection the Penal Code offers to persons with intellectual and psychosocial disabilities is crucial for their well-being, it requires a thorough lexical review to remove outdated derogatory terms, as mentioned in the case above. In this case, the High Court invalidated Section 166 of the CPC because it removed discretion from the courts, contrary to Article 160 of the 2010 Constitution, and imposed an indeterminate sentence, violating the right to freedom from torture, cruel, inhuman, and degrading treatment.[5]

According to the High Court, the mandatory wording of Section 166 of the CPC denied the court discretion to make a favourable decision based on the nature of an accused person's mental health condition. Instead, it vested discretion in the President to determine the conditions under which an accused person would serve their sentence, whether in prison or a mental health institution. This finding was informed by the 2017 groundbreaking decision in *Francis Karioko Muruatetu and another v Republic*, where the Supreme Court held that 'it is the judicial duty to impose a sentence that meets the facts and circumstances of the case.'[6]

Justice David Majanja understood this to mean that a law leaving the length of the sentence to another authority violates the rights of the accused. It is in this context that he directed the reform of the Penal Code, finding that the detention of persons with mental health conditions at the pleasure of the President was unlawful and violated their right to human dignity.[7]

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[5]Republic v SOM, para 10. Other judges, such as Justice Chitembwe in HM v Republic, High Court Criminal Appeal (HCCrA) 17 of 2017, Judgement of the High Court at Meru on 9 November 2017, eKLR, have concluded that indefinite sentences excessive and violates the dignity of the accused person. Justice Mativo in AOO & 6 others v Attorney General & another, Constitutional and human rights petition 570 of 2015, Judgement of the High Court at Nairobi on 12 May 2017, eKLR, found that detention at the president's pleasure vested judicial powers into the Executive to determine the duration of an individual's sentence and thus is in breach of the doctrine of separation of powers.
[6]See Majanja in Republic v SOM, para 16.
[7]Emphasis added.

3.4 Statutes should be interpreted in a manner that promotes access to justice

The case of *Crown Beverages Limited v MFI Document Solutions Ltd*[8] was an appeal from a judgment of the Small Claims Court to the High Court. The appellant asked the High Court to overturn the Small Claims Court's decision on the grounds that it was delivered outside the statutory 60-day timeline prescribed by the Small Claims Court Act (SCCA) 2016.

In determining the appeal, Justice Majanja emphasized that although Section 34(2) of the SCCA is framed in mandatory terms, the court must consider the context of the provision in light of the guiding principles, which include, among other things, the timely disposal of all proceedings before the court using the least expensive method. He further emphasized that the provision regarding the delivery of judgment is intended to be directory, not mandatory, as it is not the intention of the SCCA to invalidate any proceedings that violate the statutory timelines. Adopting such a position would undermine the statutory objectives and cause injustice to the parties, as the case would have to be reheard.

In other words, Justice Majanja was of the view that statutes like the SCCA should be interpreted in a manner that promotes access to justice in light of Article 48 of the Kenyan Constitution. Interpreting the statute in this way would help the court avoid inordinate delays or grave injustices to the concerned parties.

By deploying intellectual firepower and a resolute mastery of the legal theory in interpreting the statute, Justice Majanja seem to have borrowed the leaf from the clarion call of Ronald Dworkin[9] and Robert Alexy's[10] legal philosophy which calls the court of law not to disengage from the Constitution whenever the Court is interpreting statutes (which are normative derivatives of constitutional principles).

3.5 Affirmation of the link between the right to health and access to Information

In the widely cited case of *Mathew Okwanda v Minister of Health and Medical Services & 3 others,*[11] Justice Majanja affirmed the relationship between the right to health and access to information. He stated that the General Comment [Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 14] recognises that the right to health is closely related to economic rights and depends on the realisation of other rights, including the rights to food, housing, water, work, education, human dignity, life, non-discrimination, equality, prohibition of torture, privacy, access to information, and other freedoms.

Justice Majanja further appreciated that the incorporation of economic and social rights set out in Article 43 of the Constitution encapsulates the desire of Kenyans to address issues of poverty, unemployment, ignorance, and disease. He emphasised that failing to address these conditions would undermine the entire foundation of the Constitution.

By acknowledging the interconnected nature of rights, Justice Majanja was of the view that the fulfillment of all rights is essential for human endeavours if they are interconnected. This decision, by all standards, breathed fresh air into Article 43 and Article 35 of the Constitution.

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[8][2023] eKLR.
[9]See "normative derivatives" as canvassed in Ronald Dworkin, Taking Rights Seriously (Harvard University Press, 1977); See also Ronald Dworkin, A Matter of Principle (Harvard University Press, 1986).
[10]See Robert Alexy, A Theory of Constitutional Rights (Oxford University Press, 2010).
[11][2013] eKLR.

3.6 The income of the church arising from tithes, offerings, and donations is not subject to taxation

The taxation of churches has been a contentious issue, generating polarising views in many Christian-affiliated societies and states.[12] This is because taxing churches is a nuanced and complex problem that demands balancing the right to religious freedom with the need to ensure that religious institutions operate in a transparent, accountable, and responsive manner, as stated in Article 10 of the Kenyan Constitution.[13] The right to conscience, belief, and opinion underscores church autonomy, ensuring that church activities are free from state interference, thus justifying the tax exemption enjoyed by churches.[14]

In a landmark decision likely to influence Kenya's jurisprudence for years, *Commissioner of Domestic Taxes vs. Thika Road Baptist Church Ministries*[15] (HCCOMMITA/E024/2021) (an appeal by the Commissioner against the decision of the Tax Appeals Tribunal), Justice Majanja was confronted with the question of whether the income of the Respondent (a religious organisation registered under Section 10 of the Societies Act – Cap 108 Laws of Kenya), consisting of offerings, tithes, and donations, is subject to tax.

The case stemmed from an audit of the church's books of account for the years 2015 to 2017, during which the Kenya Revenue Authority (KRA) assessed a tax of KES 6,678,386 on the surplus amounts reported. The church objected to and appealed against the assessment to the Tax Appeals Tribunal (TAT), arguing that its income from offerings and tithes was exempt from tax under paragraph 10 of the First Schedule to the Income Tax Act (Cap 470 Laws of Kenya) (ITA). The church further argued that any surplus realised in a given year would be rolled over to the following year and used for the benefit of church members, without being distributed to anyone in any form.

Conversely, the KRA stated that the exemption under paragraph 10 of the First Schedule is not automatic and would only be granted upon application, approval, and issuance of an exemption certificate by the Commissioner. The KRA further asserted that the burden of proof lay with the church to demonstrate the existence of such an exemption.

The Tribunal initially ruled in favour of the church, holding that income from tithes and offerings does not fall under the ambit of taxable income. Aggrieved by the Tribunal's decision, the KRA appealed to the High Court. Justice Majanja upheld the Tribunal's decision, ruling that the church's income from tithes, offerings, and donations does not fall within the meaning of taxable income per Section 3(2) of the ITA and is therefore not subject to tax. Furthermore, the court held that only income chargeable to tax in the first instance may be exempt from tax under Section 13, as read together with the First Schedule of the ITA.

The implication of this decision is that the income of not-for-profit organizations, which does not fall within the ambit of taxable income and specific sources of taxable income per the provisions of sections 3(2) and 15(7)(e), is not subject to tax in

[12]Laureen Mukami Nyamu, 'The taxing Issue of church taxation: A legal analysis of the taxation of churches in Kenya' https://kabarak.ac.ke/klrb/the-taxing-issue-of-church-taxation-a-legal-analysis-of-the-taxation-of-churches-in-kenya-1 accessed (12 July 2024).
[13]Laureen Mukami Nyamu, 'The taxing Issue of church taxation.'
[14]See Article 32, the Constitution of Kenya, 2010, which underscores the right to freedom of conscience, religion, thought, belief and opinion.
[15]Tax Appeal E024 of 2021, Judgment of the High Court at Nairobi, 31 May [2022] eKLR.

Kenya. Such organizations are not required to apply for and obtain specific exemptions from the Commissioner for their income to be exempted. This includes grants, donations, tithes, offerings, and any other income of a similar nature.

3.7 The imposition of the housing levy against persons in the formal sector is unfair, discriminatory, and a violation of Articles 27 and 201 (b)(i) of the Constitution

Unlike many classical liberal Constitutions, the primary concern of the Constitution of Kenya, 2010 is to ensure that the full potential of all Kenyans is realised in a non-discriminatory and egalitarian manner within positive social relationships. Bearing this in mind, it is important to remember a contested decision in consolidated Petition Nos. E181 of 2023, which marked the beginning of the dispute over the 1.5% housing levy intended to impose taxation on individuals in the formal employment sector.

The three-judge bench, comprising Justices David Majanja, Christine Meoli, and Lawrence Mugambi, affirmed that the imposition of the housing levy on persons in formal employment, to the exclusion of other non-formal income earners, to support the national housing policy is unjustified, unfair, discriminatory, irrational, arbitrary, and in violation of Articles 27 and 201(b)(i) of the Constitution.

Justice Majanja, particularly while reading the decision, pointed out that the introduction of the housing levy through an amendment of the Employment Act by Section 84 of the Finance Act, 2023 lacks a comprehensive legal framework and violates various constitutional provisions, including Articles 10, 201, 206, and 210. Consequently, he issued a declaratory order on behalf of his colleagues, barring the Commissioner of the Kenya Revenue Authority from collecting or charging the 'Affordable Housing Levy' based on Section 84 of the Finance Act, 2023.

3.8 The CDF Act breaches the normative character of constitutional principles

The long struggle for constitutional reforms in Kenya was ideally informed by two objectives. First, the reforms were intended to transform the political governance structures from authoritarianism to a culture of democratic decision making where all exercises of public power were justifiable and aimed at the attainment of the common good of the nation. Secondly, the reforms were aimed at the transformation of the classical liberal constitutional, economic and social structures that entrenched endemic poverty and pervasive inequality, into the promotion of an egalitarian, caring society based on substantive equality, respect for human rights and the improvement of the condition and the welfare of all Kenyans.[16]

Central to these reforms is the idea of incorporation of devolution in the constitutional architecture. Since the onset of devolution, the courts have in numerous instances demonstrated eagerness in safeguarding the Constitution and in particular the provisions of devolution from the proclivities of the old order.[17]

In the decision of *Institute for Social Accountability (TISA) and another v The National Assembly and 4 Others*,[18] the petitioners in this decision brought a petition to the High Court challenging the constitutionality of the Constituencies

[16]See Nicholas W Orago , ' Poverty, Inequality and Socio-economic rights: A theoretical Framework for the realization of socio-economic rights in the 2010 Kenyan Constitution; p226.
[17]Senate v National Assembly (2013) eKLR, para 161.
[18]Petition No 71 of 2013

Development Fund Act No.30 of 2013(CDF Act). The petitioners in their submissions before the court were of the view that the CDF Act is a breach of the constitutional principles, namely the rule of law, good governance, transparency, accountability, separation of powers and division of powers between the National and County Government and the public finance management and administration. Justice Majanja (sitting with Justices Mumbi Ngugi and Isaac Lenaola) found that the CDF Act on its substantive nature is unconstitutional, particularly for two grounds. First, the court noted the involvement of the members of the National Assembly and Senators in the implementation and administration of CDF breaches the Constitution since the design and objectives of the fund "threatened" to infringe on county functions. This is because, the CDF Act, the legislation that provided for the fund was vaguely worded. As a consequence, the court concluded that the creation and assignment of roles to an entity outside the structures of governance established under the Constitution is antithetical to the principles of the Constitution as it threatens to violate the functional competencies of the county government within which CDF operates.[19]

Besides the above, the court also found that the Act infringed on the concept of separation of powers since its design and implementation placed Members of Parliament (as fund patrons) at the centre of service delivery, a function that traditionally belongs to the executive branch of government.[20] In this in mind, the Court also found that the CDF Act violates the key national values and principles of governance stipulated in Article 10 of the Constitution, including good governance and accountability.

Comparative constitutional scholars, studying on the area of federal governance, have pointed out that this particular decision is important for two reasons. First, the decision is an affirmation by the courts on the place of counties in the entire scheme of division of powers and functions between the two levels of government. Secondly, and even more importantly, the decision signifies the independence of the courts and their commitment and the willingness to fearlessly defend the functional autonomy of county government against the encroachment of other entities or state organs.[21]

3.9 Expanding the 'definition' of access to justice

Access to justice is cardinal to the success and well-being of any functioning democracy. Further, access to justice is a fundamental human right that has gained prominence not only in the municipal law but also in other international instruments, including the United Nations Charter and the Universal Declaration of Human Rights.[22] The Kenyan Constitution as we alluded to earlier, emphasises the essential nature of ensuring access to justice for all individuals regardless of their social status in society.[23] In doing this, the Constitution specifically underscores that any fees associated with accessing the justice system must be reasonable and not serve as an

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[20]See Conrad M. Bosire, 'The Emerging Approach of Kenyan Courts to Interpretation of National and County Powers and Functions' in (Conrad M. Bosire & Wanjiru Gikonyo eds,) Animating Devolution in Kenya: *The Role of the Judiciary*,' International Development Law Organization (IDLO) and Judicial Training Institute (JTI) and Katiba Institute,(2015) p.120.
[21]See Conrad M. Bosire, 'The Emerging Approach of Kenyan Courts to Interpretation of National and County Powers and Functions.'
[22]See for example, UNDP which states that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.
[23]Article 48 of the Constitution of Kenya, 2010.

impediment to justice.[24] Therefore, this underlines the government's obligation to make sure that the legal system is accessible to everyone, regardless of their financial situation, and that justice is not only available to those who can afford it.[25]

In the path-charting decision of *Dry Associates Ltd v Capital Markets Authority*, Justice Majanja, just to borrow the timely words of Duncan Okello,[26] injected vital nascent doses of oxygen into the Constitution 2010 by succinctly expanding the definition of access to justice by underscoring as follows:

> *Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one's rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.*

From the above case, Dry Associates, who were allegedly accused of defrauding investors who brought a commercial paper issued by Crown Berger failed to satisfy the Court that they have a compelling case in light of Article 22 of the Constitution.[27] It is this context that Justice Majanja found that the petitioner's right to access justice had not been infringed since access to justice must be seen from a broader context including affording justice without bias to all parties(in this case both the petitioners and the respondents).

3.10 Upholding the centrality of the rights and freedom of expression in 'shackles of doom' play staged by Butere girls

Freedom of expression is a fundamental component and a capstone of Kenya's constitutional edifice under Article 33 of the Constitution. It provides every person the freedom to hold diverse opinions and express them, to obtain information, as well as to communicate information and ideas without interference from public authorities or private entities. In addition, this fundamental right allows for the circulation of different perspectives and beliefs, as well as free debate and discussion within society. However, this right like many other rights in the Constitution is not absolute and thus it can be limited on the basis of criteria stipulated in Article 24 of the Kenyan Constitution.

In the landmark decision of *Okiya Omtatah v AG & 2 Others*,[28] Justice Majanja broke new ground of jurisprudence in the controversial play titled, '*shackles of doom*' when he removed the band and ordered the Ministry of Education to bear the transport of ensuring the Butere Girls School attend the festival and also perform their play in the original composition at the national stage held at Mombasa County. The play from the playwriter's point of view, depicts the grim and gloom picture of obscene inequality in the distribution of resources

[24]See Article 48, above.
[25]See *Kituo Cha Sheria & Another v Attorney General & Another* [2017]eKLR.
[26]See Duncan Okello, ' Justice David Majanja: A triple heritage of humanity, intellect and institutionalism', available at https://www.the-star-co.ke/news/realtime/2024-07-17-justice-david-majanja-a-triple-heritage-of-humanity-intellect-and-institutionalism/ accessed on (12 July 2024).
[27]Article 22 of the Constitution that provides for the enforcement of fundamental rights and freedoms under the Constitution.
[28]Petition No.192 of [2013] eKLR.

and dominance of main government within main ethnic grouping which has been the epicenter evil in many societies. In addition, the play exposed the issue of favouritism, nepotism, ethnicity, and marginalisation as the foundational ills that characterised an inequal society in our time.

Considering this play in entirety intended to promote the freedom of expression and nurturing of artistic talents as proclaimed by the Kenyan Constitution, Justice Majanja agreed with the petitioners that the Court by all means must step up to protect this hard-won right and freedom from any violation or threat. He thus underscored as follows:

> *"I am aware of the centrality of the rights and freedom of expression in a democratic state and the obligation of the court to give effect to the enjoyment of fundamental rights and freedoms to the fullest extent. I agree with the petitioner's advocates that such freedoms have been hard fought and this court will scrutinise carefully any action that will tend to undermine these freedoms. I am also aware that plays such as the one banned occur in a school setting with certain rules and standards but this of itself does not limit or diminish the rights of students to express themselves or exercise their creative freedom or that of the public to receive or impart information and ideas. In this case and on a prima facie basis it is difficult to justify the disqualification as the play must have passed several stages of competition as evidenced by the fact that it qualified for the national competition. It was also watched by several audiences in the zone, district and province and was indeed scrutinised by the various expert adjudicators at all levels. It has now been disqualified on account of hate speech pursuant to some provision of the rules and regulations governing the Kenya Schools and Drama Festival.*
>
> *Plays are a medium of expression of ideas which are sometimes subversive of accepted ideas. Plays may challenge long held beliefs and conventional wisdom. Artistic expression is not merely intended to gratify the soul. It also stirs our conscience so that we can reflect on the difficult questions of the day. The political and social history of our nation is replete with instances where plays were banned for being seditious or subsversive. This is the country of Ngugi wa Thiong'o, Micere Mugo, Francis Imbuga, Okoth Obonyo and other great playwrights who through their writings contributed to the cause of freedom we now enjoy. Some plays were banned because they went against the grain of the accepted political thinking. Kenya has moved on and a ban, such as the one imposed by the Kenya National Drama Festival must be justified as it constitutes a limitation of the freedom of expression. I am not convinced that Kenya is such a weak democracy whose foundation cannot withstand a play by high school students. I am also of the view that if our democracy is to flourish then it is students of today who must at an early age understand the meaning of freedom."*

3.11 Public participation as a requirement for Kenya's involvement in international agreement

The commitment to principles of accountability, responsiveness and openness is a justification that our constitutional democracy is not only representative, but also contains participatory elements as defining feature that is apparently prominent from the preamble of our constitutional enterprise.[29]

In *Kenya Small Scale Farmers Forum & 6 Others v Republic & Another*,[30] the petitioners challenged the decision by the government of Kenya to enter into Economic Partnerships

[29]See *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC.
[30]Petition No. 1174 of 2007.

Agreements (EPAs) with the European Union in ratification of a reciprocal free trade agreement on account of its failure to involve the petitioners (Kenya Small Scale Farmers Forum) as the main stakeholders into negotiation and engagement process. Justice Majanja (sitting with Justice Mumbi Ngugi and Isaac Lenaola) affirmed that public participation is at the heart of Kenya's constitutional order, and it entails an expression of the sovereignty of the people and also the manifest of their will. As a result, the court made orders compelling the state to allow the petitioners to be involved in its negotiation with EPA before the agreement was signed.

3.12 The resolution to exclude female golfers was found discriminatory and against the imperatives of Article 27 of the Constitution

One of the glaring impediments the Constitution of Kenyan, 2010, tend to confront is social imperfection on account of discriminatory practices, or gender-indifferent laws, policies and regulations which in its foundations have created the long-standing hierarchy of unequal power relations between men and women in various spheres.

In *Rose Wangui Mambo & 2 Others v Limuru County Club & 17 Others*,[31] the High Court bench comprises of Justice Majanja, Mumbi Ngugi and Isaac Lenaola set a new precedent by barring member clubs from using discriminatory rules that limit participation along gender lines. The facts of the case arose from the internal wrangles in a private members club known as 'the Limuru County Club'. In this case, the petitioners who were female fully paid-up members of the Limuru County Club and who had served in senior positions at the said club brought a petition to the High Court to challenge a resolution by the Board of Directors of the Club amending part of the Club's by-law. They contend that the amendment not only discriminates against the female membership contrary to the constitution of the club, but it is also in breach of their fundamental rights and freedoms enshrined in the Constitution of Kenya.

The High Court which comprised of the above three luminaries held that the chain of events leading up to the suspension and expulsion of the petitioners from participating in golf club was not only discriminatory but also ran contrary to the Club's constitution and the imperatives of Article 27 of the Constitution, which underscores on the need of non-discrimination and equality for all regardless of the listed grounds. The Court also rejected the flimsy argument of the club officials purporting that the rules that discriminate against women are widely in practice among private clubs. It proceeded to state that it cannot be safe, in a progressive democratic society, to arrive at a finding that allows private entities to hide behind the cloak of 'privacy' to escape constitutional accountability.

3.13 The Constitution devoid of values and principles is like an empty tin

Values and principles have become part of contemporary discourse on constitutionalism, for they function in important ways to affect the shape and substance of constitutional outcomes.[32] In

[29]See *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC.
[30]Petition No. 1174 of 2007.
[31]Petition No.160 of [2013]eKLR.
[32]See the Report on Implementing the Total Constitution: Towards a Normative Approach A Report on the Status of Constitutional Implementation to the Kenya Law Reform Commission'(2015), Nairobi, available at https://www.klrc.go.ke/index.php/bills/576-implementing-the-total-constitution-towards-a-normative-approach#:~:text=It%20creates%20a%20framework%20for,including%20non%2Dimplementation%20of%20the accessed on(12 July 2024).

India as in Ireland, for example, principles are explicitly enumerated within the constitutional text to serve as a directive source for political, social and economic development.[33] In South Africa, the elevated status of constitutional principles is traceable to their unique constitution-making process, in which the adoption of a final document was contingent on certification by the constitutional court that a set of mandated principled commitments had been scrupulously followed by the constitutional assembly.[34] In Kenya, the one important concern in the constitution-making process was the need to develop a normative and structural framework to facilitate the internalisation of constitutionalism and supervision of constitutionality.[35]

With this in mind, Article 10 of the Constitution was enacted to provide the scheme of constitutional overarching norms, values and principles that govern the Kenyan state of affairs.

In *COFEK v Attorney General*,[36] Justice Majanja in a novel way captured the topos of the 2010 Constitution. He underscored the fact that the Constitution devoid of values and principles is like an empty tin. He further emphasised the fact that these values are anchored in the Constitution and they give real meaning to the dry letter of the law as they equally provide a vision of the kind of society we would like to build as the Kenyan people.

4.0 Conclusion

In "*Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*," Upendra Baxi highlighted how the Supreme Court of India, under the leadership of Justice Praful N. Bhagwati, transformed itself into the people's court. This transformation was marked by a strategic shift in legal culture, characterised by the court's use of its constitutional power to alleviate the people's suffering caused by government repression and oppression.

Similarly, Justice Majanja in Kenya was a grandmaster of the country's transformative project. His deep understanding of Kenya's transformative constitutional enterprise will be remembered and immortalised for ages. Though he left us too soon, Justice Majanja leaves behind an immutable legacy with far-reaching jurisprudence that will continue to shape the legal philosophy of Kenya's 2010 Constitution.

Justice Majanja's contributions to the legal landscape mirror those of legal luminaries such as Chief Justice C.B. Madan in post-authoritarian Kenya, Dikgang Moseneke and Laurie Ackerman in post-apartheid South Africa, Chief Justice Jimly Asshidiqie in post-authoritarian Indonesia, and Justice Antonio Lamer in post-charter Canada. His life and work in the legal field have set a high standard for legal innovation and transformative jurisprudence.

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[33]Ibid, See the Report on Implementing the Total Constitution'.
[34]Gary Jacobsohn, "Constitutional Values and Principles," in Michel Rosenfeld and András Sajó (eds), The Oxford Handbook of Comparative Constitutional Law (Oxford: OUP, 2012).
[35]See Walter Khobe Ochieng, The Jurisdictional Remit of the Supreme Court of Kenya Over Questions Involving the 'Interpretation and Application' of the Constitution,' Kabarak Journal of Law and Ethics: Vol. 5 No. 1 (2020): Kabarak Journal of Law and Ethics
[36]2012]eKLR.

Majanja, J.A to humanity: A giant of the law, a legacy in precedents; well written, well read, well rested

By Christabel M. Eboso

Majanja, J.A, the person

I am deeply saddened as we reflect on the distinguished life and legacy of Justice David Shikomera Amilcar Majanja, a jurist whose intellectual prowess and dedication to the law has left an indelible mark on all who had the privilege of knowing him. As someone who had the honour of interacting with Justice Majanja, he was not just a judge. He was a mentor, a visionary in the community, the nation, and a relentless seeker of justice as he defended the Constitution of Kenya by applying the law with integrity and fairness.

In his passing, we mourn the loss of a brilliant mind, a revered mentor, and a dear friend. Yet, we also celebrate a life dedicated to the pursuit of truth and justice. Justice Majanja's contributions to the legal profession will endure as a testament to his unwavering commitment to intellectual honesty, fairness, judicial humility and the highest ideals of the law.

Justice Majanja's life was led by a dedication to duty that transcended to his professional life where he had a high reverence for reason and personal conviction that fulfilling his duties was the true source of joy and mark of a life well-lived in service. Perhaps, this was him living the Alliance High School's spirit by the motto "***Strong to serve***" that imbued him with a deep conviction that the joy and purpose of life lay in service, and integrity in service. I believe that how Justice Majanja always cheerfully and tirelessly fulfilled his duties in every aspect of his life is what led to his double-victory as the High Court representative to the Judicial Service Commission.

Majanja, JA the jurist

His empathy in legal decision-making is only matched by his respect for justice. He was alive to the fact that the law is a tool for ordering lives and it should be alive to the lived experiences of the people and should not be blind to the effects it leaves on the lives of the people. For example, his decision in the petition challenging the constitutionality of the housing levy brings out his empathetic rulings. As part of the three-judge bench together with Her Ladyship Christine Meoli and His Lordship Lawrence Mugambi, Justice Majanja will forever be remembered for fusing reason with empathy to declare the housing levy unconstitutional.

Before this brave decision on the constitutionality of the housing levy, Justice Majanja had again shown that the law should not be applied mechanically when he considered the issue of ethics and integrity in ***Community Advocacy and Awareness Trust & 8 Others v Attorney General, Interested Party National Gender and Equality Commission & 5 Others [2012]***

eKLR. In this case, he bravely forced us to confront our history as a nation by observing that previous public appointments were shrouded in vices like ethnicity, tribalism, corruption, nepotism, and political patronage. In so doing, he stressed the importance of meritocracy and equal and equitable access to opportunities. His legacy is further entrenched by pioneering reasoning on public participation in *Petition 13 of 2013* where he was part of the bench that clarified the need for meaningful public participation.

Interacting with Justice Majanja in his work as a judge was a life privilege that exposed one to intellectual rigour and empathy. Looking at his judgments, his commitment to unwavering reason and logic saw him scrutinize every argument and interrogate every precedent. He had profound respect for the certainty of law but left room for original thinking. He had an original but rare ability to turn complex legal concepts into simple legal principles that resonated with wisdom. His opinions were not just legal pronouncements but they contributed to efficiency in courts. For example, it is Justice Majanja in the case of ***J Harrison Kinyanjui v Attorney General & another [2012] eKLR*** who stated:

> *the decision of a three-judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges.*

That Justice Majanja saw the need for a single judge bench to deliver a powerful ruling is captured by his exceptional expositions of different legal issues in civil, criminal, tax, and constitutional matters. A look at ***Peter O. Ngoge V the Vetting Of Judges and Magistrates Board and Another*** shows his masterful analysis of jurisdiction. In this case, the petitioner challenged a constitutional process for violating his procedural rights in the context of natural justice. In clarifying the relationship between the High Court and a constitutional board set up to vet judges, Justice Majanja sympathized with the petitioner but observed that Schedules to the Constitution were part of the Constitution and the High Court was prohibited by the Constitution from entertaining challenges to the faithful implementation of provisions in the Schedules to the Constitution. His original reasoning echoes the aspiration of Kenya's judiciary to develop an indigenous jurisprudence that is contextual to Kenya and future justice needs.

However, this commitment to nurture local jurisprudence did not stop the good judge from drawing insights from other countries and other institutions. He expertly derived jurisprudential insights from other countries, including South Africa and Canada. For example, in his seminal judgment in ***Beatrice Wanjiku & another v Attorney General & 3 others (2012 eKLR)***, Justice Majanja conducted a masterly analysis of the constitutionality and reasonableness of arresting and committing people to civil jail for defaulting on debts. Recognising that creditors have property rights but civil jail limits constitutional liberty, he remarked that:

> *"Article 24 is not a checklist and the weighing of these considerations is not to be approached mechanically."*

This pronouncement against mechanical approach to the law is evident in the entire case as he had to balance questions of morality of civil jail and commercial sense. Still, it is through this judgment that he weighed in on the hard question of the hierarchy of laws in relation to whether international laws forming part of Kenya's laws are superior to local legislation. In the context of the supremacy clause, Justice Majanja expertly observed that the supremacy clause recognises the legal force of international treaties and conventions, but this does not make them superior to the Constitution or

local legislations. Instead, a purposive interpretation means that international laws cannot render valid Acts of Parliament that are inconsistent with international legal instruments unconstitutional. The question of hierarchy of laws and authoritativeness of international laws relative to Acts of Parliament remains unsettled but it is no doubt that Justice Majanja lay the foundation for further judicial and scholarly scrutiny of the hierarchy of laws in Kenya. It is my hope that more research will be conducted to build upon what Justice Majanja boldly and creatively started when he considered the issue of hierarchy of laws in Kenya, in the context of applying domestic laws that are inconsistent with international laws.

As a person led by duty, Justice Majanja did not tire of drawing from other institutions to strengthen local capacity. In his position as the vice-chair of the Judiciary Committee on Elections, he insisted on the country's ability to pave its solutions in electoral jurisprudence. He rightly observed that all Kenya needs is adequate preparation and continuous internal mentoring to build local capacity and share knowledge. The key thread seems that Justice Majanja believed in our internal resourcefulness and resilience to surmount challenges and build a self-improving efficient system of delivering justice tempered with reason and empathy.

I cannot say much about a good judge's accomplishments as an Advocate in civil and commercial practice, but his enduring legal prowess manifested itself in the matters he handled in the civil and commercial division of the High Court as a Judge. He unfailingly brought clarity to complex litigation in matters ranging from taxation, contracts, employment disputes, to children's rights. His 2022 decision in ***Commissioner of Domestic Taxes v Thika Road Baptist Church Ministries*** brought much-needed clarity when he directed that tax exemption certificates are only applicable for income that is taxable under Section 3(2) of the Income Tax Act. Given that taxpayers often gruntled that taxes are complex in terms of content and administration, this was one of Justice Majanja's many simple but elegant legal pronouncements that have brought certainty to our laws.

His commitment to fostering certainty extended even to criminal proceedings. For example, In ***re Estate of Philip Otieno Odhiambo (Deceased) [2015]eKLR***, Justice Majanja waded into the jurisdictional powers of magistrates to initiate criminal prosecutions after conducting death inquests. At issue, was the constitutionality of Section 387(3) of the Criminal Procedure Code:

> *If before or at the termination of the inquiry, the magistrate is of the opinion that the commission by some known person or persons of an offence has been disclosed, he shall issue a summons or warrant for his or their arrest, or take such other steps as may be necessary to secure his or their attendance to answer the charge; and on the attendance of the person or persons the magistrate shall commence the inquiry de novo and shall proceed as if he had taken cognizance of an offence.*

Majanja took judicial notice of the previous constitutional order where magisterial directions to prosecute did not erode the prosecutorial powers of the Attorney General. However, he recognised the new constitutional order and directed that the powers to prosecute reside in the Office of the Director of Public Prosecutions (ODPP) as established by the Constitution and directed that magistrates should not commence criminal trials on their own but they should forward such matters to the ODPP as is required by Article 157(6)(a) of the Constitution. Indeed, Justice Majanja marked a break with the old without really discarding the old constitutional heritage and history of our country, but by using it as a springboard to develop a new jurisprudence fully anchored on the 2010 Constitution of Kenya.

Justice David Majanja's original and pioneering thinking in defining the nature and scope of public participation is a reminder that the Constitution has a soul but the health of the soul entirely rests on us. Us, the people. Us, legal practitioners. Us, who swore to defend the Constitution. Us, sworn to uphold the law. Justice Majanja served, defended the Constitution and upheld the law; it is our turn to respect his legacy by defending the Constitution, upholding the law, and interpreting it purposively for the health and progress of our motherland, Kenya.

Majanja, J.A, the Mentor and Friend

Justice Majanjas' commitment to the people he was mentoring was profound. I have seen him provide detailed stage-by-stage guidance to Alliance old boys community. I watched him provide mentorship and grounding for many of our young colleagues in the legal profession; on his shoulders, we have towered. He not only had this natural ability to point one to relevant actions but he would selflessly open his contacts to his mentees. I had the privilege of meeting him many times for a cup of coffee, seeing him mentor those I know, and many others right from their student days to their formative careers. He was fiercely supportive of his mentees and anyone he nurtured irrespective of their profession, and he sustained the support he gave even when one had consolidated their position and become secure. In my case, we had a beautiful friendship that materialised into a friend-daughter relationship.

I fondly remember how his wealth of experience in South Africa benefitted him. He was a man in his league, and did not shy in passing on new ideas and having his mentees scrutinise his ideas. I remember, for example, how in 2020 during the Christmas holidays, Justice Majanja spent time at my father's rural home in Sabatia, Vihiga County. My memory of that period is filled lively images of very intense conversations in the living room, with him bringing his experiences and personal dramas in Pretoria alive through his sharp memory, his acute powers of observation, and his fascination with peculiarities of human life. When I mention the peculiarities of human life, those who knew Justice Majanja personally will understand what a deep pleasure it was to spend time with him, as he was liberal and at home discussing various topics.

At this point, I sadly remember my last meeting with him of 26th May, 2024, just a day after his re-election to the Judicial Service Commission. Though a short and quick conversation, he insisted that I meet him the following week, of which I promised to look for him. However, because of life's commitments, he passed away before we could have our last coffee meeting. Looking back, I am honoured to have known Justice Majanja, interacted with him, and benefitted from his diverse and exceptional knowledge. I am equally honoured that through his many mentees, the legal giant's prowess lives with us.

As we mourn our departed Justice Majanja, let us carry forward his legacy in our own lives and careers. Let us strive, as he did, to uphold the principles of fairness and equity that he championed so passionately. Though he may no longer be with us in person, his spirit will continue to guide us as we navigate the complexities of the law and strive to make a positive difference in the world.

Rest in peace, Justice David Shikomera Amilcar Majanja. You have left a gap, and your intellect, wisdom, and profound impact on our constitutional jurisprudence and positive impact on lives will forever be remembered, honoured, and cherished.

Rest well champ!

Christabel M. Eboso is an Advocate of the High of Kenya.

FOR IMMEDIATE RELEASE

Press statement: Defending the vital role of civil society organizations in Kenya

20th July 2024

For decades, Civil Society Organizations in Kenya have been the backbone of our nation, tirelessly safeguarding democratic values and principles, amplifying the voices of vulnerable communities, promoting transparency and accountability, and ensuring the rights of all Kenyans are upheld. Their contributions have been instrumental in our nation's growth and stability, and their efforts have consistently upheld the principles of justice and democracy.

In the last three months, civil society and the media have engaged robustly in pushing for public finance management accountability, including public debt, protection of human rights, especially freedom of expression and the right to assemble, including protest, active citizenship, end of extrajudicial executions, enforced disappearances, abductions, and even theft of public resources.

Kenyans share these concerns and are now pushing for an accountable government at all levels, especially the executive and legislative arms. The continued neglect of the need for an accountable and transparent government that respects and values the voices of the people of Kenya is the reason for the continued protests across several parts of the country.

Against this background, we are deeply concerned by the recent letter from the Government of Kenya implying that CSOs fund and support unlawful behaviour and unruly protests, which starkly contradict our work. We categorically repudiate these unfounded accusations and reiterate our call for the government to remain true to the constitution and protect independent civil society organizations and media in Kenya.

CSOs have been instrumental in Kenya's development and play a pivotal role in protecting human rights, upholding the rule of law, promoting good governance and fostering social and economic progress.

We unequivocally condemn any unlawful acts during protests. The allegations that CSOs are complicit in promoting illegal activities are false and undermine the invaluable work they do to strengthen our society and are aimed at tarnishing the perception of CSOs to the citizenry we serve. In recent months, CSOs have risen to initiate rapid response interventions to meet the pressing and overwhelming needs and concerns of Kenyans affected by the crisis through providing legal aid for those arrested or abducted, medical assistance for those injured, and psychosocial support for individuals and families affected. Furthermore, they have continued to amplify advocacy on the human rights and governance concerns presented by Kenyans. These actions, which CSOs have championed over a long period, should not be misconstrued as support for the acts of lawlessness and violence meted against Kenyans and which CSOs have consistently called out all through the protests.

The suggestion that young people, particularly the GenZ, are being funded to speak up and use their voices devalues their genuine contributions to Kenya's

development. Young Kenyans have shown remarkable dedication and initiative in advocating for positive change. Their voices are not just essential but inspiring in shaping the future of our nation, and they deserve to be heard and respected.

We are alarmed by the unprecedented violent crackdowns, abductions and disappearances of Kenyans who have expressed concern over the state of governance and human rights in Kenya. We see the CSOs as an extension of the ongoing general repression against civic space and human rights defenders. In recent weeks, prominent human rights organizations in the country have been subjected to an increase in acts of intimidation, harassment, and threats by the authorities, as well as threats against partners that fund their human rights work. These attacks and threats have also been unleashed upon the media and individual journalists.

We call upon the government and all stakeholders to protect the Kenyan civic space. CSOs must be allowed to operate without undue interference or baseless accusations. The constitution of Kenya guarantees the right to peaceful protest and freedom of expression. These rights must be protected and honoured, not only for CSOs but for every Kenyan.

We reiterate the calls from young people and other advocates for the Constitution of Kenya to be followed to the letter. Unlawful actions by goons, police, and other state agents must cease immediately. We demand strict accountability in the budget-making process, a thorough constitutional audit of public debt that has impeded service delivery, and the interdiction and prosecution of all people accused of corruption and theft of public money. The rule of law is paramount, and all parties must be accountable for their actions.

In conclusion, we reaffirm our unwavering commitment to supporting democracy, human rights, and the rule of law. We stand in solidarity with the civil society organizations that continue to champion these values, and we urge the government to recognize and respect their indispensable role in our nation's progress. In closing, we continue that Kenyans stay woke and continue their role as active Citizens as the people with direct power on the affairs of the Kenyan state and, in turn, call on the government to keep all channels for direct participation of the people open even when they cause discomfort to those in authority.

Name the organizations

1. Action Aid International Kenya
2. Africa Centre for Open Governance (AFRICOG)
3. African Forum for Debt and Development (AFRODAD)
4. Amnesty International Kenya
5. Article 19 Easter Africa
6.Badili Africa
7,Bajeti Hub
8. Centre for Enhancing Democracy and Good Governance
9. Centre for Rights Education and Awareness (CREA W)
10. CRAWN Trust
11. Civic Freedoms Forum (CFF)
12. Christian Aid International Kenya
13. Coalition for Grassroots Human Rights Defenders Christian Aid International Kenya
13. Coalition for Grassroots Human Rights Defenders
14. Community Aid International
15. Democracy without Borders - Kenya
16. Emerging Leaders Foundation
17. End Femicide-KE Movement
18. Feminists in Kenya
19. Federation for Women Lawyers Kenya (FIDA Kenya)
20. Human Rights Watch
21. Initiative for Equality and Non-Discrimination
22. International Commission of Jurists Kenya
23. International Medical Legal Unit
24. Inuka Kenya Ni Sisi!
25. Institute for Public Finance Kenya
26. Kenya Human Rights Commission
27. Law Society of Kenya
28. Mzalendo Trust
29. National Coalition for Human Rights Defenders
30. NAWI Collective
31. Open Institute
32. Siasa Place
33. SDG Forum Kenya
34. Shield for Justice
35. The Institute for Social Accountability
36. Transparency International Kenya
37. Tribeless Youth
38. Trust Africa

Administrative actions v judicial decisions: The drawing line in Supreme Court's actions

By Youngreen Peter Mudeyi

Abstract

In the wake of the High Court ruling in Law Society of Kenya v Attorney General, a significant question has arisen regarding the distinction between an administrative action and a judicial decision, particularly concerning the Supreme Court's role as the highest court versus the High Court's review powers. The Supreme Court of Kenya barred Senior Counsel Ahmednasir and his employees from appearing before the bench through a letter from the Registrar. Still, the Supreme Court later issued a recusal order, declining to hear submissions from Ahmednasir's Law firm. This article explores the difference between administrative actions and judicial decisions within this case, critiquing the Supreme Court's actions as malicious rather than in good faith. The paper begins with an introduction, followed by an examination of the differences between administrative actions and judicial decisions. It then discusses the Supreme Court as the highest court in Kenya and the High Court's judicial review jurisdiction, concluding with recommendations on how the Supreme Court should have acted and the potential charges against Senior Counsel Ahmednasir.

Senior Counsel Ahmednasir

1.0. Introduction

The Supreme Court of Kenya issued a ban stating that Senior Counsel Ahmednasir, anyone from his firm, or anyone acting under his instructions will not be given an audience in the court. This information was first communicated via a letter issued by the Office of the Registrar. Still, later, when an Advocate from the firm appeared before the court, six Supreme Court judges issued an order recusing themselves and affirming the position in the earlier issued letter. The Law Society of Kenya filed a matter in the High Court challenging the move by the Supreme Court.[1] The High Court issued a ruling

[1]See *Law Society of Kenya v Supreme Court of Kenya & another; Abdullahi SC & 19 others (Interested Parties) (Petition E026 of 2024) [2024] KEHC 7819* (KLR) (Constitutional and Human Rights) <Available at http://kenyalaw.org/caselaw/cases/view/293543/ > Accessed on 12th July 2024.

that has sparked a lot of questions on the difference between an administrative action and a judicial decision, what do the acts of the Supreme Court amount to? Can the High Court review an action by the Supreme Court, and whether the Constitution of Kenya 2010 insulates judicial decisions from being challenged on account of threatening to contravene or contravening the Bill of Rights?

This is what informs the argument in this paper. The paper introduces its topic, distinguishes between administrative actions and judicial decisions, discusses the Supreme Court as the highest court in Kenya and the power of judicial review of the High Court, explores the potential *mala fide* in the Supreme Court's action, and examines whether the Kenyan Constitution insulates judicial decisions that threaten or violate the Constitution and constitutional rights from being challenged. It concludes with recommendations on what ought to have been done by the Supreme Court and potential charges against SC Ahmednassir.

2.0. Administrative actions Vs. judicial decision

The enactment of the Constitution of Kenya 2010 granted Kenyans the constitutional right to a fair administrative action for the first time.[2] By this, we adopted the new concept of administrative action, which outlines the scope of rights to administrative justice.[3] In turn, our courts operate both as administrative and judicial bodies. This then calls for an urgent need to distinguish between what is an administrative action and a judicial decision to make it clear in what instances the courts act administratively and judicially. This is what informs the argument in this section.

2.1. Administrative Actions

There is a need to work out the relationship between common law, the constitutional right to administrative action, and the statute that purports to give life to it.[4] There has been a radical change in the definition of an administrative action and Reagan notes that these changes are a fascinating study in themselves.[5] Key areas of interest include the court's work in defining "administrative action," a term absent in the 2010 Constitution, and the detailed definition and elements provided in the Act. As administrative actions are now both constitutional and statutory issues, it is essential to examine them from both perspectives. These arguments are significant and will be revisited later in this paper.

2.1.1. Administrative action: The Constitution

The Constitution of Kenya 2010 has elevated judicial review from the old common law into one that is based on

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[2]Constitution of Kenya 2010, Article 47. Previously, the right to a fair administrative action was not a Constitutional right, it was governed by Sections 8 and 9 of the Law Reforms Act and Order 53 of the Civil Procedure Rules.
[3]See Hoexter C, '"Administrative Action" in the Courts' p 1. < Available at https://d1wqtxts1xzle7.cloudfront.net/61775625/Administrative_Action_in_the_Courts20200113-26207-633low-libre.pdf?1578986093=&response-content disposition=inline%3B+filename%3DAdministrative_Action_in_the_Courts.pdf&Expires=1720462490&Signature=fbFiSKprBcWFMPrKVxLLG4NeNdBRcdhh7pbjCg-8GJ-2ubVYbkIhc4nP8RupSlml8gFDmOKHLto-tJgXnvwYGZfZp6GfwLp5FcaI~mFdyILTBrR5misf0UwWfhz0-QBBqU0IMDe02QFULenVxOBf3yhN06ODs1sGV2-R0a7RRjHzT~M62GcIvu7DCjHC8wLnSVzsUgsdcQFKKdEGN~6IbxLkiDNl2zDYPXH2qXmExVrAK3N4WMCZIRRO0IOy~uCyvOR8ESV~BJf8Y3l59QCTYg2ZrnxUiZoOsl7jWCFqQS-yElDSirlPDfJ0hPXuztJfhT0jNNO7cbId0HK2a1bzfw__&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA > accessed on 8 July 2024. She argues in the context of Section 33 of the South African Constitution which is similar to Article 47 of the Constitution of Kenya 2010. This is what establishes this comparative analysis.
[4]Ibid, p 2.
[5]K O'Regan 'Breaking ground: Some thoughts on the seismic shift in our administrative law' (2004) 121 SALJ 424.

constitutional rights to administrative justice.[6] The Supreme Court of Kenya in *EACC v Tom Ojienda* stated that Article 47 of the Constitution offers insight into the meaning of "administrative action".[7] They held that it mandates that Parliament enact legislation to ensure the rights in Article 47(1) are upheld, specifically promoting efficient administration. They argued that this implies that "administrative actions" refer to actions related to the management of institutional, organisational, or agency affairs, rather than any general action, omission, or exercise of power. This distinction underscores why such actions are termed "administrative". The Supreme Court cited several dictionaries.[8] The 9th edition of the Concise Oxford Dictionary defines "administrative" as the management of affairs. According to the 11th edition of Black's Law Dictionary, "administrative action" refers to decisions or implementations related to the executive function of the government or the management of a business. Burton's Legal Thesaurus, 4th edition, describes "administrative" as including terms such as "directorial," "guiding," "managerial," "regulative," and "supervisory".

The South African court has noted that the elements of determining whether an action is administrative are the nature of the power, its source, its subject matter, whether it involves the performance of public duty, and how closely it involves the

Kisumu County Senator Prof. Tom Ojienda

implementation of legislation – which is a characteristic of administrative action – or the making of policy in the broad sense, which is not.[9] The court also emphasised that the function matters more than the functionary.[10] However, these factors do not make the work of drawing the difference easy[11] and the court noted that it is not easy to decide what should and should not be termed as an administrative action.[12] The courts in South Africa in interpreting Section 33 of their Constitution,[13] identified the principle of legality[14] as an essential tenet of the rule of law and a principle that

[6]*Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR* < Available at https://kenyalaw.org/caselaw/cases/view/101689/> Accessed on 7th July 2024. In para 355, the Supreme Court stated that Article 47 of the Constitution of Kenya 2010 has transformed judicial review into a pedestal that transforms the technicalities of common law review.
[7]EACC v Tom Ojienda {2019} eKLR. Para 56 and 57.
[8]Ibid, Para 57.
[9]*President of the Republic of South Africa v South African Rugby Football Union* (the SARFU case) 2000 (1) SA 1 (CC) at para 142. < Available at https://www.saflii.org/za/cases/ZACC/1999/11.html > Accessed on 7th Juky 2024.
[10]Ibid para 141.
[11]Hoexter C, '"Administrative Action" in the Courts' (n 3 above) p 3.
[12]See SARFU case, (n 7 above) para 143.
[13]It is important to take note that Section 33 of the Constitution of South Africa is similar to Article 47 of the Constitution of Kenya 2010.
[14]*Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC) at paras 32-45.

is necessarily implicit in the Constitution.[15] They have stated that the principle of legality implies that the wielders of public power should stay within their powers,[16] must act in good faith, and must not misconstrue their powers.[17] The principle has developed to also include a minimum requirement of objective rationality.[18] Other aspects of the rule of law such as the requirement that laws be accessible, clear, and general, and the requirement that judges give reasons for their decisions have also been identified as essential in construing the constitutional administrative action.[19]

2.1.2. Administrative action: Statutes

An "administrative action" includes the exercise of powers, functions, and duties by authorities or quasi-judicial bodies, as well as any act, omission, or decision by any individual, body, or authority that impacts the legal rights or interests of any affected party.[20] It also includes any action related to administration, such as decisions or acts in public service, failures to fulfil public duties, recommendations to a Cabinet Secretary, or actions taken following such recommendations.[21]

The Supreme Court of Kenya criticised this definition by stating:

> *"Unfortunately, the foregoing definition does not provide an accurate picture of the meaning of an "administrative action" as it simply addresses the elemental aspects of the phenomenon before describing its nature. On the face of it, therefore, any power, function, and duty exercised by authorities or quasi-judicial tribunals constitute an "administrative action". Likewise, any act, omission, or decision of any person that affects the legal rights or interests of any person to whom such action relates constitutes an "administrative action". Such definition, without more, would bring within the ambit of an "administrative action" just about anything done, or any exercise of power by an "authority" or "quasi-judicial tribunal".*

In the South African context, an "administrative action" refers to any decision or non-decision by a state organ or a person, that impacts someone's rights and has legal consequences while exercising constitutional or public powers.[22] These acts do not extend to judicial actions undertaken by judicial functions of a court established under Section 166 of South Africa's Constitution.[23] This definition has been criticised for its undue complexity and its resultant inaccessibility to users of the Act.[24] I greatly agree with this assertion as the Act tends to shield some aspects of administrative actions from review.[25] A good example is a blanket shield to executive functions.[26] As a result, in South Africa, we now have two distinct

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[15]Ibid, para 59.
[16]Ibid paras 58 and 59.
[17]See SARFU case, (n 7 above) para 148.
[18]*Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC). Para 85.
[19]C Hoexter 'The principle of legality in South African administrative law' (2004) 4 Macquarie LJ 182-183.
[20]Fair Administrative Actions Act, Laws of Kenya CAP 7L, Section 2.
[21]Commission of Administrative Justice Act, Laws of Kenya CAP 7J, Section 2.
[22]Promotion of Administrative Justice Act No. 3 of 2000, section 1.
[23]Ibid.
[24]See C Plasket, "The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in Democratic South Africa (unpublished PhD thesis, Rhodes University, 2002) 126 in Hoexter C, '"Administrative Action" in the Courts' (n 3 above) p 4.
[25]See what Nugent JA observed in *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works 7 2005 (6) SA 313 (SCA) para 21*. He stated that section 1 of the PAJA serves to surround administrative action with a 'palisade of qualifications' rather than to attribute meaning to the term.
[26]Promotion of Administrative Justice Act (n20 above).

concepts of administrative action: a broader one defined by the constitutional court and a narrower one established by the Promotion of Administrative Justice Act. The definition offered in the Kenya context is much better than the South African definition as it is more expansive and it does not appear to limit the application of Article 47 of the Constitution of Kenya 2010.

2.2. Judicial decisions

A "judicial decision" is the term that is given to the decision made by a judge in the matter that is before them.[27] The Consultative Council of European Judges in their "***Opinion No. 11 of 2008 on the Quality of Judicial Decisions" stated that a "judicial decision***" must have clear reasoning and analysis and it must be perceived by the parties and by society in general as being the result of a correct application of legal rules, of a fair proceeding and a proper factual evaluation, as well as being effectively enforceable.[28] Judicial decisions are primarily based on the Constitution, laws passed by legislatures, or, in common law systems, upon such laws and principles established by judicial precedent.[29] A judicial decision can be in the form of a judgment,[30] a decree,[31] an order,[32] or a ruling.[33] Judicial decisions can only be challenged by way of appeal or an application for review.[34] After establishing what administrative actions and judicial decisions are, the next section analyses the issue of jurisdiction and review.

3.0. Supreme Court as the highest court vis a vis the judicial review jurisdiction of the High Court

This is one of the greatest issues of concern. The question is there any instance where the High Court can review an action by the Supreme Court? This is what informs the need to look at the Supreme Court and the review jurisdiction of the High Court.

3.1. Highest court

Article 163(7) of the Constitution of Kenya states that all other courts other than the Supreme Court itself are bound by the decision of the Supreme Court. Section 3 of the Supreme Court Act further defines it as the Court of final judicial authority. The Court has firmly asserted this position in one of its decisions. The Supreme Court in the case of *Kenya Hotel Properties Limited v Attorney General & 5 others*[35] stated that the principle of finality in legal disputes dictates the necessity of concluding legal proceedings and preventing endless

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[27]Mudeyi YP, 'A Question of Jurisdiction: Administrative Actions vs Judicial Decisions in Law Society of Kenya v Supreme Court of Kenya [Guest Post]' (Constitutional Law and Philosophy7 July 2024) < Available at https://indconlawphil.wordpress.com/2024/07/07/a-question-of-jurisdiction-administrative-actions-vs-judicial-decisions-in-law-society-of-kenya-v-supreme-court-of-kenya-guest-post/ > accessed 10 July 2024

[28]Opinion No. 11 of 2008 on the Quality of Judicial Decisions, '8 November 2007' (Coe.int2024) < Available at https://rm.coe.int/16807482bf#:~:text=The%20elements%20inherent%20to%20the%20decision&text=To%20be%20of%20high%20quality,well%20as%20being%20effectively%20enforceable> accessed 10 July 2024.

[29]Ibid.

[30]See order 21 of the Civil Procedure Rules of 2010. < Available at http://kenyalaw.org:8181/exist/kenyalex/sublegview.xql?subleg=CAP.%2021> Accessed on 10th July 2024.

[31]See The Civil Procedure Act, Laws of Kenya CAP 21, Section 2, which defines a decree as the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties about all or any of the matters in controversy in the suit and may be either preliminary or final.

[32]See The Civil Procedure Act, Laws of Kenya CAP 21, Section 2, which defines an order as the formal expression of any decision of a court which is not a decree.

[33]See order 40 rule 5 which gives an instance in which the court may grant a ruling.

[34]See Section 65-69 of the Civil Procedure Act for Appeals and Section 80 for review.

[35]Kenya Hotel Properties Limited v Attorney General & 5 others (Petition 16 of 2020) [2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment). < Available at http://kenyalaw.org/caselaw/cases/view/242944/> Accessed on 11th July 2024.

litigation. They held that it is unacceptable for parties to repeatedly request courts to revisit and potentially overturn final decisions issued by a higher court in the judicial system.[36] They further stated that the High Court may not in any way purport to overturn or to order final decisions issued by higher courts than itself to start de novo, especially on appeals that have been finally concluded by the highest court at the time.[37] That said, however, it is important to note that this is limited only to judicial decisions and does not extend to administrative actions. With that in mind, I shall first assess the judicial review jurisdiction of the High Court.

3.2. Judicial review jurisdiction

Article 22 of the Constitution[38] states that any person can approach the High Court where their rights have been beached. Further, Article 23 states that the High Court, when approached via Article 22, may grant any appropriate reliefs including an order of judicial review. The Fair Administrative Action Act[39] states that a person who is dissatisfied with an administrative decision has the right to seek judicial review by promptly applying to the High Court or a subordinate court granted original jurisdiction under Article 22(3) of the Constitution. Section 3 of the act asserts that it applies to all state and non-state agencies or any person exercising an administrative action, a judicial or quasi-judicial function under the constitution, or whose actions or omissions affect the legal rights or interests of any other person. It is important to note that when applying this to the Supreme Court, the judicial functions that can be reviewed by the High Court are only limited to administrative actions and do not extend to judicial decisions and pronunciations.[40] The main question that arises from the arguments in the case, thus, is where the line lies between an administrative action of the Supreme Court and a judicial decision. My argument in this instance is the adoption of the definition of the Kenyan Fair Administrative Action Act as it is not limited. Later on in the paper, I will use the elements to classify the letter and the recusal order by the Supreme Court, and that makes it easier to draw the distinction.

4.0. The Supreme Court's mala fide: Does the Constitution insulate any decision from being challenged on the account of contravening or threatening to contravene the Bill of Rights

Justice must not only be done but it must be seen to be done.[41] Furthermore, justice is rooted in confidence and confidence is lost when right-minded people go away thinking that the judge was biased.[42] The Supreme Court issued an order and after large public critique, that's when they proceeded to issue a ruling. Malice is defined to mean, a condition of mind which prompts a person to do an act willfully, i.e. on purpose, to the injury of another, or to do intentionally an act toward another without justification or excuse.[43] The Supreme Court action, despite it being out of the need to enforce the law, was more punitive as a way of getting rid of Senior Counsel Ahmednasir's critiques than to prevent or punish him for contempt of court. This informs my position of *mala fide* in the actions of the Supreme Court as it was not based on the principle of good

[36]Ibid, Para 60.
[37]Ibid, Para 55.
[38]Constitution of Kenya 2010.
[39]Fair Administrative Actions Act, Section 9,
[40]Mudeyi YP, 'A Question of Jurisdiction,' (n 25 above).
[41]R v Sussex Justices, ex parte McCarthy ([1924] 1 KB 256, [1923] All ER Rep 233)
[42]Metropolitan Properties Co (FGC) Ltd v Lannon [1968] EWCA Civ 5, [1969] 1 QB 577, Court of Appeal (England and Wales).
[43]Black's Law Dictionary, 6th edition p. 956.

faith. On the second aspect of whether the Constitution insulates judicial decisions from being challenged on account of contravening the Constitution, it is important to note that judicial decisions can only be challenged through an appeal or application for review.[44] Now the fact that the Supreme Court is the highest court and its decisions cannot be appealed,[45] the forum that remains is review. I will establish the possibility of this in the recommendation section.

Section 33 of the South African Constitution[46] which is similar to Article 47 of the Constitution of Kenya 2010[47] has been interpreted by the South African Constitutional Court which has argued that the right to a fair administrative action does not apply to judicial decisions.[48] In another context, the South African Constitutional Court in *Zondi v MEC for Traditional and Local Government Affairs*[49] PAJA cannot be used to usurp Section 33 of the Constitution, and the reason for the direct application of Section 33 was that the Act cannot be used to evaluate a constitutional challenge. A constitutional challenge must be evaluated under Section 33 of the Constitution. Generally, PAJA only comes into the picture when it is sought to review administrative action. The Court even took care to point out that it was not concerned with the constitutionality of the Act, and that 'nothing said in this judgment must be taken as a pronouncement on its constitutionality'.[50] Yekiso J emphasises that in section 33(1), the term 'lawfulness' comprehensively covers all aspects of administrative legality, encompassing the full range of requirements and grounds for invalidity detailed in section 6 of the Promotion of Administrative Justice Act.[51]

With this comparative study, coupled with the fact that Section 33 of the Constitution of South Africa is similar to Article 47 of the Constitution of Kenya, does this then mean that a constitutional claim of the infringement of the right to a fair administrative action as a breach of a constitutional right succeeds independently without claiming the review jurisdiction? In Kenya, one can approach the High Court under Article 22(1) and claim an infringement or threat to infringement of the right to a fair administrative action[52] vide a constitutional petition without relying on the Fair Administrative Act. In this case, judicial review can be granted as a constitutional remedy without the court relying on the Act. This is because the Act provides that when one approaches the court by applying for review.[53] However, note that the Act cannot simply be circumvented by resorting directly to the constitutional rights in Article 47. This follows logically from the fact that the Fair Administrative Actions Act gives effect to constitutional rights.[54]

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[44]See The Civil Procedure Act, [n 32 above].

[45]See Attorney General (On Behalf of the National Government) v Karua (Reference E001 of 2022) [2024] KESC 21 (KLR) (31 May 2024) (Advisory Opinion) < Available at https://kenyalaw.org/caselaw/cases/view/290499/> Accessed on 8th July 2024 and Kenya Hotel Properties Limited v Attorney General & 5 others (Petition 16 of 2020) [2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment) para 55-60.

[46]Constitution of South Africa, 1996.

[47]Constitution of Kenya, 2010.

[48]Nel v Le Roux NO 1996 (3) SA 562 (CC) at para 24. Available at https://www.saflii.org/za/cases/ZACC/1996/6.html

[49]2005 (3) SA 589 (CC). para 99.

[50]Ibid, para 101. Note that the PAJA's narrow definition of administrative action limits the scope of review and remedies to administrative actions only. If an exercise of public power doesn't qualify under the PAJA, alternative relief must be sought through special statutory review or the general principle of legality established by the Constitutional Court.

[51]New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang & another NNO; Pharmaceutical Society of South Africa & others v Tshabalala-Msimang & another NNO 2005 (2) SA 530 (C). para 61.

[52]Constitution of Kenya 2010, Article 47.

[53]Fair Administrative Actions Act, Section 9(1).

[54]The Fair Administrative Actions Act itself can of course be measured against constitutional rights, but that is not the same thing. See Hoexter C, '"Administrative Action" in the Courts' p 6.

5.0. Classifying the letter and the recusal order of the Supreme Court

5.1. The letter

The Supreme Court judges in *Law Society of Kenya v Supreme Court of Kenya & Another*[55] argued that the letter was an order under Rule 29(1) of the Supreme Court Rules.[56] The first important elements to consider in determining whether it was an administrative action or judicial decision – as noted above – are the nature of the power, its source, and its subject matter.[57] Rule 29(1) provides that except for an advisory opinion, a decision of the court on any proceedings shall be in the form of a decree or an order. Rule 29(3) further provides that the order shall be as set out in Form D of the First Schedule. The letter that was addressed to SC Ahmednasir was in no way close to, or its source attributed to Rule 29. The subject matter does not match the subject matter of the form in the first schedule. The first clear argument is that the letter was made by a state organ which is an administrative body, the letter related to the administration of the court, the state organ was performing a judicial function, and the letter affected the right to legal representation of the parties who were being represented by SC Ahmednasir's firm.

Secondly, a judicial decision must be based on clear legal reasoning and analysis, perceived by all parties and society as a fair application of legal rules, a proper evaluation of facts, and enforceable in practice.[58] The letter was not based on any clear legal reasoning and analysis and cannot be perceived as a fair and proper application of legal rules and reasoning. Also, the letter was an aspect of institutional management since it was communicated through the office of the Registrar. This then means that the letter cannot be a judicial decision and it is an administrative action.

5.2. The recusal ruling

On 23rd January 2024, during the hearing of Supreme Court Petition No. E021 of 2022 *(Zehrabanu Janmohamed & Another v Nathaniel K. Lagat & 3 others)*, involving SC Ahmednasir's law firm, six Justices reiterated a previous communication and recused themselves from the case due to the involvement of counsel from his firm and issued a ruling affirming their communication in the letter banning SC Ahmednasir.[59] The question then is, does this ruling meet the threshold of a judicial decision? The first element is that a judicial decision is one made by a judge on a matter before them and in this case, the Supreme Court judges gave an order on a matter that was presented before them.[60] Secondly, the recusal ruling was in the form of an order and it meets the definition in Section 2 of the Civil Procedure Rules as it is a formal expression of the Supreme Court's decision. Third is that the Supreme Court gave reasons such as disrespect towards the bench and lastly is that they stated that it was under the hand and seal of the court which then meets the element that a decision must be made on the ground of law. My argument thus is that the recusal order meets the test of a judicial decision.

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[55]See Law Society of Kenya v Supreme Court of Kenya & another; Abdullahi SC & 19 others (Interested Parties) (Petition E026 of 2024) [2024] KEHC 7819 (KLR) (Constitutional and Human Rights) <Available at http://kenyalaw.org/caselaw/cases/view/293543/>

[56]Supreme Court Rules of 2020. < Available at http://kenyalaw.org:8181/exist/kenyalex/sublegview.xql?subleg=CAP.%209B >

[57]See note 7 above.

[58]See note 26 above.

[59]See note 1 above, para 3.

[60]See note 25 above.

Chief Justice Martha Koome said:

> "*We are recusing ourselves from hearing the matter as long as Ahmednasir Abdullahi Senior Counsel is appearing before the court or anyone is holding his brief. This is under the hand and seal of the court.*"

A question that then creates a quagmire in this is if the letter or communication is administrative and the ruling a judicial action, can the court quash the communication and leave the judicial decision? I leave this question for the determination of the High Court when they shall be rendering the final judgment on the matter. Another question might be, does the recusal order apply to only that case[61] or does it apply to all cases handled by the firm of SC Ahmednasir? This question is answered by the words of the Chief Justice that the court will not hear any matter in which SC's firm is involved. What the High Court will have to answer is if this contravenes the right to access justice of the parties represented by SC Ahmednasir.

6.0. A critique of the High Court action in LSK v Supreme Court of Kenya and Another[62]

The High Court should have heard and determined whether the matter was a judicial decision or an administrative action at the interlocutory stage because the issue is essential in answering jurisdictional questions – which are always preliminary questions determined at the interlocutory stage of a case.[63] In this case, I count it impossible to make a declaration that the High Court had jurisdiction without touching on the substance of the letter and the recusal ruling. The next part gives solutions that can be adopted to avoid future flaws.

7.0 Recommendations

These recommendations touch specifically on the action that ought to have been taken by the Supreme Court and the action that Senior Counsel Ahmednasir can take to enforce his rights. It does not touch on the matter that is still before the High Court due to the doctrine of *sub judice* a Latin term meaning "under judgment" restricts comments and discussions about ongoing legal proceedings, particularly to avoid prejudicing the outcome or influencing the court's decision.[64] On the first aspect, Section 28 of the Supreme Court Act provides that a person who assaults, threatens, intimidates, insults court officials or witnesses, interrupts court proceedings or disobeys court orders during a Supreme Court session commits an offence of contempt of court and may be detained and sentenced to imprisonment for up to six months, fined up to one million shillings, or both.[65] To avoid misnomers, this is the charge that the Supreme Court of Kenya ought to have given SC Ahmednasir as in the letter one of the complaints was that he insulted the court officials.

On the side of SC Ahmednasir, since the only way of challenging a judicial decision is by way of appeal or review, and the Supreme Court is the highest and they have stated that their decisions cannot be appealed against,[66] he can apply to the

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[61] Zehrabanu Janmohamed & Another v Nathaniel K. Lagat & Others, Supreme Court Petition No. E 021 of 2022.
[62] Law Society of Kenya v Supreme Court of Kenya & another; Abdullahi SC & 19 others (Interested Parties) (Petition E026 of 2024) [2024] KEHC 7819 (KLR) (Constitutional and Human Rights) <Available at http://kenyalaw.org/caselaw/cases/view/293543/>
[63] See Mudeyi YP, 'A Question of Jurisdiction (n 25 above)
[64] Van Rooyen K, 'Challenges to the Sub Judice Rule in South Africa' (2014) 70 HTS Theologies Studies / Theological Studies < Available at https://journals.co.za/doi/abs/10.4102/hts.v70i1.2714>
[65] <Available at http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%209B>
[66] See Attorney General (On Behalf of the National Government) v Karua (n 43 above)

Supreme Court for review of its decision.[67] He can raise the claim that the decision was reached per incuriam and with *mala fide*.[68] The only hurdle will be the lack of judicial humility,[69] and the potential for bias. A ruling is deemed per incuriam when it has been made through oversight, failing to consider essential legal instruments or authoritative principles.[70] A decision rendered per incuriam is fundamentally flawed, as it overlooks critical legal provisions or established authorities.[71] The test for determining per incuriam is stringent, requiring that the decision has failed to consider specific and applicable legal instruments, rules, or authorities.[72] In this case, Senior Counsel Ahmednasir can raise a claim that the court disregarded the provisions of the Supreme Court Act on the charge of contempt of court and out of malice decided to punish him in a punitive way that contravenes the provisions of the law.

8.0. Conclusion

This paper delineates the crucial difference between administrative actions and judicial decisions, using the Supreme Court of Kenya's actions against Senior Counsel Ahmednasir as a case study. It contends that the ban was punitive and executed in bad faith. The letter from the Registrar qualifies as an administrative action, while the recusal ruling constitutes a judicial decision. Recommendations include proper procedural conduct by the Supreme Court and avenues for Ahmednasir to challenge the actions taken against him.

Senior Counsel Ahmednasir

Youngreen Peter Mudeyi is a law student at Kabarak University.

[67]See Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR < Available at > where the Supreme Court reviewed its decision in Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited &Two Others, Sup. Ct. Application No. 2 of 2011; [2012] eKLR but in that instance, they upheld the previous decision.
[68]See Rai v Rai, para 50.
[69]See Joshua Malidzo Nyawa, 'Judicial Humility and Kenya's Supreme Court "under the Table" Overruling of Precedents' [2024] Social Science Research Network < Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4842243> accessed 10 July 2024 where he argues that the Supreme Court is not a 'paragon of judicial humility' and cannot easily agree that they have made a mistake. Walter Khobe wrote that '...if there is a group of people whose ideology is contrary to the spirit, values, and principles of the 2010 Constitution, it is the judges of the Court of Appeal. If there is a group of people who are irredeemably mired in a legal culture of liberal legalism (formalism, positivism, and rule-bound technical approach to adjudication) associated with the pre-2010 dispensation and are oblivious to the demands of change in legal culture demanded by the 2010 Constitution, it is the judges of the Court of Appeal. A reading of Advocate Malidzo Nyawa's paper makes me say that the term Court of Appeal in the quote should be replaced with Supreme Court to match the current context and wave of events.
[70]See Rai v Rai, para 50.
[71]Ibid, para 51.
[72]English House of Lords judgment in *Cassell & Company Limited v. Broome [1972] 2 WLR 645*. Here, the Court of Appeal's assertion that *Rookes v. Barnard [1964] AC 1129* was decided per incuriam was scrutinized. Lord Reid clarified that disagreement with a decision does not equate to it being per incuriam. He emphasized that a thorough review of the law by the House, which identifies and elucidates previously unclear principles, should not be described as per incuriam or ultra vires.

Liberating Kenya by blood, sweat and tears — My story

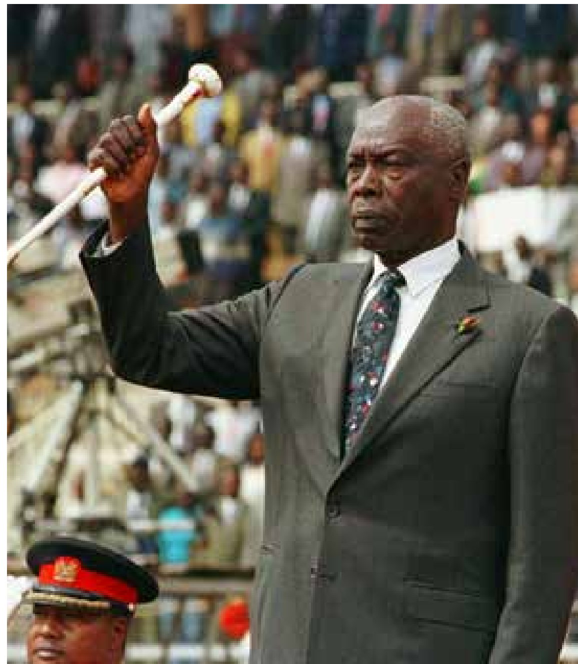
By Wanja Gathu

They say that when a talk about bones starts, old men and women feel targeted. I have been having nightmares since the trouble in Kenya started. My sleep pattern has become erratic and when I manage to fall asleep, even briefly, I wake up in panic with my heart racing. On the streets recently, I panicked and bolted when I heard a loud bang, startling other pedestrians.

I am reminded of a time when following my arrest at gunpoint and subsequent torture and detention by the Kenya government, I suffered serious panic attacks and anxiety. I thought I was going crazy and considered checking myself into a mental institution. I was tormented by thoughts of suicide, reasoning it was better to die than live in fear.

These thoughts have come back to haunt me in recent weeks, when I see young men and women lying dead in the streets and hear gunfire ringing loud, the military and police armed to the teeth rounding up and brutalising innocent Kenyans. Shooting unarmed civilians. Scenes last seen in 1982. It feels like déjà vu.

I was a young audacious and curious journalist in my early 20's just like the boys and girls leading the Gen-Z revolution– fearless, tribeless and leaderless. It was a dark time for Kenya, then, under the strong-armed rule of President Daniel arap Moi, of whom the incumbent President William Ruto is a protege.



The late President Daniel arap Moi

The people were tired of oppression and clamour for change had reached fever pitch, post the repeal of Section 2A of the Kenyan Constitution that ushered in a multi-party democracy, and heralded the beginning of the end for Moi rule. President Moi was furious. He unleashed a reign of terror using state agents and targeting vocal opposition leaders, journalists and youth, with deadly consequences.

The wind of change is unstoppable

Forced disappearances and state-sanctioned assassinations were common. Leading opposition figures, like Kenneth Matiba, Raila Odinga and Charles Rubia, Martin Shikuku- the fathers of the 2nd liberation-rights defenders, civil society, vocal clergy the likes of Bishop Alexander Muge, Reverend Timothy Njoya, Father John Kaiser, my parish priest, and other dissenting voices were targeted. Many died painfully.

Prof. Wangari Maathai camping at Uhuru Park, February 1991. Her courage helped protect Uhuru Park and Karura Forest from powerful land grabbers.

Arbitrary arrest and illegal detention were also routine. I covered cases of political prisoners, Koigi wa Wamwere, Rumba Kinuthia, and watched them brought to court in chains like common criminals in a heavily guarded courtroom in Nakuru, which led to the historic, Release Political Prisoners movement of defiance staged at Freedom square, Uhuru Park and championed by Professor Wangari Maathai, Koigi's mother, Wangui Wamwere and the mother of Rumba Kinuthia among other strong women and mothers of Kenya's second liberation.

Newsrooms were raided and journalists were arrested. I witnessed the arrest and brutal beating of my editor, Magayu Magayu and saw media houses and printing presses raided and destroyed, rendering dozens of journalists jobless. We were hounded by the special branch and terrorised. Colleagues disappeared and died in the line of duty. Then as now, the fear was real but in the end, tyranny was defeated by the people. It was against that backdrop that I left my newsroom on assignment in a remote village in central Kenya. The event was graced by a high powered delegation of leading opposition figures including the late environmentalist and Nobel Laureate Prof. Wangari Maathai, legendary human rights lawyer, Wanyiri Kihoro and other big names. I travelled in the Greenbelt convoy, feeling important and safe. This was going to be a big story and I was excited.

Nothing could have prepared me for the events that followed. I would suffer a series of harrowing, near-death experiences, dodging live bullets. I witnessed people being shot and brutalised by police in unimaginable ways and endured severe beating, torture and detention without trial, all for being a journalist, which was not a crime.

I was arrested on a Friday and would not be heard from again for days. My family was kept in the dark about my whereabouts, while I was starved to near death in a dingy cell packed to the rafters with men, accused of all manner of crimes including murder.

Being the only woman in the dingy, pitch-dark cell, I feared for my life, thinking someone would rape me or kill me and my family would never know what became of me.

I survived on tears and a cigarette stub, sneaked into the cell by a friendly cop and passed around between inmates to stave off hunger pangs. We slept on our feet because there was hardly any room to maneuver and when our feet were numb, someone devised a plan to allow some people to lie down and sleep in turns. One person would clap once to signal when to turn in unison and again to signal when it was time for those sleeping to rise and allow the next lot to sleep.

I couldn't sleep. I stayed awake and hyper-alert just in case someone defiled me in the night and stuck like glue to a male friend I had made on the trip down from Nairobi, who also ended up in jail with me and beaten to a pulp for taking photos. I believe he saved my life.

My arrest happened without warning. The setting was a large unfamiliar homestead, surrounded by trees and farmland. The event was billed as a cultural renaissance and began with music, dance and good food before speeches were made. I was busy taking notes, when I heard the sound of what sounded like gunfire. I remember seeing photojournalist Raphael Munge, then with the Standard newspaper and Muliro Telewa, with the BBC among other journalists before all hell broke loose.

The homestead was surrounded by heavily armed police in full combat gear. More police were landing from the air with guns blazing. Like a deer caught in the glare of headlights, I was transfixed to the spot by fear, before pandemonium broke out, forcing me to run for dear life, not knowing where I was going.

With bullets flying about me all round and people wailing in agony, I didn't get far

Police brutality in Kenya has been a serious and ongoing issue, characterized by excessive use of force, human rights abuses, and systemic problems within the law enforcement agencies. This problem has been particularly acute during periods of political unrest, demonstrations, or in the handling of suspects.

before my legs gave out and I fell into a ditch. I was dragged out by a uniformed police officer by the leg through shrubs and barbed wire fences, scraping my arms, legs and body very painfully along the way.

Surviving police brutality

I had the presence of mind to whip out my press card and identify myself as a journalist when the police demanded it but that did not help me. I was slapped, kicked, jeered and abused before being unceremoniously thrown into a police vehicle and landing head-first onto a pile of other bodies in various states of agony.

I remember one young man bleeding profusely from an open wound on his chest where a teargas canister had landed. I feared he would die before this day was up but his cries for help fell on deaf ears and so did the cries of a young boy whose broken arm hung loose.

Before this, I could not stand the sight of blood. I would faint but faced with so

much blood, and with no place to hide, my survival instincts kicked in. I tried to stave off the flow of blood from the injured man's chest with my sweater to no avail, so I watched as his life ebbed away, knowing my own life was also at stake.

I don't know whether he lived or died because when we arrived at the police station, we found a fresh set of police armed with whips and clubs, waiting to beat us senseless and they did. When I came to, I was in a huge police truck popularly known as a Mariamu. My left wrist was cuffed to a man, much taller and stronger than me, so when he moved, he dragged me along with him.

Not knowing where I was or where I would end up, I was gripped by the fear of death and I cried desperately for my mother, thinking about the message I would give my killers to take to my mother and siblings.

I wanted my family to know that I loved them and that I had done nothing wrong. My dying wish was that my killers would not show my mother my battered and broken body. I prayed they would have the decency to clean me up and cover up my nakedness and wounds before presenting me to my distraught mother. I wondered how colleagues at work would receive the news of my death in the line of duty. I was distraught.

I could taste dried blood, sweat and tears when I woke up next to find myself sprawled on the ground, stark naked in a very cold mud room, where I would spend many days and nights, in high security remand prison, alongside hardened female criminals. My face was swollen and I had a split lip and a black eye. I was sure my left wrist was sprained if not broken because of the severe pain I felt there, but I was in pain all over and did not receive any medical attention.

Because of this, I understand perfectly what those young Kenyans brutalised by police in the past few weeks are going through and deeply commiserate with them. My heart goes out to those killed and the bereaved families. Their sacrifice is not in vain.

Remaining unbowed through humiliation and torture

The last thing I remembered was being stripped naked and forced to bend, twist and turn at every angle and being prodded in every crevice of my body as police, both men and women, laughed and jeered.

They called me 'Mungiiki wife' and forced my legs wide open to see if I was circumcised, all the while laughing at me and making lewd jokes about sex and uncircumcised women. I was stripped of my clothes and my dignity on that day.

The objective of the oppressor is to dehumanise and reduce the victim to nothing so that they become docile and submissive. I refused to submit to the indignity and made up my mind right there to stand up and fight injustice whatever the cost.

For those who may not know, the Mungiki is a proscribed group, notorious for murder, extortion and other heinous crimes. In 2017 Mungiki terrorised and killed many Kenyans and in the height of the post-election violence of 2007/2008, in which more than 1200 Kenyans were killed, causing the indictment for crimes against humanity by the International Criminal Court, of former President Kenyatta and his deputy, William Ruto, now sitting President of Kenya—the Mungiki has been implicated in macabre killings across the country.

Even though I was released with no case to answer, my perceived association with the Mungiki would irreparably hurt my career and self-image. It is why I shudder and shiver when I see the architects of that murderous group cosying up to the government today, along with other people

While the ICC's proceedings against President William Ruto were a significant aspect of the post-election violence saga, his acquittal did not end the broader discussions about accountability, justice, and reconciliation in Kenya.

of questionable character, with known links to violence and other dastardly acts.

Trauma healing and search for justice

More than two decades later, I still suffer the trauma of arrest, detention and torture. This trauma has been triggered anew by the happenings in Kenya these past few weeks, which seem to follow a familiar and dangerous pattern. Even though my suffering was never acknowledged and I never received any restitution or compensation from the government, despite efforts to seek justice through the legal systems.
That said, my experience taught me first-hand, what can go wrong when those in positions of power are allowed to abuse that power and use it to silence, torment and persecute the people they are sworn to protect. I am still learning how to take better care of myself.

That experience also hardened my resolve to always speak up against human rights abuses, to defend people's rights, give voice to the voiceless and support the quest for justice for those treated unjustly by the system and its agents.

These activities have put me at loggerheads with powerful individuals and put me in harms way on numerous occasions as expected but I am a firm believer that silence emboldens the evil and as such I will not keep silent when innocent youth die by gunfire on the streets of Nairobi for exercising their democratic right to protest bad governance and oppression by corrupt, inept, wasteful and selfish leadership, that is deaf to the needs of people they are sworn to serve.
I will speak out loud and condemn in the strongest terms possible, the torture and killing of young men and women. Chopping up, stuffing in dirty bags, pieces of their bodies and dumping them in a quarry under the very noses of police who only yesterday were so eager to shoot and kill defenseless youth.

The GenZ revolution in Kenya represents a dynamic shift towards a more engaged, tech-savvy, and socially conscious generation. Their influence is shaping the future of the country, driving new conversations, and challenging traditional norms and systems.

Police who are paid by taxpayers' money but fail spectacularly to tackle crime and insecurity, leaving Kenyans unprotected and vulnerable. I will not tire of reminding police, the armed forces and all government security agents who kill civilians under orders from above, that they will be held personally responsible for their actions by law.

Lessons from the trenches

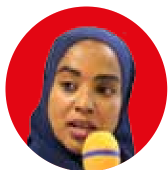
If this GenZ revolution does nothing else for the youth and the people of Kenya, I hope that it hardens their resolve to challenge those in positions of power to do right by the people. I hope that survivors rise up and demand justice for those whose lives were cut short and for those whose livelihoods and futures have been stolen by the ruling kleptocracy that is holding Kenya hostage.

I hope that people are believed and protected when they say their lives are in danger. That by their suffering, the youth are riled up so much that they stop at nothing in their quest to change Kenya for the better; for their own sakes and for generations to come. I hope that because of this revolt, the current and outgoing crop of leaders learn their lesson well. That no man or woman without integrity will dare to come even within a few feet of a public office because vigilant youth will henceforth stand guard.

I hope that when all is said and done, Kenya, my motherland will rise again in all its glory and splendour and that justice will once again be our shield and defender. God bless Kenya.

Wanja Gathu is an award-winning freelance journalist based in Toronto, Canada. She is also a human rights and social justice advocate.

Voices of accountability and the quest to be heard

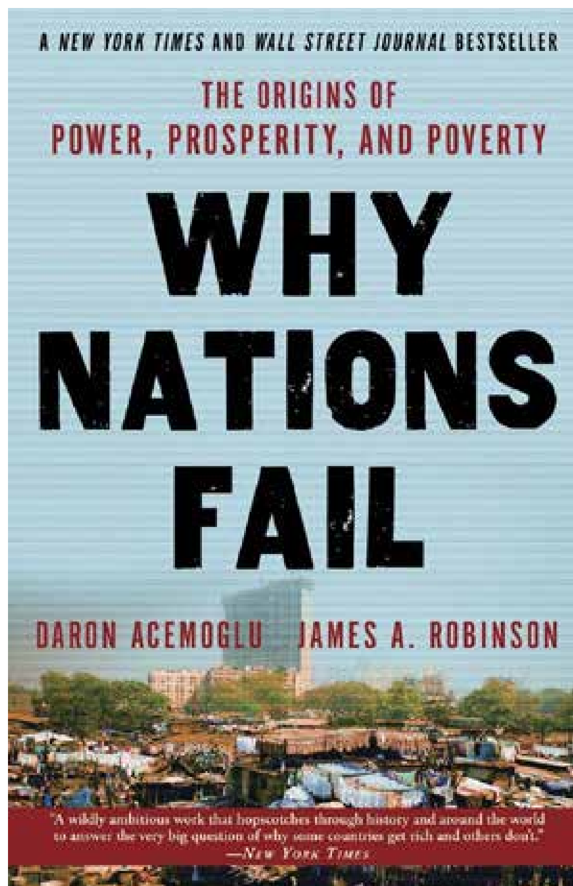


By Munira Ali Omar

In the beginning of the year, I distinctly recall posing questions to my colleagues in the field of human rights: "How much longer will we tolerate being disregarded by the government? How much longer will we continue submitting our concerns regarding draconian laws and policies knowing they will fall on deaf ears? How much can we allow the government to ignore us? Aren't we exhausted by the status quo? When will we finally make an impact in the streets?" Little did I foresee the passionate uprising of a Generation Z movement ignited by voices determined to challenge the status quo and demand meaningful change. It reminded me of the book:" *Why Nations Fail: The Origins of Power, Prosperity and Poverty*" by Daron Acemoglu and James A. Robinson. The writers gave an eloquent description of the emergence of Brazil's labour movement in the 1970s as follows:

> *"The rise of Brazil since the 1970s was not engineered by economists of international institutions instructing Brazilian policymakers on how to design better policies or avoid market failures. It was not achieved with injections of foreign aid. It was not the natural outcome of modernisation. Rather it was the consequence of diverse groups of people courageously building inclusive institutions which eventually led to more inclusive economic institutions."*

In Brazil, as Acemoglu and Robinson described, the labour movement played a



crucial role in challenging entrenched power structures and advocating for inclusive economic policies. The movement sought to empower workers and marginalised communities to push for reforms that would lead to a more equitable distribution of wealth and opportunities.

The authors also emphasized the role of the Workers' Party in Brazil, particularly in cities like Porto Alegre as follows:

> *"In taking over many local governments, something that accelerated in the 1990s, the Worker's Party began to enter into a symbiotic relationship with many local social movements. In Porto Alegre, the first Workers' Party administration after*

Accountability is indeed a fundamental pillar for achieving and sustaining peace in any society. It ensures that individuals and institutions are held responsible for their actions, particularly in situations of conflict or governance issues.

> *1988 introduced 'participatory budgeting' which was a mechanism for bringing ordinary citizens into the formulation of the spending priorities of the city. It created a system that has become a world model for local government accountability and responsiveness and it went along with huge improvement in public service provision and the quality of life in the city."*

Porto Alegre was the first city in the world to enhance citizen participation in municipal governance through a participatory budget-making process. This was a result of grassroots initiatives, community innovations and popular movements to counteract social exclusion and expand opportunities for democratic participation.

The Brazilian labour movement serves as a powerful example of how a united front from various segments of society can confront entrenched inequalities and injustices. Akin to what is discussed in the book, Kenya's Gen Z movement stemmed from the realisation that a broad coalition with a vision of rebuilding democracy has the power to compel and influence leaders to listen and respond to their demands.

The movement arose out of frustration and dissatisfaction with futile dialogues, talks, discussions and empty promises that lead nowhere. The youth decided to unequivocally reject corruption, conmanship and lies and their demand is just one: the enforcement of Article 10 of the Constitution. They are demanding social justice, equality, integrity, good governance, transparency, accountability and sustainable development. Simply put, they are advocating for meaningful action and change. This is because, for a long time, our leaders have failed us. They have consistently neglected our voices as evidenced by their corruption, greed and unethical behaviour which has stifled our nation's development and perpetuated social injustice despite years of promises and abundant resources earmarked for progress. The Gen-Z movement is now amplifying these grievances with unwavering resolve.

Theirs is a strong call for real action and profound change driven by the urgency to address historical injustices and economic disparities. This movement understands that true societal change requires the active participation of ordinary citizens in decision-making processes, echoing the participatory budgeting initiative in Porto Alegre.

Accountability is the bedrock of sustainable peace

Recently, a debate among civil society members became contentious when some advocated for peace, love and unity as our guiding motto. In response, I raised a critical question: how can there truly be peace without truth, transparency and honesty from our leaders? As an advocate for accountability, I argued that by holding the government to account, we are not inciting violence or praying for a coup. Put another way, peace, love and unity cannot be our guiding principles when leaders ignore the foundational values embedded in the Constitution.

Holding the government accountable is not an act of violence but a fundamental duty in any democratic society. It is about ensuring that those in power act in the best interests of all citizens and that they are answerable for their actions. Thus, peace built on a foundation of truth and justice is sustainable and inclusive.

Bottom-up empowerment

The parallels drawn between Brazil's labour movement and Kenya's Gen Z movement underscore a universal truth that sustainable development and prosperity arise not from top-down mandates but from the bottom-up efforts of empowered citizens striving for inclusive institutions and equitable opportunities. Unfortunately, Mr. Ruto's commitment to "bottom-up" progress has ultimately been exposed as deceptive and misleading.

It is for this reason that the youth decided enough is enough and a time has come to demand inclusive institutions and equitable opportunities as guided by the values and principles enshrined in Kenya's Preamble, Article 10, Chapter 6 and other constitutional provisions. These reflect Kenya's diverse historical, economic, social, cultural and political landscape shaping a vision where governance genuinely serves the needs and aspirations of its people.

Call for constitutional integrity

Just like we value accountability in our personal and professional lives, so too in leadership, we expect our leaders to act with integrity and prioritise the interests of those they serve. We must not tire in our firm determination to push for the full and uncompromising enforcement of Article 10 of the Constitution. Ours is not just a plea for change, we represent a profound commitment to creating a political environment where voices are heard and governance genuinely reflects the needs and aspirations of Kenyans.

Former Member of the National Assembly, Jeremiah Ngayu Kioni pointed out that reports like the Waki report, Ndungu report, TJRC report, BBI report and the NADCO report were all outcomes of dialogues and he asked: "How many more dialogues should be done before action is taken? Clearly, the time has come to uphold the Constitution!"

Indeed, it is evident that we have reached a critical juncture where mere discussions no longer suffice. The time for our leaders to move beyond promises and dialogues and to prioritise tangible steps towards accountability and progress for all is long overdue.

Munira Ali Omar is an Advocate at the High Court of Kenya and the Land Program Officer at Haki Yetu Organization.

Breaking executive chains: A call for true autonomy of Kenya's National Police Service Commission

By Youngreen Peter Mudeyi

By Valentine Kasidhi

Abstract

The Kenya National Police Service Commission (NPSC), established under the 2010 Constitution, aims to ensure police accountability and democratic oversight. However, its independence is compromised by executive influence, particularly in appointments, operational directives from the Director of Public Prosecutions (DPP), and financial dependence. This paper examines the NPSC's role as an independent watchdog, its historical and constitutional context, and its performance in terms of functional, operational, financial, and perceived independence. Findings show executive control undermines NPSC's autonomy, mainly through DPP directives and presidential appointments. The paper advocates for constitutional amendments to limit DPP authority over police investigations, reform appointment processes, ensure financial autonomy, and improve public perception of NPSC's independence. Additionally, empowering the Independent Policing Oversight Authority (IPOA) with prosecutorial powers is recommended. These reforms are essential for transforming the NPSC into a robust institution that upholds the rule of law, protects human rights, and fosters public trust in Kenya's democracy.

1. Introduction

Willy Mutunga notes that one of the most integral tenets of a transformative Constitution is having provisions for independent commissions.[1] Independent Commissions and Offices are established as bodies separate from the three arms of government, which ought to act as constitutional watchdogs or people's watchdogs to prevent the abrogation of human rights.[2] In Kenya, Commissions are not a separate government branch. The Supreme Court highlighted that the Constitution's "independence clause" protects these bodies from undue interference to prevent historical presidential power abuses.[3] Independent

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[1]Willy Mutunga, 'Transformative constitutions and constitutionalism: A new theory and school of jurisprudence from the Global South?' Transnational Human Rights Review Vol 8 (2021), 30-60, see also Willy Mutunga, In search and in defense of radical legal education: A personal footnote, Inaugural Lecture, Kabarak University, page 40. < Available at https://kabarak.ac.ke/news/inaugural-lecture-by-prof-willy-mutunga>

[2]See *In the Matter of the National Land Commission* [2015] eKLR. (NLC Advisory Opinion)

[3]In Re The Matter of the Interim Independent Electoral Commission, Constitutional application Number 2 of 2011, para 59. (Re IIEC case)

Established by the Kenyan Constitution, the Kenya National Police Service Commission plays a crucial role in ensuring the police force operates with integrity, accountability, and efficiency.

bodies, including several Commissions and the Judiciary, are tasked with safeguarding democracy's core principles—the rule of law, transparency, human rights, and public participation—acting as vigilant guardians for the people.[4]

The 2010 Constitution establishes autonomous constitutional commissions and independent offices, governed by the Constitution and laws, to operate free from external control.[5] While the textual acknowledgment of their independence is crucial, their effectiveness in promoting accountable governance hinges on their institutional design and the maintenance of their autonomy amidst political realities.[6] The NPSC is one of the crucial independent commissions, and if it fails to perform its duties well, it can lead to a significant abrogation of the Constitution.

This paper examines the history of the NPSC, the separation of powers doctrine, and the concept of a fourth arm of government composed of Independent Commissions. It analyzes the types of constitutional independence and assesses the NPSC's adherence. The paper discusses the NPSC's role in checking government arms and how it should be checked, concluding with recommendations to operationalize NPSC independence and ensure its effectiveness.

2. History of the National Police Commission and why Kenyans established it as an Independent Commission

To truly grasp the significance of constitutional commissions and independent offices (collectively known as independent institutions) in Kenya's constitutional framework post-2010, it is essential to

[4]Constitution of Kenya 2010, Article 249.
[5]Ibid, Article 249(2).
[6]J Yeh 'Experimenting with Independent Commissions in a New Democracy with a Civil Law Tradition: The Case of Taiwan' in S Rose-Ackerman & PL Lindseth Comparative administrative law (2010) 262.

The late Oginga Odinga

examine their development within the context of the country's constitutional evolution.[7] At independence in 1963, Kenya's Independence Constitution aimed to build a unified nation that respected individual rights and promoted social and economic progress.[8] This Constitution sought to replace the oppressive colonial system with a limited government structure, balancing power across the Executive, Legislature, and Judiciary. It also introduced a quasi-federal system and established independent offices, such as the Attorney-General and Controller and Auditor-General,[9] to ensure checks and balances further.

The Independence Constitution was amended to create an imperial presidency with extensive executive control. Fundamental changes included the 1986 Act removing job security for the Attorney-General and others and the 1988 Act removing job security for Public Service Commissioners and judges. These amendments, noted by Ben Sihanya, centralized power in the President and weakened governance accountability[10] of which I agree with him to the extent that the quasi-federal offices were also weakened. The history of executive control of the police in Kenya reflects a transition marked by efforts to centralize authority under the post-colonial bureaucratic executive state.[11] Kenya's independence constitution decentralized power, but leaders like Jomo Kenyatta and Oginga Odinga pushed for centralization. In 1964, KANU sought constitutional changes to abolish regional governments, reinforcing executive control over the police and administrative bodies.[12] Under direct executive control, the provincial administration suppressed dissent and ensured executive dominance through centralized, colonial-like governance and patronage networks. The police, functioning as part of the executive rather than independently, lacked autonomy. Independent Commissions were created to address governance's "accountability deficit" by checking the power and potential abuse of elected branches.[13] Under the old Constitution, there was a common belief that government officials lacked sufficient oversight, necessitating the creation of independent institutions to ensure accountability.[14] Khobe states this informed Kenyans' desire for the constitutional entrenchment of 'bodies that were separate

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[7]Khobe Ochieng , W. 'The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya. *Kabarak Journal of Law and Ethics*, (2021) 4(1) page 136. < Available at https://journals.kabarak.ac.ke/index.php/kjle/article/view/178 >

[8]K Murungi 'Kenya's Constitutional Theory and the Myth of Africanity' in K Kibwana (ed.) Law and the Administration of Justice in Kenya (1992) 58.

[9]Independence Constitution, Section 86 and 128.

[10]B Sihanya 'Reconstructing the Kenyan Constitution and State, 1963-2010: Lessons from German and American Constitutionalism' (2010) 6(1) The Law Society of Kenya Journal 24

[11]Bienen B. *Kenya:The Politics of Participation and Control*, Princeton: Princeton University Press (1974).

[12]Odinga, 'Not Yet Uhuru, Nairobi : : East African Educational Publishers (1964).

[13]Khobe Ochieng , W. 'The Independence, Accountability' (n 7 above) p 140.

[14]Y Ghai 'A Journey around Constitutions: Reflecting on Contemporary Constitutions' (2004) 122(4) The South African Law Journal. p 815.

from government and capable of applying and protecting the constitution.'[15]

Before the Constitution was promulgated, Kenya had statutory commissions that lacked constitutional protection, rendering them susceptible to executive influence and financial dependence on the treasury.[16] This compromised their independence and effectiveness, failing to enhance governance significantly. Including constitutional commissions and independent offices in the 2010 Constitution was a definitive response to these historical shortcomings. The rise of independent institutions in Kenya addresses governance accountability issues. The Constitution of Kenya 2010 categorizes the NPSC as one of these independent commissions.[17] It is supposed to act independently of all the other arms of government and should not be subject to the control of any. That is why the Constitution labels the President as the Commander-In-Chief of the armed forces,[18] of which the National Police is not part of it.[19] Studying the separation of powers will be essential to determine where the National Police falls.

3. Separation of powers and the need for a fourth arm of government

The Constitution aims to transform Kenya's legal, political, and economic landscape by instituting checks and balances on governmental powers, mitigating the unchecked authority of past presidencies and the Executive branch.[20] Montesquieu's concept of the separation of powers can be interpreted in several ways.[21] It advocates against dual roles in government, such as ministers serving as MPs, stresses independence between branches, and prohibits encroachment on each other's functions. Montesquieu's framework lacks accountability oversight. Kenya's commissions align with global trends, establishing a 'fourth branch' for rights enforcement, accountability, and decision-making enhancement alongside traditional branches.[22]

However, the Supreme Court of Kenya rejected the idea of a fourth branch of government, emphasizing that while commissions and independent offices lack sovereign power under Chapter 15 of the Constitution, they serve crucial roles as watchdogs over government functions separate from the Executive, Judiciary, and Legislature.[23] The Constitution establishes the NPSC as one of the Independent Commissions.[24] After establishing that the commissions, the National Police included, are not parts of the three arms of government and do not form a fourth arm, it will be essential to consider how the National Police can exercise different types of independence.

4. Types of Independence: Does the National Police Commission reflect them

The NPSC requires independence to hold the executive accountable and ensure

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[15]Khobe Ochieng , W. 'The Independence, Accountability' (n 7 above) p 140.
[16]Khobe Ochieng , W. 'The Independence, Accountability' (n 7 above) p 142.
[17]Constitution of Kenya 2010, Chapter 15. See also CM Fombad *'Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects' (2011) 59 Buffalo Law Review 1007* where he argues that the enactment of new constitutions in the African continent is aimed at ushering in an era of constitutionalism. This appears to be an illusion in Kenya when it comes to the NPSC which is independent only by perception.
[18]Constitution of Kenya 2010, Article 131(1c).
[19]Ibid, Article 241.
[20]Khobe Ochieng , W. 'The Independence, Accountability' (n 7 above) p 138.
[21]AW Bradley & K Ewing (eds) Constitutional and administrate law (1994) (11ed) 4.
[22]D Olowu 'Good Governance and Development Challenges in the South Pacific: The Promise of Ombudsmanship' (2004) 8 in LC Reif (ed) The International Ombudsman Yearbook 94-95.
[23]NLC Advisory Opinion.
[24]Constitution of Kenya 2010, Article 248(2j).

adequate oversight. Recognizing it as part of the government could compromise its impartiality. The Supreme Court identifies five factors for achieving independence: functional, operational, and financial autonomy, perceived independence, and collaboration with other state organs.[25]

4.1. Functional Independence

Functional independence implies that independent institutions should enjoy administrative independence, namely being subject to the constitution and the law only.[26] They should operate without direction or control from external interests or individuals, adhering strictly to legally mandated channels of accountability.[27] This implies that independent bodies exercise their autonomy by performing their functions independently, without being directed or ordered by other state organs or entities. This is where I note the first problem. The Constitution of Kenya 2010 states that the Director of Public Prosecution shall have the power to direct the Inspector General of the National Service to investigate any information, and the IG shall comply with any of such directions.[28] The police service should be independent and not under any organ's control. Despite the Office of the Director of Public Prosecutions (DPP) being institutionally independent and part of the Executive chapter of the Constitution, its perceived alignment with the executive allows it to influence the police, facilitating presidential control through so-called "orders from above."

Functional independence aligns with the specific functions and powers granted to commissions under Articles 252 and 253 of the Constitution.[29] These provisions safeguard independent institutions from other state organs assuming their duties. Amendment affecting their independence needs referendum approval under Article 255(1)(g). The Constitution allows the Cabinet Secretary for police services to direct the Inspector General on policy matters for the National Police Service.[30] Article 245 enables the Cabinet Secretary to give non-binding policy directions to the Inspector General (IG). Still, it prohibits directions on specific criminal investigations, prompting questions about the role of the Office of the Director of Public Prosecutions (ODPP) under Article 157 and the need for judicial clarity.

4.2. Operational Independence

Operational independence ensures that constitutional commissions and independent offices have sole authority over their daily operations, free from political interference.[31] This entails making decisions autonomously and maintaining organizational infrastructure for efficient functioning.[32] It prevents legislative or executive branches from influencing staffing,[33] procurement, or investigations, preserving the final administrative control within the independent institution. A significant lacuna also arises here: the NPSC plays the most critical role in the control of the National Police Service, yet all the members of the Commission are appointed by the President.[34] The Constitution conflicts with Article 252, which mandates commissions and independent offices to recruit their own staff—sarcastically asking

[25] NLC Advisory Opinion, para 184.
[26] Constitution of Kenya 2010, Article 249(2a).
[27] Ibid, Article 249(2b).
[28] Ibid, Article 157(4).
[29] Khobe Ochieng , W. 'The Independence, Accountability' p 147.
[30] Constitution of Kenya 2010, Article 245(4).
[31] Khobe Ochieng , W. 'The Independence, Accountability' p 148.
[32] See Republic v Attorney General; Law Society of Kenya (Interested Party); Ex-parte: Francis Andrew Moriasi [2019] eKLR.
[33] Constitution of Kenya 2010, Article 252.
[34] Ibid, Article 246(2).

if the President is included. Additionally, the President can remove the IG under Article 245(7), potentially compromising the IG's independence by fostering subservience to the President.

4.3. Financial Independence

It is crucial to safeguard the financial autonomy of constitutional commissions and independent offices to prevent their budgetary process from obstructing their mandate.[35] Adequate funding is vital for effective performance; underfunding can lead to inefficiency and loss of public trust, undermining effectiveness. Financial independence means the executive shouldn't control funding; Parliament should allocate funds after independent institutions present budgets for scrutiny. The Constitution mandates sufficient funding allocation by Parliament for these institutions to operate effectively and fulfill their constitutional duties.[36] This process involves the National Assembly conscientiously considering funding requests and respecting the importance of these institutions' roles in governance. The NPSC Act provides that Parliament shall appropriate the Commission's monies for the Commission.[37] For the National Police Service, the Parliament allocates adequate funds to enable the Service to perform its functions, and the budget for the Service shall be a separate vote.[38] Control over finances translates to control over power. If the executive manages funds for the National Police Service without them coming from a consolidated fund or receiving a separate vote, it enables the executive to influence the commission and the police service.

4.4. Perception of Independence

Public trust in these independent bodies must be maintained. The perception of independence exists when the public sees these institutions as being insulated from both deliberate and unintentional efforts to undermine their authority or weaken their position.[39] From Wanjiku's perspective, the Police are seen as part of the executive and not independent, having relinquished their constitutional roles for financial incentives, thus becoming tools of the Executive rather than guardians of the people as intended by the Constitution.

Judicial Interpretation of Independence of Constitutional Commissions and Independent Offices

The courts have occasionally attempted to interpret the independence of constitutional commissions and independent offices as contemplated in the Constitution. The question of independence is familiar in our superior courts.

In the Matter of the National Land Commission (NLC Advisory Opinion),[40]

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[35]Khobe Ochieng W. 'The Independence, Accountability' p 151.
[36]Constitution of Kenya 2010, Article 249(3).
[37]National Police Service Commission Act, CAP 85 Laws of Kenya, Section 18.
[38]Ibid, Section 116.
[39]P de Vos 'Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy' in D Chirwa & L Nijzink (eds) Accountable Government in Africa: Perspectives from Public Law and Political Studies (United Nations University Press, 2012) 165.
[40](2015) eKLR. Para 162-211.

The Communications Commission of Kenya (CCK) was the regulatory body responsible for overseeing the telecommunications and broadcasting sectors in Kenya. However, in 2014, CCK was restructured and its functions were taken over by the Communications Authority of Kenya (CA).

the Supreme Court considered the notion of the Constitutional Commissions and Independent Offices being categorized as the fourth arm of government. The judges acknowledged that the notion of a "fourth arm" of government deviates from the traditional separation of powers conceptualized by Montesquieu. They highlighted that Article 1(3) of the Constitution recognizes a tripartite separation of powers, delegating sovereign power to Parliament, the national executive, and the Judiciary, including independent tribunals. In the NLC Advisory Opinion, the Supreme Court confirmed that constitutional commissions are classified as State organs under the Constitution. While Article 1(3) vests sovereign power in the Executive, Legislature, and Judiciary, it does not exclude commissions from exercising public power. The Court emphasized that commissions safeguard the people's sovereign power, crucial for the authority of the Executive, Legislature, and Judiciary. Therefore, they are regarded as 'constitutional watchdogs' or 'people's watchdogs,' emphasizing their independence and perceived independence as critical. Article 249(2) ensures constitutional commissions' independence, shielding them from external control, as emphasized in *In Re the Matter of the Interim Independent Electoral Commission*.[41] The clause safeguards against historical executive dominance, aiming to empower commissions as guardians of democracy's core values: rule of law, integrity, transparency, human rights, and public participation. Commissions act as watchdogs, necessitating freedom from improper influences to fulfill their governance mandates effectively.[42]

In the Communication Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others,[43] the Supreme Court emphasized independence as a shield from government, political, and commercial interference. It ruled that commissions must operate free from external instructions or influence to maintain their integrity and effectiveness.[44] The High Court was emphatic in *IPOA v AG*[45] by stating that

[41]Sup. Ct. Application No. 2 of 2011; [2011] eKLR (Re IIEC case).
[42]Ibid.
[43][2014] eKLR (CCK case).
[44]Ibid.
[45]Independent Policing Oversight Authority & Another v. Attorney General & 660 Others, Petition No. 390 of 2014; [2014] Eklr, para 98.

the NPSC must avoid any appearance of direction or control by external authorities to uphold its independence under Article 249(2)(b) of the Constitution, especially in police recruitment. Nonetheless, the Supreme Court was swift in distinguishing independence from detachment In Re the matter IIEC by stating that:

> *"For due operation in the matrix, "independence" does not mean "detachment," "isolation" or "disengagement" from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest…"*

The Supreme Court, from the interpretations, expects Constitutional Commissions to collaborate with other State organs for effective public service. Since most commissions lack prosecutorial powers, working harmoniously with other governance offices is crucial for fulfilling their constitutional roles. This view was reiterated in the CCK case,[46] where the learned judges emphasized that the constitutional commissions cannot be isolated from other players in public governance. This perspective was also mirrored in the NLC Advisory Opinion, whereby the Supreme Court emphasized that independence of the Constitutional Commissions is not an end in itself; of paramount importance is the operational benefits that flow from the Commission's role.[47]

Now, considering the attributes of independence contemplated in the Constitution, the Supreme Court, in the NLC Advisory Opinion, referred to Langa DP's wisdom in the South African case of *New National Party v. Government of the Republic of South Africa and Others*,[48] where the judge categorized independence into financial independence, which means having access to necessary funds for constitutional duties. Parliament, not the commissions, handles budgeting and must rationally consider the commission's funding needs while balancing national interests. As stated by the South African Constitutional Court, Parliament, not the executive, must ensure adequate funding and allow commissions to defend their budgetary needs before relevant committees.[49] The South African court outlined the second factor, "administrative independence," as control over matters related to the commission's constitutional functions. The executive must assist the commission in maintaining its independence, impartiality, dignity, and effectiveness but cannot dictate its operations. If the commission needs government assistance, the government must provide it if possible or fund the commission to meet its needs.[50]

In the NLC Advisory Opinion, the Supreme Court established crucial principles of Constitutional Commission independence. It defined functional independence as the need for commissions to operate autonomously without external instructions or orders, as outlined in Articles 252 and 253 of the Constitution. This concept, also known as administrative independence, was affirmed in *JSC v. Speaker of the National Assembly and Others and the New National Party of South Africa.*

The Supreme Court addressed operational

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[46]CCK case.
[47]NLC Advisory Opinion.
[48]New National Party v. Government of the Republic of South Africa and Others (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489
[49]Ibid, para 98
[50]Ibid, para 99

IPOA investigates complaints against police officers and ensures accountability for any misconduct or abuse of power. This includes handling cases of police brutality, misuse of authority, and corruption.

independence as essential for autonomy, covering appointment procedures, commission composition, and operational processes, as outlined in Article 255(1)(g)(11). It also stressed that financial independence, ensuring adequate funding as mandated by Parliament under Article 249(3), is crucial for commissions to perform their functions effectively. It also stated the importance of perceived independence, requiring commissions to operate free from external influences like government, politics, and commercial interests, as affirmed in cases such as CCK and IPOA. Additionally, the Court discusses the necessity of collaboration and consultation with other state organs and civil society for effective service delivery, ensuring accountability and inter-agency harmony, as seen in cases like the National Land Commission and IIEC.

5. Checks and Balances: What role can the National Police Service Commission play

The President is the Commander in Chief of the Kenya Defense Forces and not the National Police Service Commission. Khobe notes that Independent institutions play a crucial role in upholding human rights and fostering accountability in governance, and their effectiveness in providing checks and balances on other government branches relies on their independence and accountability.[51] Thus, this paper posits that the Independent Commissions also have a role in achieving institutional independence. Fombad argued on this and said that merely establishing new institutions in a constitution does not ensure the fulfillment of constitutional goals; their success depends on respecting and supporting their designated roles.[52] The Independent Police Oversight Authority can play the accountability part, as seen in the ensuing part of this paper.

The 2010 Constitution creates independent institutions to safeguard the people's sovereignty, ensure all State organs uphold

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[51]Khobe Ochieng , W. 'The Independence, Accountability' p 139.
[52]CM Fombad 'The New Cameroonian Constitutional Council in a Comparative Perspective: Progress or Retrogression' (1998) 42(2) Journal of African Law 175.

democratic values and principles, and advance constitutionalism.[53] The joint mandate of these independent institutions is to check government, thus ensuring accountability in governance. The main question is whether or not the NPSC can perform this role.

6. IPOA: An institution of accountability

The Independent Policing Oversight Authority operates independently in its functions and is not answerable to any individual, office, or entity.[55] IPOA must maintain impartiality and follow natural justice principles. The government must support its independence and effectiveness without interference. Parliament funds IPOA for oversight of police, investigations, and advising victims.[56] IPOA members are appointed independently of executive influence to ensure they can perform duties without fear. However, IPOA lacks prosecutorial powers, limiting its role to advisory. This allows corruption and undermines its constitutional defense role, possibly due to presidential influence in appointments.[57] The President approves the list that is sent to the selection panel. This means that the selection process can only move on with his approval. This will intimidate prospective IPOA board members to bend to the Executive's interests, fearing that the President has nominating powers.

7. The Judiciary as an instrument for holding the Police Accountable

The Constitution mandates all state organs and institutions adhere to its provisions and the rule of law. As guardians of the Constitution and law under Article 165, courts can intervene if independent institutions violate these principles, as confirmed in judicial rulings. Public Interest Litigation plays a crucial role here. The Law Society of Kenya sets an example and should sue the National Police Service Commission for human rights violations during the #REJECT THE FINANCE BILL period. Courts cannot initiate cases independently but require petitions, underscoring the need for public awareness to enhance access to judicial oversight over institutions like the National Police Service Commission.

8. Recommendations

Fombad outlines four principles to safeguard the independence of these commissions: constitutional recognition of their autonomy, their subjection solely to the constitution and law, support and protection by other state organs, non-interference in their operations by any state entity, and accountability to Parliament.[58] In addition to separating powers among the Executive, Legislature, and Judiciary, embedding independent institutions into the constitution to promote accountability and uphold democracy is essential for fostering constitutionalism.[59] It is important to note that creating independent institutions that ensure accountable governance is a significant challenge, demanding a legal framework that explicitly safeguards their independence and impartiality, including operational autonomy, to prevent interference by other actors.[60] It is a reality that the enforcement of accountability

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[53]Constitution of Kenya 2010, Article 249(1).
[54]Khobe Ochieng , W. 'The Independence, Accountability' p 142.
[55]Independent Policing Oversight Authority Act, Section 4.
[56]Ibid, Section 6.
[57]Ibid, Section 11.
[58]CM Fombad 'Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects' (2011) 59 Buffalo Law Review 1007.
[59]Khobe Ochieng , W. 'The Independence, Accountability' p 141.
[60]CM Fombad 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa' (2007) 5 The American Journal of Comparative Law 6.

discharged by independent institutions threatens powerful interests that often make a concerted effort to weaken their power and influence.[61] To address this situation, legal and institutional frameworks should ensure that independent institutions are distinct from the President, preventing any Executive control over their agenda and operations.[62] Appointment processes must be insulated from political interference to bolster the legitimacy and autonomy of these bodies.[63] Maintaining a certain independence from Parliament, which may also face scrutiny, is crucial. It is in light of this that I suggest the following:

First, functional independence requires amending the Constitution to remove the DPP's power to direct the IG of the National Police Service. Operational independence involves reforming NPSC members' appointment and removal processes to minimize presidential influence. Financial freedom can be achieved by allocating a dedicated budget for the NPSC, which can be managed independently of the executive. Enhancing the perception of independence is also crucial; this can be done by increasing public trust through transparency and asserting the NPSC's autonomy. Lastly, oversight and accountability can be reinforced by granting IPOA prosecutorial powers and removing the executive's role in appointing IPOA board members. These reforms are vital for empowering the NPSC to uphold the rule of law and protect human rights, aligning with Kenya's constitutional and democratic ideals.

9. Conclusion

From the foregoing, it is established that independence, in all its forms, is a fundamental aspect of our Constitutional Commissions and independent offices. Drawing from the wisdom of Chief Justice Emeritus Dr. Willy Mutunga, Kenyans promulgated a transformative and progressive constitution on the promise of a "reconstitution or reconfiguration of a Kenyan state from its former vertical, imperial, authoritative, non-accountable content under the former Constitution to a state that is accountable, horizontal, decentralized, democratized, and responsive to the vision of the Constitution."[64] Additionally, the Constitution 2010 strengthened institutions and created institutions that provide checks and balances to remedy the historical injustices Kenyans suffered under an unfettered Executive. Hence, constitutional commissions and independent offices were established for this purpose. Nonetheless, while their independence is guaranteed in the Constitution, we advocate for wholesome institutional reforms that reinforce the independence of constitutional commissions and independent offices.

Crucial reforms to empower the NPSC include removing DPP control, minimizing presidential influence in appointments, ensuring financial independence, enhancing public trust, and granting IPOA prosecutorial powers. These steps will bolster the NPSC's autonomy and accountability.

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[61] JM Ackerman 'Understanding Independent Accountability Agencies' in S Rose-Ackerman & PL Lindseth Comparative Administrative Law (2010) 271, in Khobe Ochieng , W. 'The Independence, Accountability' p 146.
[62] PL Strauss 'The Place of Agencies in Government: Separation of Powers and the Fourth Branch' (1984) 84(3) Columbia Law Review 594.
[63] Khobe Ochieng , W. 'The Independence, Accountability' p 147.
[64] 'Mutunga, Willy "the 2010 Constitution of Kenya and Its Interpretation: Reflections from the Supreme Court's Decisions" (Vol 1) [2015] SPECJU 6' (*Saflii.org* 2015) <https://www.saflii.org/za/journals/SPECJU/2015/6.html> accessed 19 July 2024.

From avoidance to constitutionalisation of private law: The puzzle of horizontality

By Ronald Odhiambo Bwana

I. Introduction

Mattias Kumm, in his seminal work 'Who is afraid of the total constitution',[1] coined the term 'total constitution'. Kumm borrows Carl Schmitt's thoughts on a total state where 'everything is up for grabs politically'.[2] A total state is defined by the prevalence of politics over the law such that the relationship between the public and private domains is blurred.[3] A total constitution, in contrast, reverses the ideals of a total state. The law, in a total constitution, thus supersedes politics and imposes substantive constraints on the resolution of any and every political question.[4] Therefore, the defining features of a total constitution include the provision of rights and freedoms to provide individuals with a defensive mechanism against the latent excesses of the state as well as other individuals, judicial enforcement of the rights and liberties, and entrenching basic structures such as the rule of law.[5]

Mattias Kumm

The Constitution of Kenya has been pronounced a total constitution.[6] Article 1 of the Constitution of Kenya declares itself as

[1]Mattias Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalisation of Private Law' 7 German Law Journal 4.
[2]Ibid, 341.
[3]Ibid.
[4]Ibid, 343.
[5]Ibid, 344-5.
[6]Joshua Malidzo Nyawa, 'Justice Kiage and the Total Constitution: Judicial Protection of religious minorities in Kenyan School' (2023) The Platform for Law, Justice and Society, 1; Kenya Law Reform Commission, 'Implementing the Total Constitution: Towards a Normative Approach' (2015); Walter Khobe Ochieng, 'From constitutional avoidance to the primacy of rights approach to adjudication in Kenya: A case study of the interplay between constitutional rights and the law of contract' (2022) 6 Kabarak Journal of Law and Ethics, 165.

the foundational norm from which all other norms draw their legitimacy. It also spells out the general normative standards for the resolution of all legal disputes. It follows therefore that the Kenyan constitution is, borrowing the words of Ernst Forsthoff,[7] *A juristisches Weltenei*, meaning a special 'kind of juridical genome that contains the DNA for the development of the whole legal system'.[8] The Constitution of Kenya therefore creates a value system that spreads to all areas of legal conflict rocks cannot withstand the volcanic outburst of the values that imbue the constitutional system. Nonetheless, Joshua Nyawa maintains that the Constitution, in and of itself cannot transform the Kenyan society and thus demands a 'willing and able judiciary to enforce the progressive bill of rights.[9]

II. Constitutional avoidance

The doctrine of constitutional avoidance has various dimensions. These conceptions are based on the progenitors of the doctrine-the United States of America and South Africa. In the American realm, avoidance varies along the lines of classic and modern avoidance. Classic avoidance is based on what kinds of interpretations a judge can avoid i.e., those that are found unconstitutional or those that merely raise constitutional 'doubts. Modern avoidance is based on how far the statutory meaning can be stretched in the name of avoidance i.e., whether the canon is merely a tiebreaker, or allows judges to choose the less plausible meaning to avoid constitutional problems.[10] The modern dimension of the avoidance canon is reflected in *Ashwander v Tennessee Valley Authority*[11] where Brandeis J in his concurring opinion said the following; "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court (Supreme Court of the United States of America) will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

The South African conception of the canon is that courts and litigants should not invoke a constitutional norm or value where it is possible to decide a case without reaching a constitutional issue.[12] Speaking to the referral of matters originating in inferior courts under section 103(4) of the South African Constitution, the Constitutional Court of South Africa [Kentridge AJ] in *S v Mhlungu*[13] held that; … where it is possible (for the inferior courts) to decide any case, criminal or civil, without reaching a constitutional issue, that is the course which should be followed. This has been taken to mean an indirect as opposed to a direct application of the Bill of Rights to private law disputes i.e., a court must apply the provisions of ordinary law to resolve the dispute even when the Bill of Rights applies directly.[14]

In Kenya, the avoidance canon is primarily understood from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved.[15] Therefore, if it

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[7] E Forsthoff, Der staat der industriegesellchaft 144 (2d ed. 1971).
[8] Kumm (n 1), 'Who is Afraid of the Total Constitution? 344.
[9] Nyawa (n 6), 2.
[10] Eric Fish, 'Constitutional Avoidance as Interpretation and as Remedy' (2016) 114 Michigan Law Review 7, 1281.
[11] 297 US 288, 348 (1936).
[12] Walter Khobe Ochieng, 'From constitutional avoidance to the primacy of rights approach to adjudication in Kenya: A case study of the interplay between constitutional rights and the law of contract' (2022) 6 Kabarak Journal of Law and Ethics, 160.
[13] 1995 (3) SA 867 (CC) [59].
[14] Christine Noella Lubano, 'The application of fundamental rights to private relations in Kenya: Striking a balance between fundamental rights and the freedom of contract' (LLM thesis, University of Cape Town 2013), 32.
[15] *KKB v SCM & 5 others* [2022] KEHC 289 (KLR) (22 April 2022) (Ruling) [32].

is possible for a court to decide a case upon a statute, common law, or customary law then it should not determine constitutional issues arising in the case.[16] According to Walter Khobe Ochieng, avoidance demands that a litigant seeks recourse in secondary norms first before invoking the constitution since once a normative derivative of the constitution has been enacted in statute the constitution assumes a 'background role and ceases to be the primary avenue of enforcement of constitutional aspirations and demands'.[17]

In *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*,[18] the Supreme Court of Kenya held that where there are mechanisms other than the Constitution through which a dispute can be resolved, the said mechanisms ought to be utilized to resolve the dispute. Principally, avoidance is linked to the doctrine of separation of powers. In broad terms, separation of powers is meant to 'ensure the protection of individual rights by way of the distribution of political power between different institutional actors and includes mechanisms to ensure that such power is not unduly exercised'.[19] In the context of avoidance, separation of powers reflects the cooperation that courts owe the legislature in breathing life into the Constitution.[20]

Avoidance, therefore, is an instrument of judicial restraint that is steeped in the need to weigh judicial power together with legislative intent.[21] As with other general rules, the avoidance doctrine is not absolute. Therefore, in certain circumstances, litigants can skirt legislation and base their cases on constitutional provisions. These may be in cases of palpable, direct, and clear violations of the Constitution and where non-constitutional relief is insufficient to fully vindicate a litigant's right. Defenders of the canon justify it on the ground that it protects the function served by statutes in implementing the Constitution. Professor Githu Muigai, for instance, argues for a minimalist interpretation of the Constitution since the statutes play a subsidiary role in implementing the Constitution. Avoidance equally seeks to enhance institutional comity through judicial deference to parliament's role in constitutional implementation. It is also justified based on discouraging the development of dual systems of law by estopping litigants from directly invoking constitutional provisions in the insubordination of their normative derivatives.[22]

Be that as it may, avoidance has been condemned on various grounds. Firstly, it is carped for denying litigants constitutional remedies. This is because the doctrine is often invoked to prevent the vindication of a constitutional right.[23] Secondly, the doctrine of avoidance avoids a direct application of the Bill of Rights thus undermines not only the Bill of Rights but also the rule of law.[24] Thirdly, the doctrine is perceived to lead to 'unaccountable judicial law-making' since when interpreting a statute avoidance demands that judges only take the path

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[16]*SG v Standard Media Group & 3 others* (Constitutional Petition E066 of 2021) [2022] KEHC 13633 (KLR) (6 October 2022) (Judgment) [19]; Khobe, 'From constitutional avoidance to the primacy of rights approach to adjudication in Kenya', 160.
[17]Khobe (n 12), ''From constitutional avoidance to the primacy of rights approach to adjudication in Kenya', 161.
[18](2014) eKLR [256]-[258].
[19]Stu Woolman and Michael Bishop, *Constitutional Law of South Africa* (2013), 12-1.
[20]Khobe (n 12).
[21]Sharon Hofisi, 'The doctrine of constitutional avoidance as a nemesis to the public interest and strategic impact litigation in Zimbabwe: Thesis, antithesis and synthesis' (LLM thesis, University of Zimbabwe 2017), 29.
[22]Khobe (n 12), 'From constitutional avoidance to the primacy of rights approach to adjudication in Kenya', 163.
[23]Ibid, 60.
[24]Stu Woolman, 'The Amazing, Vanishing Bill of Rights' (2007) The South African Law Journal 124, 762-794.

that raises no constitutional concerns.[25] Michelle Slack argues that dalliance with the avoidance doctrine has elevated it to a virtue leading to a 'passive-aggressive (judicial) activism' thus undermining judicial independence.[26] Kloppenberg maintains that by embracing avoidance courts abdicate their role of upholding the Constitution thus undermining the development of the law hence calling for the avoidance of the avoidance canon.[27]

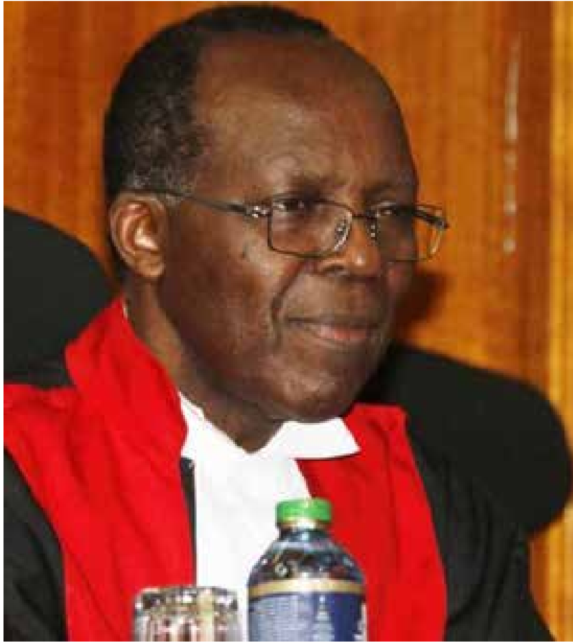
III. Constitutionalisation of private law

Fundamental rights and freedoms enshrined in the Bill of Rights were previously understood as spelling the obligations that the state and its organs owe individual citizens i.e., in a vertical relationship rather than a horizontal relationship.[28] This was premised on the inequality of power between the state and the individual in that the State is far more powerful than the individual and has a monopoly of violence within its territory thus it is necessary to provide the individual with a defensive mechanism against abuse of the State's power.[29] In recent times, fundamental rights have evolved to include an obligation on individuals and private entities to uphold fundamental rights in appreciation of the fact that rights abuses can also be instigated by private actors i.e., horizontal relationships.[30] For instance, Article 20 (1) of the Constitution of Kenya recognizes that the Bill of Rights applies to all laws and binds all State organs and all persons. Article 20(1) thus establishes both a vertical and horizontal application of the Bill of Rights.

Private law is essential for the functioning of a society as it provides the legal framework for personal interactions and transactions. It helps individuals and businesses navigate their relationships and resolve conflicts in a structured manner.

Constitutionalisation of private law, therefore, implies that private law i.e., the law of tort, property, and contract, etc should be 'designed or developed by judges in a way that aligns it with Constitutional rights'.[31] This is because the whole legal system derives its legitimacy from human or fundamental rights. The Bill of Rights therefore is not only the highest or supreme law but also the source or origin of all the laws in the legal system.[32] Collins surmises that the requirement of alignment 'signifies that although private law does not have to duplicate constitutional rights exactly, it should not contradict or subvert constitutional rights'.[33] Critics argue that the application of fundamental rights to the private sphere may prove disruptive in

[25]KG Young, 'The Avoidance of Substance in Constitutional Rights'; Michelle Slack, 'Avoiding avoidance: Why the use of the constitutional avoidance canon undermines judicial independence-a response to Lisa Kloppenberg' (2006) 56 Case Western Reserve Law Review 4, 1057-1069.
[26]Michelle Slack, 'Avoiding avoidance: Why the use of the constitutional avoidance canon undermines judicial independence-a response to Lisa Kloppenberg' (2006) 56 Case Western Reserve Law Review 4, 1059.
[27]Ibid.
[28]Lubano (n 14), 'The application of fundamental rights to private relations in Kenya' 1.
[29]Ibid.
[30]Ibid.
[31]Hugh Collins, 'Private Law, Fundamental Rights, and the Rule of Law' (2018) 121 West Virginia Law Review 1, 3.
[32]Ibid, 13.
[33]ibid



Justice Jackton Ojwang

that it could change the content of private law thereby creating new causes of action.[34] However, Khobe contends that the emphasis by the Court on avoidance will result in courts not infusing constitutional values and rights in private law matters thereby working against the goal of imbuing the legal system with the ideals and aspirations that underpin the Bill of Rights.[35]

The application of the avoidance doctrine must therefore take into account Kenya's constitutional context. Notably, Article 10 spells out the values and principles that underpin the Constitution including the rule of law, democracy, equity, social justice, equality, and human rights. The national values and the Bill of Rights are not just there for some relaxed reading. Instead, they bind all state officers including judges when they apply or interpret the constitution; enact, apply, or interpret any law. Article 20 of the Constitution of Kenya thus constitutionalises private law since fundamental values and principles inherent in the constitution permeate all law whether public or private. Khobe surmises that instead of avoiding constitutional issues Article 20 constitutionalises all legal matters (including private law) thus introducing a primacy of constitutional rights approach to adjudication as opposed to constitutional avoidance.[36]

The Constitution requires that judges must consider the values that are enshrined as founding values in the Constitution when interpreting breaches of human rights.[37] Ojwang J (as he then was) in *Luka Kitumbi and 8 Others vs Commissioner of Mines and Geology and Another*[38] considered that:

> "*…the Constitution of Kenya, 2010 is a unique governance charter, quite a departure from the two [1963 and 1969] earlier Constitutions of the post-Independence period. Whereas the earlier Constitutions were essentially programme documents for regulating governance arrangements, in a manner encapsulating the dominant political theme of centralized authority, the new Constitution not only departs from that scheme, but also lays a foundation for values and principles that must imbue public decision-making, and especially the adjudication of disputes by the Judiciary. It will not be possible, I think, for the Judiciary to determine causes such as the instant one, without beginning from the pillars erected by the Constitution of Kenya, 2010.*"

This means that courts cannot overlook or sideline constitutional values when applying or interpreting any law in Kenya's legal system. In contrast, the avoidance

[34] Hugh Collins, 'Private Law, Fundamental Rights, and the Rule of Law' (2018) 121 West Virginia Law Review 1, 9.
[35] Khobe (n 12), 'From constitutional avoidance to the primacy of rights approach to adjudication in Kenya', 179-180.
[36] Khobe (n 12), 'From constitutional avoidance to the primacy of rights approach to adjudication in Kenya', 169.
[37] Constitution of Kenya (2010), Article 20(4).
[38] (2010) eKLR

doctrine encompasses the interplay between constitutional principles and empowers courts to skirt constitutional issues where non-constitutional grounds are available.[39] In that regard, Articles 10 and 20 of the Constitution limit the application of the avoidance doctrine to Kenya since the value system embedded in the Constitution calls on the courts to adopt a maximalist as opposed to a minimalist interpretation of the Constitution. Nevertheless, each case must be treated according to its peculiar circumstances.

IV. A case study of the interplay between the Bill of Rights and private law

The application of fundamental rights in the private sphere in Kenya is highly contested. This section interrogates the approach adopted by Kenyan courts in various cases where it was alleged that the substratum of the suits was private law matters amenable for resolution through the interpretation and application of statutes and the common law. These are cases where Kenyan courts have embraced both the canon of constitutional avoidance and the primacy of rights approach (Constitutionalisation of private law) to adjudication.

a) Uhuru Kenyatta v Nairobi Star Publications Limited[40]

The petitioner, Uhuru Muigai Kenyatta complained about a publication by the Nairobi Star newspaper which proposed that he was involved in a plot to murder Maina Njenga, the former head of the proscribed Mungiki sect.[41] Uhuru Kenyatta argued that the publication constituted a gross abuse of

Kenya's Bill of Rights is part of its Constitution, which was comprehensively revised and adopted in 2010. The Bill of Rights in the Kenyan Constitution is found in Chapter Four of the Constitution and outlines a broad range of fundamental rights and freedoms guaranteed to all citizens.

the freedom of expression and a violation of his rights and fundamental freedoms in the Bill of Rights.[42] On its part, Nairobi Star objected to Mr. Kenyatta's petition arguing that the fundamental rights and freedoms set out in the Kenyan Constitution can only be enforced against the state and state organs and not private individuals as sought by Mr. Kenyatta. Nairobi Star further argued that Mr. Kenyatta's claim if any, was a claim under the tort of defamation and could only be remedied in a civil suit and not through a constitutional petition.[43]

In determining the matter, Lenaola J (as he then was) relied on Article 21(1) of the Kenyan Constitution and local and international case law to find that fundamental rights and freedoms did not apply between private parties.[44] In his view, the said provision required the state and every state organ to observe, protect, promote, and fulfil the fundamental rights and freedoms in the Bill of Rights. He

[39]Sharon Hofisi, 'The doctrine of constitutional avoidance as a nemesis to the public interest and strategic impact litigation in Zimbabwe: Thesis, antithesis and synthesis' (LLM thesis, University of Zimbabwe 2017), 32.
[40]High Court Petition No. 187 of 2012.
[41]*Uhuru Kenyatta v Nairobi Star Publications Limited*, [3].
[42]*Uhuru Kenyatta v Nairobi Star Publications Limited*, [1].
[43]*Uhuru Kenyatta v Nairobi Star Publications Limited*, [2].
[44]*Uhuru Kenyatta v Nairobi Star Publications Limited*, [12].

Mohamed Ali Mohamed

observed that a similar obligation had not been imposed on private parties.

b) Brookside Dairy Limited v Mohamed & another[45]

The petitioner filed a constitutional petition alleging that the 1st respondent, Mohamed Ali Mohamed, had publicly uttered defamatory statements against it by claiming, amongst others, that the petitioner exploited dairy farmers who sold and supplied milk to it as raw materials for its business and that it sold processed milk products that were not processed or manufactured to required health or safety standards and were of substandard quality. It was the petitioner's case that such utterances were meant and did cause public resentment against it, its business practice, and the products that it manufactures and sells as part of its business operations thus violating its rights under Articles 20, 33(2) (d) and 27 of the Constitution. In that regard, the petitioner prayed for, inter alia, an order of compensation for harm and loss caused to it by the constitutional violations.[46]

The 1st respondent filed a preliminary objection to the court's assumption of jurisdiction over the petition. It argued that since the petitioner was a limited liability company it could not afford itself the protection and guarantees of the Bill of Rights. It proceeded to assert that the dispute raised no constitutional questions but related to defamation and thus ought to have been addressed by the civil or commercial divisions of the High Court, assertions of which were supported by the 2nd respondent.[47] In reply, the petitioner argued that the word 'person' as used in the Constitution included juristic persons such as it hence it enjoyed equal rights with all others. The petitioner further argued that the law on defamation on its own does not contain sufficient remedies for vilification and it is an enabling law on human dignity protected under Article 28 and reputation under Article 33 (3) which is different from vilification.[48]

Placing reliance on Article 20 of the Constitution the High Court (Ong'udi J) held that the protections and guarantees in the Bill of Rights extended to limited liability companies such as the petitioner.[49] However, the Court upheld the preliminary objection. It noted that although the avoidance canon does not divest the court of its jurisdiction the petition raised no constitutional question thus it restrained itself from hearing the dispute because it could effectively be

[45] *Brookside Dairy Limited v Mohamed & another* (Constitutional Petition E339 of 2022) [2022] KEHC 13627 (KLR) (Commercial and Tax) (13 October 2022) (Ruling).
[46] *Brookside Dairy Limited v Mohamed & another*, [2]-[7].
[47] *Brookside Dairy Limited v Mohamed & another*, [8]-[10].
[48] *Brookside Dairy Limited v Mohamed & another*, [11]-[13].
[49] *Brookside Dairy Limited v Mohamed & another*, [20]-[29].

determined as a civil cause rather than a constitutional petition. The Court was of the view that while the petitioner referred to Article 33(2) (d) and 27 of the Constitution, fashioning its case as a constitutional petition was not the only course that would have given it the remedy it sought. Ong'udi J reasoned that it was incumbent upon the civil court to determine whether the utterances were defamatory under the law of defamation before it could eventually determine the issue of breach of the said Articles after granting effective remedies if it agreed with the petitioner.[50]

c) Busia Sugar Industry Limited v Agriculture and Food Authority & 2 others[51]

The petitioner, Busia Sugar Industry Limited (Busia Sugar), and the 2nd respondent, West Kenya Sugar Company Limited (West Kenya Sugar) were sugar milling companies operating within Busia County. The background of the petitioner's case was that it had set up a sugar mill, upon being licensed by the 1st respondent, at Ebusibwabo Location, while the 2nd respondent, without authorisation, was in the process of setting up a similar mill at Olepito, some 10 kilometres away from the petitioner's mill. The petitioner initially went to court where it was found, *inter alia*, that West Kenya Sugar was acting unlawfully, there was a need for the views of the petitioner to be heard, and the 2nd respondent was ordered to apply for a transfer of a licence within 30 days.[52]

West Kenya Sugar applied for an amendment of its then licence whereby the 1st respondent issued it a new licence which the petitioner felt was not proper, as it did not conform with the initial court judgment. The petitioner argued that section 20 of the Crops Act was not complied with, as the right procedures were not followed. It complained that it was not accorded the opportunity to air its views, as the location of the 2nd respondent's mill was an encroachment on its cane catchment area, which was exposing it to loss, of over Kshs. 6,000,000,000.00. It further complained that contrary to the aforesaid judgment, the 1st respondent issued West Kenya Sugar with a new licence, instead of transferring the previous one.[53]

To the petitioner, the impugned registration contravened not only the previous court judgment but also Articles 35, 40, 47, and 60 of the Constitution, and section 20 of the Crops Act, with relation to the right to information, the right to own property, the right to fair administrative action, rights around use and management of land, and licensing of players in agribusiness. It thus sought orders, inter alia, for a declaration that its fundamental rights under Articles 27(2), 35(1), 40, and 60 of the Constitution were violated; certiorari to quash the decision to license the 2nd respondent and to issue a new registration certificate number and a permanent injunction to prohibit the 2nd respondent from carrying on operations at Olepito, before obtaining a lawful licence, by section 20 of the Crops Act.[54]

West Kenya Sugar's response to the petition was that although a remedy is available for a constitutional tort, in the form of an award of compensation in damages, that can only be granted against a public entity, otherwise the private entity could only pursue damages in an ordinary civil action, which was best tailored for litigation of that kind.

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[50]*Brookside Dairy Limited v Mohamed & another*, [30]-[44].
[51][2024] KEHC 1099 (KLR).
[52]*Busia Sugar Industry Limited v Agriculture and Food Authority & 2 others*, [2].
[53]*Busia Sugar Industry Limited v Agriculture and Food Authority & 2 others*, [2].
[54]*Busia Sugar Industry Limited v Agriculture and Food Authority & 2 others*, [1].

The 3rd respondent submitted that the claim against it was founded on a breach of an alleged duty of care, owed to the petitioner which made it a tort, whose right remedies lay in an ordinary civil suit, and not a constitutional cause. The 3rd respondent thus urged the court to strike off the petition on grounds of constitutional avoidance.[55]

In determining the matter, Musyoka J invoked constitutional avoidance noting that the petitioner had an alternative remedy by way of an ordinary civil suit rather than the constitutional cause.[56] He appreciated that the doctrine was mainly cited and applied in cases where the dispute was between private entities. Musyoka J abhorred the principle of avoidance concerning the horizontal application of the Bill of Rights noting that '[t]he horizontal application of the Bill of Rights enabled the court, seized of a constitutional cause, to determine disputes that would have also been quite properly handled in ordinary suits.[57]

d) Jemimah Wambui Ikere v Standard Group Limited & another[58]

Jemimah Wambui Ikere, the petitioner, took issue with publications appearing in the respondents' newspapers, The East African Standard and the Daily Nation. In the publications, the respondents detailed the killing of the late Simon Matheri, a man who had been described by the police as a most wanted criminal. Alongside the story, the Standard Group Limited's 'East African Standard' had published images of Rahab Wacuka who was the wife of the late Simon Matheri together with images of six of Matheri's children namely, David Njoroge, Ann Mueni, Elizabeth Wanjiku Matheri, Caroline Wanjiku Matheri and Michael Korongo Matheri (all minors) who stood beside her. Similarly, on page 3 of Nation Media Group's 'The Daily Nation' appeared pictures of Anne Mueni and David Njoroge (Simon Matheri's children) under a headline titled 'The agony of being the wife of a wanted man'.[59]

According to the petitioner, the published stories, narrations, and images were highly offensive and severely embarrassing to the minors as they prejudiced their innocence and psychological integrity. The petitioner further argued that publication of the said stories pictures and narrations was calculated, intentional, reckless, and negligent since they failed to give due consideration to the general interests of the children and safeguard their constitutional rights to privacy and dignity, thus prejudicing their reputation, development, and growth. The petitioner thus prayed for, amongst others, a declaration that the respondent failed to safeguard the best interests of the child in the manner the newspaper reports were done in respect of their deceased father.

As would be expected the respondents opposed the petition by raising a preliminary objection. They argued that rights and fundamental freedoms could not be enforced directly by way of a petition to the High Court against non-state actors. It was the respondents' position that the Bill of Rights was not self-sufficient and an interpretation of Article 20 as the basis of the claim was restrictive and would likely occasion confusion in adjudicating breaches of rights within and without the constitutional provisions. They thus urged the Court to find that Article 20 of the Constitution did not impose duties on

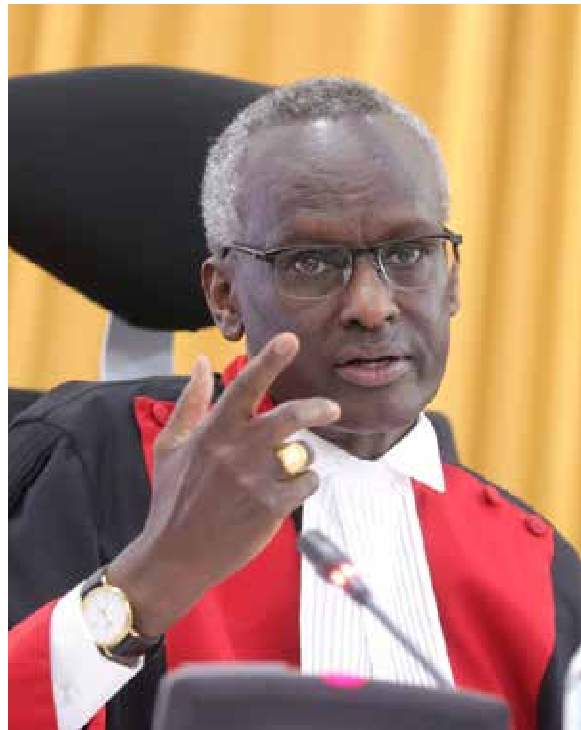
[55]*Busia Sugar Industry Limited v Agriculture and Food Authority & 2 others*, [28].
[56]*Busia Sugar Industry Limited v Agriculture and Food Authority & 2 others*, [94].
[57]Busia Sugar Industry *Limited v Agriculture and Food Authority & 2 others*, [95].
[58](2013) eKLR.
[59]*Jemimah Wambui Ikere v Standard Group Limited & another*, [2],[3].

non-state actors that could be enforced by a constitutional petition and that if any claim arose, then the Petitioner ought to have raised the same by way of a civil suit.[60]

In determining the matter, Lenaola J (as he then was) relied on both local and international case law to dismiss the preliminary objection. Lenaola J found that in terms of Articles 2, 20, and 260 of the Constitution a private citizen could claim a violation of fundamental rights and freedoms as against another private citizen. In his view, the Court had an obligation to interpret the law in consonance with the Bill of Rights so that rights are not undermined in the private sphere. In reaching this conclusion Lenaola J stated; "… the question is whether the alleged acts violate any of the Petitioners' constitutional rights and that is an issue to be determined at the trial. To close the door at this stage would be unfair and unreasonable".[61]

e) Cradle (The Children Foundation) suing as trustee through Geoffrey Maganya v Nation Media Group Limited[62]

Cradle, a non-governmental organization with a mandate to protect the rights of children sought an order to compel Nation Media Group Limited (Nation Media') to provide sign language insets or subtitles in all newscasts, educational programmes, and all programmes covering events of national significance. Cradle argued that Nation Media's failure to do so constituted a violation of the express provisions of Section 39 of the Persons with Disabilities Act as well as a violation of the constitutional right of persons with disabilities to receive



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information and not to be discriminated against on account of their disability.

On its part, Nation Media argued that under Article 21(1) of the Kenyan Constitution, it is the duty of the state and not Nation Media to address the needs of vulnerable groups in society. Nation Media further argued that the implementation of sign language insets was costly and would expose it to heavy losses. It justified its position based on Article 44(1) of the Kenyan Constitution which entitled it to use a language of its choice including sign language. Nation Media further argued that the orders sought by Cradle if granted would amount to interference or control of Nation Media's broadcasting function contrary to Article 34 of the Kenyan Constitution.

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[55]*Busia Sugar Industry Limited v Agriculture and Food Authority & 2 others*, [28].
[56]*Busia Sugar Industry Limited v Agriculture and Food Authority & 2 others*, [94].
[57]Busia Sugar Industry *Limited v Agriculture and Food Authority & 2 others*, [95].
[58](2013) eKLR.
[59]*Jemimah Wambui Ikere v Standard Group Limited & another*, [2],[3].
[60]*Jemimah Wambui Ikere v Standard Group Limited & another*, [6]-[12].
[61]*Jemimah Wambui Ikere v Standard Group Limited & another*, [15]-[28].

In determining the matter, Githua J relied on Article 2(1) and Article 20(1) of the Kenyan Constitution as a basis for finding that the Bill of Rights 'applies to all laws and binds all state organs and all persons'. In her view, state organs as well as private entities such as Nation Media were bound to respect and obey all the provisions of the Kenyan Constitution. She therefore found that the Kenyan Constitution imposed a duty on all persons and not just the state to ensure access by persons with disabilities to all places, public transport, and information. In reaching this conclusion, Githua J stated that: 'The Constitution makes it clear that there is both a vertical – state to citizen and horizontal – citizen to citizen application of the Bill of Rights…'

f) Baobab Beach Resort and Spa Limited v Duncan Muriuki Kaguuru & another[63]

The appellant was an operator of a hotel resort in Diani. The respondents were tour operators. The appeal arose from a ruling and order made by the High Court (Mumbi Ngugi J) on 12th June 2014, that dismissed a preliminary objection filed by the appellant, Baobab Beach Resort and Spa Limited that sought to have a constitutional petition filed by the 1st respondent, Duncan Muriuki Kaguuru and the 2nd respondent, Destination Africa DMC Limited dismissed with costs. The preliminary objection was premised on, amongst other grounds, that the fundamental rights and freedoms set out in the Bill of Rights applied vertically and not horizontally and that the substratum of the suit was private law amenable for resolution through the interpretation and application of statutes and the common law not by way of a constitutional petition.[64]

The respondents, in their petition, sought a declaration that their fundamental rights to equality and freedom from discrimination on grounds of race, colour, birth, and ethnic and social origin under Article 27 of the Constitution had been violated; an injunction restraining the appellant from further publication of defamatory words; compensation in general damages for the violation of their rights; exemplary, aggravative and punitive damages for defamation and compensation for loss of business. The 1st respondent's case was that he was discriminated against by the appellant since he was denied entry into the hotel precincts by the security personnel who selectively and discriminatorily allowed other persons to enter the hotel on the grounds of race, colour, birth, ethnic and social origin due to the hotel management's policy to exclude small tour operators. The 1st respondent further complained that following the incident, the appellant went on to defame him by falsely and maliciously publishing articles on the social and local print media insinuating that he was a charlatan, a fraudster and a malicious person, which exposed him to ridicule,

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[62] *Cradle (The Children Foundation) suing as trustee through Geoffrey Maganya v Nation Media Group Limited*, High Court Judicial Review Miscellaneous Application No. 217 of 2011.
[63] (2014) eKLR.
[64] *Baobab Beach Resort and Spa Limited v Duncan Muriuki Kaguuru & another*, [1], [2].

embarrassment and distress, as well as harming his business.[65]

In her ruling, Mumbi Ngugi J dismissed the Preliminary objection for reasons that, the Constitution made it clear that the Bill of Rights was applicable horizontally and that the Constitutional & Judicial Review Division of the High Court and not the NCIC was the proper forum for the determination of the claims of discrimination and defamation. Dissatisfied with the High Court's decision, the appellant challenged the ruling at the Court of Appeal on grounds that the learned judge was wrong in finding that the Constitutional & Judicial Review Division of the High Court had the exclusive jurisdiction to hear and determine any Constitutional Petition alleging a violation or infringement of fundamental rights under the Constitution 2010; for wrongly concluding that a constitutional claim for breach of Article 27 (4) and (5) of the Constitution could be applied by one private citizen against a fellow private citizen, yet the remedy lay in either private law or under some other legal provision and for erroneously finding that fundamental rights and freedoms apply vertically and horizontally under the Bill of Rights.

The Court of Appeal dismissed the appeal. The appellate court was of the view that the 2010 Constitution ushered in a new dawn such that claims under the Bill of Rights could be made both vertically and horizontally. The appellate court noted that whether a claim should invoke the provisions of the Constitution or be commenced as a civil suit under some other legislation was a matter that required to be determined based on its own particular set of facts. In any event, the starting point would be to ascertain whether the dispute

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is one of a constitutional or civil nature. It went on to argue that since there was no alternative remedy for redress of Article 27 discrimination the respondents were entitled to institute a constitutional petition.[66]

V. Critical analysis of the emerging approach to the doctrine of constitutional avoidance in private law

The *Uhuru, Brookside* and B*usia Sugar* cases illustrate a preference by the Kenyan courts for a 'restrained' or 'formal' approach to the application of fundamental rights to private law disputes. Judges in the cases were therefore reluctant to upset the perceived 'settled' rules of private law. Constitutional avoidance for that matter has been wrongly linked to the doctrines of exhaustion and ripeness.[67] It is submitted that while the doctrines of exhaustion and ripeness raise jurisdictional questions avoidance does

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[65]*Baobab Beach Resort and Spa Limited v Duncan Muriuki Kaguuru & another*, [2].
[66]*Baobab Beach Resort and Spa Limited v Duncan Muriuki Kaguuru & another*, [7], [8].
[67]*Anthony Miano & others v Attorney General & others* [2021] eKLR, [29], [33].

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not, although all the doctrines are core principles of judicial restraint.[68] Ripeness relates to the timing of the presentation of a dispute for adjudication such that courts would normally refuse to adjudicate matters that have not properly crystallized into justiciable disputes.[69] On the other hand, the doctrine of exhaustion serves the purpose of ensuring that a litigant follows the prescribed procedure for addressing his/her grievances.[70] In other words, exhaustion ensures the postponement of judicial consideration of matters to ensure that a party first seeks redress within the mechanisms in place for resolution outside the Courts.

However, constitutional avoidance operates when a court is properly seized with a matter but chooses not to determine it on the ground that the matters raised therein are amenable to resolution through the application of ordinary law rather than the Constitution. The departure between avoidance and exhaustion is that 'whereas the doctrine of exhaustion is limited to alternative mechanisms outside of the court system, the principle of avoidance includes the courts as part of the alternative processes for legal redress'.[71] It follows therefore that by wrongly linking constitutional avoidance to the doctrines of exhaustion and ripeness Kenyan courts

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[68] Heinz Klug, 'Judicial Training and the Role of Judges in a Constitutional Democracy' (2018) 1 South African Judicial Education Journal 1, 17.
[69] *National Assembly of Kenya & another v Institute for Social Accountability & 6 others*, Nairobi Civil Appeal 92 of 2015 [2017] eKLR [73].
[70] *Speaker of National Assembly v Karume* [1992] KLR 21
[71] *Busia Sugar Industry Limited v Agriculture and Food Authority & 2 others* [2024] KEHC 1099 (KLR), [93].

as seen in the *Uhuru, Aliela*, and *Brookside cases* squandered the opportunity of 'infusing constitutional values and rights in private law matters thereby working against the goal of imbuing the legal system with the ideals and aspirations that underpin the Bill of Rights'.[72]

In any event, the avoidance canon as expressed in *Mhlungu* related to the jurisdiction of the South African Constitutional Court under the interim Constitution. For that matter, only cases where there was a palpable violation of Constitutional rights could be used to invoke the Constitutional Court's jurisdiction. Subsequently, only constitutional issues reached the Constitutional Court. If anything, the South African Constitutional Court in *Jordaan v City of Tshwane*,[73] disavowed Kentridge J's statement 'where it is possible to decide any case without reaching a constitutional issue, that course should be followed'.[74] The context of Mhlungu was abandoned under the final South African Constitution when the Constitutional Court became the apex court on all matters such that in the current dispensation, 'constitutional approaches to rights determination generally enjoy primacy'.[75]

The changing views of the Kenyan courts on the application of fundamental rights in the private sphere are exemplified by the *Cradle, Jemimah Wambui Ikere*, and *Baobab Hotel* cases. This points to the willingness by the Kenyan courts to align private law with constitutional rights thereby enabling private law to evolve in ways that make it more consistent with the values of the present generation. Besides, constitutional values permeate all law therefore Kenyan courts cannot skirt constitutional values and the Bill of Rights by dangling constitutional avoidance on litigants. The point is that under the current constitutional dispensation, all legal issues are constitutional. In that regard, Cameron J argued in *Jordaan* that 'far from avoiding constitutional issues whenever possible, this Court (South African Constitutional Court) has emphasised that virtually all issues – including the interpretation and application of legislation and the development and application of the common law – are, ultimately, constitutional'.[76]

VI. Conclusion

The total nature of the Constitution of Kenya implies that no legal dispute is beyond its reach. Therefore, when presented with disputes under private law courts are under an obligation to read the provisions of the private law in light of constitutional values and rights to ensure that they do not contradict or subvert constitutional rights. If anything, the supremacy clause in the Constitution implies that ordinary law (legislation and the common law) cannot be elevated above the Constitution thus in all legal disputes it cannot assume a subsidiary role following constitutional avoidance. The change brought by the Kenyan Constitution therefore envisages a primacy of constitutional rights approach to adjudication limiting the application of constitutional avoidance to Kenya. Penultimately, the avoidance canon runs contra to the letter and spirit of the Constitution of Kenya.

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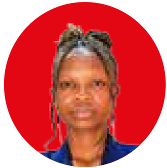
[72]Khobe (n 12), 'From constitutional avoidance to the primacy of rights approach to adjudication in Kenya', 179-180.
[73][2017] ZACC 31, [6].
[74]Klug (n 61), 'Judicial Training and the Role of Judges in a Constitutional Democracy' (2018), 19.
[75]*Jordaan v City of Tshwane Metropolitan Municipality* [2017] ZACC 31, [7], [8].
[76]Ibid, [8].

The cloudflare firing: A turning point for workplace privacy and data protection in Kenya?



By Esther N. Wasike

A recent incident involving Brittany Pietsch, an employee of a company known as Cloudflare, recorded on video her termination meeting and shared it on the social media platform TikTok, sparking global conversations about employee rights. The video captured a seemingly impersonal interaction with a Human Resource representative, who was unable to provide clear reasons for the layoff. This led to criticism of Cloudflare's handling of the situation and raised questions about transparency, corporate responsibility, and empathy shown to employees during layoffs.

When interrogated about her motive for recording and sharing the video, the employee stated that she recorded the meeting to help her remember the details and avoid having to recount the incident to friends and family. With only about ten followers at the time, she believed the video would remain private. However, she did not seek consent from the HR representative or the company before recording and sharing the termination process. The widespread reach of social media means that such information can easily transcend territorial borders, raising concerns about data privacy and consent if such a scenario took place in other countries.

The European Union's Data Protection Directive 95/46, as interpreted in the

Brittany Pietsch

CJEU case C-25/17 Jehovan todistajat, establishes that data processing intended for an unrestricted audience or extending to the public domain cannot be considered for personal or domestic purposes. This suggests that even with privacy settings, sharing a video recording on social media without the consent of the data subjects would not fall under the purely personal use exemption. Therefore, one's intention to keep video or audio-recorded information private might not align with the nature of the platform and the legal interpretation of personal data processing. This highlights the importance of understanding the implications of sharing content on social media, with or without limited visibility settings.

Data protection in Kenya is governed by the Data Protection Act, 2019, which came into force on November 25, 2019. This Act provides a framework for the protection of personal data and privacy and aligns with global standards like the EU's General Data Protection Regulation (GDPR).

In Kenya, the Cloudflare incident would be subject to privacy considerations outlined in the Constitution of Kenya (2010) and the Data Protection Act (2019). Article 31 of the Constitution guarantees the right to privacy, encompassing the confidentiality of personal affairs and communications. While Article 41(4) grants employers autonomy in their operations, potentially including terminations, the privacy laws introduce a layer of complexity. This creates a delicate balance between an employer's right to manage internal affairs and an employee's right to privacy, particularly concerning the collection, use, and disclosure of personal data during termination procedures.

The Data Protection Act 2019 and the Computer Misuse and Cybercrimes Act 2018 further delineate the principles for handling personal data, upholding the constitutional guarantees of privacy, freedom of expression, and access to information. These principles are woven throughout the objectives and provisions of the legislation. Although these laws stand as guardians, ensuring the responsible handling of personal information, neither Act explicitly addresses the scenario of an employee recording their termination meeting without consent and subsequently posting it on social media. This digital age dilemma leaves employers, particularly legal persons, vulnerable to public humiliation or reputational damage if sensitive details of the termination process are broadcasted.

The Data Protection Act protects personal information relating to "natural persons". It does not explicitly protect information relating to companies and firms. The Computer Misuse and Cybercrimes Act, on

The Kenyan government and various organisations continue to work on improving data protection practices and raising awareness about the importance of data privacy. Compliance with the Data Protection Act is crucial for organisations to build trust with customers and avoid legal and financial repercussions. ary principles in data protection. Organisations must obtain explicit and informed consent from individuals before collecting, processing, or sharing their personal data.

the other hand, focuses on criminal offenses, potentially applicable if the recording is defamatory, but doesn't directly address the act of recording itself. This legislative silence highlights the need for a clearer legal framework to navigate the complexities of the digital workplace and protect the privacy interests of employers and the employees' right of expression.

Recording a layoff or employment termination conversation without consent could be considered a violation of the data protection and privacy laws and regulations. However, the legality of such recordings in Kenya is a grey area due to potential exceptions under the law. If the recording and posting are done with the consent of all parties involved, it might be permissible. The situation, however, becomes murky when the recording is done covertly without the knowledge of the other party.
One may argue that even without explicit consent, if the recording is made for a legitimate purpose, such as documenting evidence of unfair dismissal or discrimination, it might be considered legal. Even so, such evidence should be obtained in a manner that does not violate any right or fundamental freedom in the Bill of Rights as such renders the trial unfair. This is as provided for under Article 50(4) of the Constitution.

In RC v KKR [2021] eKLR, the High Court of Kenya grappled with the matter of illegally obtained evidence in civil cases. Justice Anthony Mrima found and held that any evidence procured from the CCTV camera secretly installed in the parties' son's bedroom, evidence from any voice recorder, evidence gathered by the private investigator, and any evidence from the Petitioner's email and social media accounts all amount to illegally obtained evidence and that such evidence offends the administration of justice.

Data protection is increasingly crucial in the digital age, where vast amounts of personal information are collected, processed, and shared. Proper data protection helps build trust between organizations and individuals and ensures compliance with legal requirements.

Despite the general rule that illegally obtained evidence is admissible provided that it is relevant and does not cause injustice to the accused, the ghost continues to haunt jurisprudence as regards civil cases. Courts have been making different pronouncements on the matter, with some holding that the rule on illegally obtained evidence applies only to criminal cases where judges have discretion while others holding that in civil cases judges have no discretion but to admit it.

Sharing a recording of a layoff on social media without the consent of all parties involved is a clear violation of the Data Protection Act. It infringes on the privacy rights of the individuals involved and could also be considered defamation if it harms the reputation of the employer. The Pietsch incident highlights the tension between employee transparency and employer privacy more so in Kenya. While employees may have a right to document their experiences, especially in situations of unfair treatment, employers also have a right to protect confidential information and maintain a certain level of privacy in their internal processes.

As Kenya's digital landscape evolves, it is crucial to develop clearer guidelines and regulations on workplace recordings and social media use. Striking a balance between transparency and privacy will require existing data protection regulations to be clarified or expanded to address the specific issue of workplace recordings and employer privacy. Furthermore, in addition to amendments on the employment and data privacy legislations, employers could consider including clauses in employment contracts regarding recording restrictions during disciplinary or termination meetings.

While there is a need for more legal clarity in this area, it's important to remember that recording and sharing personal conversations, especially without consent, can have serious legal and ethical repercussions. It is advisable to exercise caution and prioritise open communication with all parties involved.

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A "pro-family" approach to the irretrievable breakdown of marriages in Kenya (I): Stating the problem

By Adrian Nyiha

In a judgment delivered at the High Court at Nakuru on 18th April 2024, the court dissolved the Hindu marriage between NHS and TSS. As a justification for this decision, the Honorable Judge SM Mohochi, stated its reasoning in the following succinct terms: "No man and woman can be bound by law or religion where no love and feelings exist in holding the union of marriage together." This single statement seems to encapsulate the increasingly common view of courts presented with divorce matters.

The Marriage Act of 2014 provides for five grounds of divorce: adultery, cruelty, desertion, exceptional depravity, and "irretrievable breakdown of the marriage". The first four of these grounds belong to a fault-based divorce system, that is, one in which marriages can be dissolved only upon proof of a matrimonial fault by either of the spouses. The last ground, however, is (perhaps intentionally) nebulous. In the absence of sufficient proof of a matrimonial fault, the courts have tended to rely on the ground of "irretrievable breakdown" of the marriage (whether or not either of the parties brought it forward as a ground for divorce) to dissolve the marriage because, in the words of the Honorable Judge Wananda in the High Court at Eldoret, "the couple no longer benefits from or enjoys any companionship". In effect, this development has transformed Kenya's divorce system into a no-fault divorce system, in which a marriage is dissoluble almost at the will of the parties, culminating in the brief statement of Honorable Judge Mohochi.

Of course, Section 66 (6) of the Marriage Act lists conditions that a court may consider in finding that a marriage has irretrievably broken down, including the first three

grounds of divorce or matrimonial faults (adultery, cruelty, or desertion for a duration of at least three years). The provision goes on to add to this list "separation" for two years, incurable insanity, willful neglect of the other spouse for at least two years, and imprisonment of one spouse for a term of seven years or more. However, even in such cases, it is not always clear whether a marriage has irretrievably broken down. There do exist situations where, for example, couples have reconciled after one has committed adultery, or after separation. The mere existence of these factual situations is not factually sufficient for a court to make a ruling that a marriage is unsalvageable. Moreover, the provision of the Act adds to the ambiguity by adding that "a marriage has irretrievably broken down if [there is present] any other ground that the court deems appropriate".

In *Kamweru vs Kamweru* [2000] eKLR, a much-cited decision, the Court of Appeal defined irretrievable breakdown as "the situation where one or both spouses are no longer able or willing to live together and, as a result, the husband-and-wife relationship is irreversibly destroyed with no hope of resumption of spousal duties". In a further attempt to clarify the meaning of "irretrievable breakdown", the Court of Appeal made a non-exhaustive list of considerations that a court may take into account in determining whether a marriage has irretrievably broken down:

- the length of the period of physical separation,
- the levels of antagonism, resentment, or mistrust between the parties,
- the concern of the parties for each other's emotional needs,
- the commitment of the parties to the marriage,
- the chances of the parties resuming their "spousal duties", and
- the chances of the marriage ever working again.

Yet even then, it is not at all clear whether or when a marriage can be said to be "irretrievably" broken down, to have no possible recourse by which to achieve reconciliation, especially given the fact that a marriage is built on the free (and, therefore, unpredictable) decisions of a man and a woman. And this lack of clarity

The Marriage Act, 2014 is a comprehensive piece of legislation in Kenya that governs various aspects of marriage, including its formation, registration, and dissolution. The Act aims to provide a unified framework for marriage in Kenya, accommodating different religious, cultural, and personal practices.

is especially glaring when the parties have made no attempts at reconciliation—without such attempts, it is difficult to say with any adequate level of certainty that reconciliation is impossible. However, precisely such a lack of clarity is perpetuated by the interpretation of the courts, a number of which deem marriages to be irretrievably broken down without deeming it necessary to demonstrate any attempts at reconciliation. In fact, on 25th January 2024, the High Court at Kisii ruled in SKN vs SSS [2024] eKLR that, when judging a marriage to be irretrievably broken down, it is simply unnecessary for a court to satisfy itself that parties have tried to salvage their union. Such an interpretation of the provision seems erroneous, and much more so given the historical and contemporary precedents of unlikely marital reconciliations that even a cursory Google search will unearth. In light of this, it appears that there is indeed reason to place much more hope in the marital promise of "Till death do us part" than the courts have been doing recently.

In addition to this, there is a second and complementary reason why it is erroneous to deem a marriage to be irretrievably broken down even in the absence of attempts to salvage it. As the National Family Policy of October 2023 notes, the family is the fundamental unit of society, both biologically (through procreation, it is the source of new members of the society) and socially (the family is the first school of social virtues such as fraternity and trust, without which a society degenerates into a conflictive mass of individuals). For this reason, the State has an interest in protecting and promoting the family and, indeed, a duty to do so. In recognition of this duty, Article 45 (1) of the Constitution states that: "The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State."

This is not just an arbitrary dictum of the Executive, or of the drafters of the Constitution.

Regarding the status of the family as the biological foundation of society if founded on stable marriage, historical evidence testifies to the truth of this claim. For example, in the Roman Empire, the family was characterised by frequent divorce and the (socially accepted) access of men to prostitutes and concubines. As a result, childlessness prevailed and men and women had recourse to available methods of abortion, contraception, and even infanticide – which was most common.[1]

Empirical evidence likewise demonstrates the enduring truth of the claim in our day and age. Changes in fertility or *marriage behaviour* cause changes in the other behaviour.[2]

This fact also has economic implications. The natural fecundity of the marital union produces labour, one of the three main factors of the production of wealth. Indeed, at present, countries with low fertility rates rely, to an increasing extent, on immigrant labour – that is, on labor produced by countries with high fertility rates.[3] The fecundity of the marital union, then, is necessary for the creation of wealth.

Moreover, stable marriage is an indispensable agent for an upright distribution of wealth—this is an economic and a moral implication. In a family animated by the unconditional love of

[1]Carlson, A. C. and Hurtado, R. (2022). The end of liberalism? The renaissance of the natural family? *Conocimiento y Acción* 2(3). pp. 11-22.
[2]Stone, L. and James, S. (2022, October). *Marriage Still Matters: Demonstrating the Link Between Marriage and Fertility in the 21st Century*. Institute for Family Studies. https://ifstudies.org/ifs-admin/resources/reports/marriagestillmatters-final.pdf

the spouses for each other, the children too are loved unconditionally as the fruit of the spouses' union. Thus, the children learn that people are not instruments to be used but instead persons to be affirmed in one's action – including (eventually) in one's economic activity – even though this requires sacrifice. They learn to put others above themselves.[4] Without this, children, and the workers they will eventually become, may easily lack the desire to safeguard the vulnerable: the poor, the elderly, the disabled, etc. They will also tend to place higher values on so-called "goods and services" that reduce others to objects of use and accumulate self-centered material wealth or pleasure. This shapes economic markets according to the mould of self-centeredness.[5]

Rather than make the summary declaration that a marriage is irretrievably broken down even in the absence of attempts to reconcile, the courts should attempt to encourage the parties to pursue some form of reconciliation, in their own best interest, for the benefit of society, and in the fulfillment of the constitutional duty of the State to recognise and promote the family.

Although the unconditional union of marriage often entails difficulties, it leads to profound fulfillment and lasting satisfaction – much more so than marriage as a conditional union. The State should aim to help married couples overcome their challenges and achieve enduring happiness rather than undermine the marriage bond.

For this reason, I wish to propose that courts pursue a "pro-family" approach to marriage and divorce, the details of which I will lay out in the following articles in this series. Such an approach would both satisfy the requirements of the new National Family Policy and affirm, with a well-grounded hope, that many marriages that are dissolved can, in fact, be salvaged, and be stronger as a result of the storms that assail them.

In Kenya, the breakdown of a marriage can involve various legal processes and considerations depending on the nature of the marriage and the circumstances leading to its dissolution. The Marriage Act, 2014 and related legislation provide the framework for addressing marriage breakdowns, including divorce, separation, and related matters.

Disclosure: A substantial portion of this first part of the series has appeared on the blog of the law firm at which Adrian works, Nyiha, Mukoma, & Company Advocates.

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[3]Cave, D., Bubola, E., and Sang-Hun, C. (2021, May 22). "Long Slide Looms for World Population, With Sweeping Ramifications." *The New York Times.* https://www.nytimes.com/2021/05/22/world/global-population-shrinking.html

[4]Alvira, R., and Hurtado, R. (2017). The truth about poverty and wealth: Reflections on the centrality of the natural family in economics and politics. *Metafísica y persona: Filosofía, conocimiento, y vida [Metaphysics and the Person: Philosophy, Knowledge, and Life]*, 9(18), pp. 101-113.

[5]Alvira, R., and Hurtado, R. (2017). The truth about poverty and wealth: Reflections on the centrality of the natural family in economics and politics. *Metafísica y persona: Filosofía, conocimiento, y vida [Metaphysics and the Person: Philosophy, Knowledge, and Life]*, 9(18), pp. 101-113.

The unconstitutionality of the Kenyan Assembly and Demonstration Bill 2024

By Gautam Bhatia

The Kenyan National Assembly is presently considering **The Assembly and Demonstration Bill 2024**. The consideration of this Bill has assumed specific urgency in light of the ongoing nationwide protests around the Finance Bill 2024. This blog post will argue that key provisions of The Assembly and Demonstration Bill ["the Bill"] are unconstitutional. Under the guise of imposing neutral time/place/manner regulations, the Bill in effect imposes disproportionate restrictions upon the fundamental right to assembly and to demonstrate, protected by Article 37 of the Kenyan Constitution.

This post will focus upon three sets of provisions: the "mask mandate", the "liability clauses", and the "permissions clauses" (the names are mine).

The mask mandate

Section 11(c) of the Bill prohibits any person, at an assembly or a demonstration, from "wear[ing] a mask or any other apparel or item which obscures his face or prevents his identification." The intent of the provision is obvious: it is to make protesters transparent to the State, and deny them anonymity in the exercise of their constitutional rights under Article 37. Put this way, it is also obvious that the provision is unconstitutional. It has long been accepted in jurisdictions across the world that in certain circumstances, expressive rights (free speech, freedom of assembly, freedom of association) are meaningful only if individuals are able to exercise them while protecting their privacy. This is especially true in situations where people have a well-founded fear of reprisal, from the State or otherwise. Thus, in *NAACP vs Alabama*, the US Supreme Court famously held that the NAACP need not reveal its membership register to the authorities, as doing so in a deep South State such as Alabama would leave its members open to State and non-State persecution. In other words, the freedom of association included within it the freedom to associate without making yourself transparent to the State.

Especially with respect to the mask mandate, there is direct precedent. In 2019, the Government of Hong Kong passed the Prohibition on Face Covering Regulation ["PFCR"] under the colonial-era Emergency Regulations Ordinance. Let me start by saying that when the closest precedent to what you are doing is a colonial-era Emergency Ordinance, you may want to stop and reflect on what you're doing! That apart, the PFCR was evidently targeted at the Yellow Umbrella protests that were sweeping Hong Kong at the time. It was promptly challenged before the High Court. In a detailed and closely reasoned judgment, the High Court struck down the PFCR as being a disproportionate and excessive violation of the freedom of expression. At the heart of the High Court's judgment was the doctrine of proportionality which - as

we know - is codified in Article 24(2) of the Constitution of Kenya, and is accepted as the doctrine that is to be applied in adjudicating the validity of State-imposed restrictions upon fundamental freedoms.

The Government of Hong Kong attempted to justify the face covering ban on the ground that it would deter those who would otherwise use the garb of anonymity to break the law, and also ease the task of law enforcement. No doubt, the Government of Kenya will deploy similar arguments to defend the Bill. When asked why the ban was indiscriminate in nature - that is, it targeted both law-breakers and law-abiding citizens - the Government of Hong Kong essentially argued that in the course of protests, specific targeting of law-breakers was impossible, and that law-breakers tended to infiltrate law-abiding protesters, and influence them to break the law as well. Therefore, everyone's freedom had to be restricted.

The High Court gave short shrift to this argument. It categorically acknowledged that protesters had legitimate reasons to wear face coverings at protests: in particular, the fear of reprisals and retribution. The ban, thus, interfered with their constitutional rights, and it entirely failed to achieve the State's goals in a proportionate manner. The High Court's reasoning can be crystallised in paragraph 166 of its judgment, in words that are squarely applicable to the Kenyan Bill:

… having regard to the reach of the impugned restrictions to perfectly lawful and peaceful public gatherings, the width of the restrictions affecting public gatherings for whatever causes, the lack of clarity as regards the application of the restrictions to persons present at the public gathering other than as participants, the breadth of the prohibition against the use of facial covering of any type and worn for whatever reasons, the absence of any mechanism for a case by case evaluation or assessment of the risk of violence or crimes such as would justify the application of the restrictions, the lack of robust evidence on the effectiveness of the measure, and lastly the importance that the law attaches to the freedom of expression, freedom of assembly, procession and demonstration, and the right to privacy, we do not consider the restrictions of rights imposed by s 3(1)(b), (c) and (d) to be proportionate to the legitimate aims sought to be achieved by the imposition of those restrictions.

As I have argued in my analysis of the judgment, the High Court decided the way it did despite according substantial deference to the State, and acknowledging that the existing spate of protests had turned violent on occasion. Despite this, the High Court found the blanket nature of the face covering ban to be unconstitutional. It is important to note that neither the factual nor the doctrinal conditions apply in Kenya: there is no "Emergency-like" situation that exists (the protests have been entirely peaceful), and after the 2010 Constitution, the Kenyan Courts do not adopt a deferential attitude on the question of State interference with civil rights. The High Court's judgment - and its use of the proportionality doctrine - therefore applies with even greater force to our analysis of the Kenyan Bill. It is important to note, as well, that while the Hong Kong Court of Appeal eventually read down the High Court's judgment, the Kenyan Courts' use of the proportionality doctrine is far closer to the High Court's articulation of it. It is the High Court judgment, therefore, that constitutes more persuasive precedent.

In my submission, therefore, the "mask mandate" is very clearly unconstitutional.

The liability clauses

Section 8(2)(b) of the Bill authorises the Regulating Officer to impose, as part of the conditions for allowing a demonstration, "the payment of the costs of cleaning up which may arise out of the holding of the

assembly or demonstration." Section 12(1) stipulates that in the case of damage to property in the course of an assembly or demonstration, "every organisation and every person participating" in the assembly shall be "jointly and severally liable" for the damage, unless they can satisfy certain conditions (that they did not "permit" the acts, that the acts were beyond the "scope" of the assembly, or that "reasonable steps" were taken to prevent the acts). Notably, the section also stipulates that the mere fact that the person or organisation "forbade" the act would not be sufficient proof that they took reasonable steps to "prevent" it.

I suggest that these provisions are designed to indirectly suffocate the right to demonstrate in two ways: (i) first, by targeting a demonstration's organisers; and (ii) secondly, by imposing a set of conditions that are fundamentally incompatible with how public protests happen on the ground. When you combine (i) and (ii), what you get is a chilling effect upon people's willingness to sign up as the formal organisers of a protest. And since the Bill requires protests to have registered organisers as a precondition for allowing them, what you end up with is a chilling effect on protests.

As everyone who has participated, witnessed, or read about a protest or demonstration knows, these are inherently fluid events. In particular, they are fluid with respect to participants. When a person or an organisation gives a call for a protest, it is not akin to a guest list at a State banquet, where liveried officials will check the ID of everyone attending. Indeed, the entire point of a demonstration will be defeated if you started checking IDs on the street. The fluidity of demonstrations means two things: first, that those who are formally "organisers" cannot control the behaviour of everyone who attends; and secondly, demonstrations invariably have agent provocateurs, or what are colloquially known as "spoilers": that is, individuals who are there at the behest of other parties (including the State), with a specific mandate to be disruptive (or even violent), and thus deprive the protest of legitimacy. This is not conspiracy theorising, but documented fact, across countries and times.

In this context, the limits of what the organisers of a protest can reasonably do is to clearly and publicly spell out the objectives of the protest, and its peaceful nature. The mischief of the Bill lies in the fact that via the proviso that we have discussed above, it specifically states that doing so will not be sufficient proof of all reasonable steps having been taken to prevent damage to property! Given that organisers cannot reasonably do more without the entire point of the demonstration being defeated, the chilling effect is evident.

Here, the judgment of the South African Constitutional Court in ***Commercial Stevedoring Agricultural and Allied Workers' Union vs Oak Valley Estates*** assumes significance. In this case, the Constitutional Court rejected a general interdict imposed by the Labour Court upon certain striking workers on the basis that doing so would cast a chilling effect upon striking. The Constitutional Court held that a clear link would have to be established between an interdict and specific unlawful action carried on by a particular participant in the strike. In reasoning that is directly relevant to our analysis of the Kenyan Bill, in para 23, the Constitutional Court observed that:

If mere participation in a strike or protest carries the risk of being placed under an interdict, this might well serve to deter lawful strike and protest action. Moreover, if a participant in a strike or protest is placed under an interdict, despite having conducted herself lawfully, she might well refrain from further strike action out of the justifiable fear of being swept up in contempt proceedings in the event that other persons in the crowd act in breach of the interdict.

The Court went on to note that the law knows no concept of "collective guilt." As I have noted in my analysis of the judgment, the Court correctly held that "even more so than a strike, the actions of every single individual who has elected to participate in a protest are simply not within the control of any one person or entity, and this includes the organisers of the protest."

Now, the Government of Kenya will no doubt argue that Section 12(1) is not a case of collective guilt, as an individual or organisation can escape liability by demonstrating that they were not responsible for the damage to property. Now, apart from the fact that - as noted above - the Bill takes out of the equation the only feasible way that this might be demonstrated, its structure also gets the constitutional scheme back to front. In essence, Section 12 places the burden upon the citizen to justify their exercise of a fundamental right, instead of placing it upon the State to justify the restriction upon the right. In other words, it is the individual or the organisation who must prove that they were not directly responsible for causing damage to property in the course of exercising their fundamental rights, rather than the State having to show that they were responsible. This reverse burden is unknown to constitutional law, and an evidently disproportionate interference with Article 37.

With this analysis in place, it should also be clear that the innocuous "cleaning up" fees levied by Section 8 is also blatantly unconstitutional. There is no physical way that an organiser of a protest can prevent every single participant from (for instance) littering during the protest. Section 8, in effect, imposes what is called an unconstitutional condition: it conditions the exercise of a constitutional right upon a prohibitive financial penalty that makes the right itself useless for those who wish to exercise it. "Either refrain from having a demonstration organiser (which is the only way the demonstration can go ahead legally), or pay a hefty financial penalty" is the very definition of an unconstitutional condition.

The permissions clauses

Section 6(1) states that the right to peacefully assemble or demonstrate under Article 37 may be limited under Article 24 in the manner specified by Section 6(2). Section 6(2)(c) states that the right under Section 6(1) may not be exercised by any person where such assembly or demonstration "may affect the protection of the rights and freedoms of other persons."

Except that this is not the language of Article 24(2). There are two crucial alterations.

Article 24(2) does have a "rights and freedoms of others" clause. Its exact wording is: "the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others."

Section 6(2)(c) replaces "prejudice" with "affect", and drops the word "fundamental."

Why does this matter? It matters because every demonstration, by definition, affects the freedoms of others. That is the whole point. Unless you go and protest in the Aberdare Forest, you will be affecting someone's freedom (their commute, their environment, or just causing a plain old nuisance). The carefully-crafted Article 24(2) deliberately uses the word prejudice (which suggests normative content, and - in my view - incorporates proportionality), and is also careful to use fundamental freedoms. That is, the freedoms cited in order to restrict a constitutional right must also be within the Constitution. My being nuisanced by a protest is not a ground to restrict it under Article 24(2), because my freedom from nuisance is not a fundamental freedom under the Constitution.

The Kenya National Assembly is a critical institution in Kenya's democracy, providing a platform for debate, legislation, and accountability. It ensures that the executive branch of government operates within the bounds of the law and addresses the needs and concerns of the Kenyan people.

Section 6(2)(c), therefore, suffers from the classic vice of overbreadth. It also falls foul of the Grayned vs Rockford dictum that laws should not be giving implementing officials (especially the police) wide swathes of discretion (in this case, the discretion to deny permission for non-compliance with section 6). It is therefore unconstitutional.

As a final point, we may also note that the Bill's provision of imprisonment for non-compliance is also disproportionate. The onus is upon the State to establish why civil liability for violating the provisions of the Bill would not be sufficient. This - I would suggest - it will not be able to do.

Conclusion

In my submission, contrary to what it claims in the long title, there is nothing "regulatory" about The Assembly and Demonstration Bill 2024. It is an unconstitutional infringement of Article 37, albeit sought to be achieved through a web of subtle and indirect provisions: preventing masks, or making organisers liable for things they cannot prevent (and thus killing protests altogether). That said, Kenyan constitutional doctrine has enough tools in its arsenal to strike down this Bill, should it become law: let us see what happens.

This article was first published by the Indian Constitution Law and Philosophy Blog available at https://indconlawphil.wordpress.com/2024/06/23/the-unconstitutionality-of-the-kenyan-assembly-and-demonstration-bill-2024/

The constitutionality of the Gujarat Land Grabbing Act of 2020: On Article 254 and the aftermath

By Priyanshi Joshi

Introduction

The Gujarat High Court, on May 09, 2024, dismissed the constitutional challenges to the Gujarat Land Grabbing Act, 2020 (hereinafter referred to as "GLGA") and the GLGA Rules, 2020. With the introduction of the GLGA in 2020, Gujarat had become the fourth state in the country to bring into effect a state land grabbing prohibition law. Andhra Pradesh was the first state to introduce land-grabbing law in 1982, and the subsequent states were Assam and Karnataka.

It is pertinent to note that the Andhra Pradesh and Karnataka statutes apply only to government lands (including lands belonging to a wakf, religious institutions, and charitable endowments) and not to privately owned lands. Gujarat is only the second state after Assam to criminalise land-grabbing of private lands. Both the Karnataka and Assam land grabbing statutes have been subjected to a constitutional challenge, and both statutes have survived such challenges by their respective High Courts.

What sets apart the GLGA is the following: (i) The GLGA has not received presidential assent under Article 254. As discussed hereinafter, there are certain provisions that conflict with the provisions of the CPC, Limitation Act, and CrPC. These provisions are pari materia to the statutes of Karnataka, Andhra Pradesh and Assam, all three of

Gujarat High Court

which have received presidential assent (ii) The minimum sentence imposed by the GLGA is the highest – 10 years (which may extend to fourteen years), hence taking away the power of judicial review by the Courts in deciding the sentence. For reference, the minimum sentence imposed by Karnataka is 1 year, Andhra Pradesh –six months and Assam – 2 years (iii) When the Karnataka and Assam statutes were challenged, the respective Governments stated the intention behind the law as land grabbing being a 'menace', whereas the Gujarat government has not disclosed such express legislative intention.

The challenges to the GLGA were mainly the following: (i) the GLGA suffers from a lack of presidential assent and the provisions of the Act are repugnant to Central Laws (mainly CPC, CrPC, Limitation Act and Specific Relief Act) and thus, the statute is hit by Article 246 and 254 of the Constitution; (ii) The Act is manifestly arbitrary, thus violating Article 14 of the Constitution (iii) the Act is hit by the Doctrine of Proportionality as the minimum sentence is 10 years (iv) the Act is hit by Article 20 of the Constitution for its retrospective effect and non-inclusion of a requirement for **Mens Rea.**

The constitutional validity of state land grabbing laws had already been upheld by other High Courts on merits. Hence, the Gujarat High Court had a specific task ahead of it – to examine whether the GLGA survives on absence of presidential assent, since all other state laws had received presidential assent. This article aims to focus on the following two issues (i) To analyze Sections 4(2), 9 and 15, and ask if they are "inconsistent" or "repugnant" as necessitated by Article 254; (ii) The impending effect of this statute to create scores of vexatious and frivolous litigation while analyzing the minimum sentencing policy and the procedure to be followed by the Special Courts.

Presidential assent under Article 254

Article 254 of the Constitution effectively states that if any provision of a State law is "inconsistent" or "repugnant" to any provision of a law enacted by the Parliament, it shall be void, unless presidential assent has been obtained under Art. 254(2).

The first provision to come under scrutiny is Section 4(2) of the GLGA which essentially states that, *"any person, who, on or after the commencement of this Act, continues to be in occupation, otherwise than as a lawful tenant, of a grabbed land belonging to the Government, local authority, religious or charitable institution or endowment or other private person, shall be guilty of an offence under this Act."* This provision essentially empowers a litigant to file a complaint at any point of time, without any limitation. For instance, A, living in a land possessed adversely since 60 years, passes down to his heir, AB. YZ is the heir who gets to know about this land which was in his father's name, Z. It is now possible for YZ to file a complaint against AB. This provision essentially defeats the limitation of 12 years which was envisaged by the Parliament through Article 64 and 65 of the Limitation Act.

The Court, while dealing with provision, cites Sec.29 – the Savings Clause of the Limitation Act which states that, "where any special or local law prescribes a limitation for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule…"

Here, the Court notes that no limitation has been prescribed by the special law before it, but does not reason any further: that if no limitation is prescribed, whether the Savings Clause is applicable at all. The GLGA provides civil as well as criminal remedies. Hence, even if for the sake of argument, it

Andhra Pradesh was indeed the first Indian state to introduce legislation specifically targeting land grabbing. The state enacted the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 to address the issue of illegal land acquisitions and protect property owners from land grabbers.

is established that the GLGA is 'inconsistent' with the provisions of Limitation Act, it would not deter anyone from simply lodging a criminal complaint because the Limitation Act does not apply to criminal proceedings. Hence, the real question is: Whether, by creating "land grabbing" a criminal offence, the State has circumvented the Limitation Act which intended such disputes to be brought within 12 years? When no limitation period is prescribed in GLGA, it runs contrary to the limitation period prescribed in the Limitation Act, which falls under Entry 13 of List III. Hence, a presidential assent is required to solve the inconsistency, or it needs to be struck down. However, the Court fails to consider the same and simply accepts the Savings Clause as the saviour of the provision.

The second provision scrutinised by the court is Section 9(2) of the GLGA, which essentially takes away the jurisdiction from the Civil Courts. It states that cases involving "land grabbing" – disputes of title, ownership and interest, are to be triable by the Special Court. Section 9(3) states that the special court, in addition to try civil cases, has jurisdiction to try all offences under the GLGA. The clauses of Section 9 are *pari materia* to those of Andhra Pradesh, Karnataka and Assam. Hence, the task before the Court was that in absence of presidential assent, whether Section 9 survives as it falls under Entry 13 of List III (which states: Civil procedure, including all matters included in the Code of Civil Procedure…). However, the court only goes on to note that under Section 9 of the Civil Procedure Code, the Civil Court can be refrained from trying cases if it is "impliedly or expressly barred". The court fails to reason why Section 9 of the GLGA is not inconsistent with Civil Procedure Code.

The third provision that comes under the Court's scrutiny is Section 15 of the GLGA, which states that, *"the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or custom, usage or agreement or decree or order of a court or any other tribunal or authority."* This provision is also *pari materia* to the Andhra Pradesh and Karnataka statutes, but not to Assam, where the law is applicable to private lands as well.

Here, the court first tries to derive the legislative intention by taking reference to Section 9(2) and notes that the legislative intention behind the provision is that a decree or an order of the court in favour of the person against whom allegations of land grabbing are made would not help or shield him and the special court can still take cognizance to examine the correctness of the allegations of the land grabbing. The court goes on to note that, *"a person against whom allegations of land grabbing are made, would not be able to protect his possession, simply based of any order or decree of the Civil Court, without any lawful entitlement, to the land in question."*

Without going into the question whether this provision would run contrary to the principle of res judicata, which has been enshrined by way of Section 11 of the Civil Procedure Code, the Court further goes on to make this problematic observation: *"There will be no estoppel or res judicata for the Special Court to examine a complaint of land grabbing even in the case of a decree or order in favour of a person who is termed as "land grabber" and who is claiming right or possession in or of any "grabbed land" under the Act."* Hence, in effect, it has been held that even if an "alleged land grabber" has a decree in his favour which has attained finality, the special court can move ahead with the allegations without the principle of res judicata becoming a hindrance. The court fails to explain why Section 15 is not repugnant with Section 11 of the Civil Procedure Code and in the absence of presidential assent, why the words, " decree or order of a court or any other tribunal or authority" should not be struck down.

Vexatious litigation, sentencing policy and procedure:

Disputes relating to title, interest and ownership have been under the purview of civil courts for a long time. These disputes are intricate, complex and multifaceted. It is not uncommon in India for a case involving title rights to go on for decades, because of such complexity at the ground level. Assigning criminality to such disputes will only amplify its complexity.

It is pertinent to discuss here Section 5 – where the penalty prescribed for land grabbing is minimum 10 years which may extend to 14 years, apart from civil liability. The court as well as the state, fail to rationalize exactly what prompted the Legislature to not only criminalise disputes of title and ownership, but to create land-grabbing a separate offence wherein it was thought apt to introduce minimum sentence of 10 years. The court fails to consider the ramifications of such a severe and disproportionate sentencing policy and the lack of state's rationalisation behind it.

Section 9 of the GLGA lays down the procedure to be followed by the Special Court. Section 9(1) states that the Special Court can take cognizance on its own, or by an Application by any person regarding any alleged act of land grabbing before or after the commencement of the Act. Section 9(3) empowers the Special Court to follow its procedure which shall not be inconsistent with the principles of natural justice in determining civil liability. Section 9(6) states that the special court shall 'as far as possible' dispose of the case finally within a period of six months. These provisions will, in fact, augment the institution of frivolous and vexations cases. When the judiciary is already overburdened, this law only intensifies such burden. And with the recommendation to dispose of the cases in six months, in the worst possible scenario, the ground reality of such title disputes may become a farce.

The article was first published by the Indian Constitutional Law and Philosophy Blog and is available at: https://indconlawphil.wordpress.com/2024/06/28/the-constitutionality-of-the-gujarat-land-grabbing-act-of-2020-on-article-254-and-the-aftermath-guest-post/

Tempering executive power: The Kenyan High Court's decision on presidential commissions

By Gautam Bhatia

Constitutions are documents that create, organise, and constrain power. Constitutions also have gaps and silences. What happens when an exercise of power is challenged, and the Constitution appears to be silent? This question has been at the heart of many constitutional battles across jurisdictions. In its judgment last week in *Azimio vs The President*, the High Court of Kenya gave a clear answer.

The challenge was to a Gazette Notice issued by the President of Kenya, purporting to establish a "Commission of Inquiry" into the **Shakahola Tragedy** (a series of mass deaths occasioned by a religious cult). The Commission of Inquiry was to inquire into the facts, affix responsibility, recommend action, and to recommend broader legal and administrative reform that would prevent such tragedies from recurring. The source of authority for the Notice was, apparently, the **1962 Commission of Inquiry Act.**

The Petitioner argued that the Gazette Notice usurped multiple powers and functions that the 2010 Constitution expressly granted to other offices. It usurped judicial power, which was the mandate of the Courts (especially as the Commission was to be headed by a judge). It usurped the power of identifying criminal responsibility and recommending criminal legal action, which lay with the independent National Police Service and the Director of Public Prosecution. It usurped Parliament's

The Kenyan High Court has made several key decisions regarding presidential commissions, each influencing how such commissions are established, operated, and their findings are treated.

power of oversight over the National Intelligence Service. It usurped the power of the independent Kenya National Human Rights Commission to inquire into human rights violations. And finally, it usurped the power of the Senate to constitute ad-hoc Committees that occupied a similar role.

In response, the Attorney-General relied upon the Commission of Inquiry Act, but also upon Article 129(2) of the 2010 Constitution, which stipulates that "executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit." The

Attorney-General argued that establishing a Commission of Inquiry was a part of the *general* executive authority vested in the President. The Attorney-General also relied upon Article 131(2)(e) which required the President to ensure the protection of human rights, and upon Article 132(4), which granted the President the authority to "perform any other executive function" provided under the Constitution, or legislation.

As is evident, however, none of these provisions *specifically* authorise the President to establish Commissions of Inquiry. When you add to this the fact that many of the functions that Commissions of Inquiry generally tend to perform have been vested in other bodies (whose independence from the executive has been especially guaranteed in the Constitution), an important interpretive question arises: if a *specific* power is not vested in the Executive, and incidences of that power have been vested in other bodies, can the Executive nonetheless claim that power by invoking its *general* executive functions? Or, to put it more abstractly, is the default constitutional baseline that the Executive/President has power *unless* specifically prohibited by the Constitution? Or is the baseline that the Executive/President *does not* have power unless specifically authorised by the Constitution?

In its analysis, the Court noted that the Constitution vested the power to investigate crime in the National Police Service, which had expressly been made independent; the executive was allowed to give directions to the NPS on matters of policy, but categorically *not* on the issue of investigation of a particular crime (only the DPP could do this). That being the case, the Court held that "it is difficult to see how the action of the President using the powers under the Commission of Inquiry Act can constitutionally confer the mandate of the police to investigate crime and purport to bestow it on a Commission of Inquiry." **(para 128)** The Court held exactly the same on the issue of investigating human rights violations, noting that "by creating a Commission of Inquiry to **"inquire into torture, inhumane and degrading treatment of members and other persons linked to the Good News'** the 1st Respondent had unilaterally seized the [National Human Rights Commission's] explicit mandate and allocated it to a Commission of Inquiry he created." **(para 134)**

What of the Attorney-General's argument that the President was deploying his general executive power? The Court's answer was clear and unambiguous:

The President should respect the specific mandate given to the Independent Offices and Commissions under the Constitution. He cannot create extra constitutional bodies to undertake that specific functions belonging to agencies created by the Constitution. He cannot use general powers to override specific powers. ***(para 136)***

Additionally, the Court also struck down the provision in the Commission of Inquiry Act that authorised the President to unilaterally gazette anyone (including judicial officers) to head a Commission, holding it to be "a relic of the Imperial Presidency." **(paras 153-154)**

I suggest that the judgment of the High Court is part of an evolving tradition in post-2010 Kenyan constitutional jurisprudence that understands one of the main purposes of the Constitution being to *temper executive power*. Indeed, the structure of the case – and the Court's holding – closely followed one of the key issues in the landmark *BBI Judgment*: the issue of interpreting Article 257 of the Constitution. Recall that the question was whether the President could be involved with the initiation of a "Popular Initiative" to amend the Kenyan Constitution under Article 257. There, as here, Article 257 was silent on the point: it neither prohibited, nor authorised, Presidential

involvement. There, as here, the State relied on the President's *general* powers (in that case, his political rights) to source his legal authority. And there, as here, the Court rejected the argument. All three Courts that heard the *BBI Case* – the High Court, the Court of Appeal, and the Supreme Court – were unified in holding that one of the key bases of the 2010 Constitution was to check the Imperial Presidency. In practice, this meant nipping executive power creep in the bud by disallowing the invocation of general powers for that which was not authorised by the Constitution.

There is a deeper similarity between the *BBI Case* and the *Commissions Case*. In the *BBI Case*, the purpose of Article 257 was to allow *the People* to play the role of protagonists in the process of constitutional change. The problem, thus, was not just with the President attempting to do something the Constitution did not authorise him to do, but that in doing so, he was *encroaching* upon powers that the Constitution had devolved to other entities. In the *Commissions Case*, replace "the People" with "independent Fourth Branch Institutions," and the issue is exactly the same. Indeed, even the nature of the arguments was similar: in the *BBI Case*, it was argued that the President should be allowed to invoke Article 257 in order to bypass a recalcitrant Parliament that was holding up key constitutional reforms, and go directly to the People. An almost *identical* argument is recorded in **paragraph 26** of the *Commissions Judgment*: "that in opting for the appointment of a Commission of inquiry, the President was conscious of the fact that a Commissions of inquiry are free of many *institutional impediments* which at times constrain the operation of various arms of Government." In rejecting this argument, both in the BBI Case and the *Commissions Case,* the Courts have affirmed that "institutional impediments" and "constraint" *is the precise point of constitutionalism*: that is just what "tempering power" means.

When we read the *BBI Case* and the *Commissions Case* together, then, we see the evolution of a constitutional tradition that understands the role of the 2010 Constitution to be about tempering power, and which specifically seeks to protect forms of power vested in other institutions, bodies, and the People from seemingly innocuous executive power-creep. The constitutional baseline is that the executive cannot rely on general executive powers, in the absence of *specific* authorisation, especially when the Constitution has granted that family of powers and functions to bodies that have been consciously made independent of the executive.

A final point, by way of aside: interestingly, many of the Fourth Branch Institutions were parties to the case, and supported the stand of the Attorney-General, arguing that was no encroachment into their domain. In other words, the Fourth Branch bodies appeared to be unwilling to defend their own powers, and it was left to the Court – and the Petitioner – to do so. While in this case the Court did do so, this might not be sustainable in the long term. There is perhaps, thus, still some way to go before these bodies become genuinely independent of the executive.

But for now, the *Commissions Case* is an important judgment that lies at the intersection of three pillars that form part of the architecture of the 2010 Kenyan Constitution: the separation of powers, independent fourth branch institutions, and the tempering of executive power. The High Court's judgment has strengthened these three pillars, and in doing so, has reinforced the foundations of constitutionalism.

This article was first published by the Indian Constitution Law and Philosophy Blog available at: https://indconlawphil.wordpress.com/2024/07/17/tempering-executive-power-the-kenyan-high-courts-decision-on-presidential-commissions/

Notes from a foreign Field: Lesotho accepts the basic structure doctrine

By Masoom Sanyal

The **Unconstitutional Constitutional Amendments Doctrine** ('UCA Doctrine'), that we in India refer to as the **Basic Structure Doctrine** ('BSD'), has travelled to yet another constitutional jurisdiction. This time, the Lesotho Court of Appeal, the apex court in the Kingdom of Lesotho, has employed the BSD to **invalidate** the Ninth Amendment to the Lesotho Constitution. In this essay, I will analyse the judgement of the Lesotho COA in ***Democratic Congress and Others v. Puseletso and Others*** [2024] LSCA 1, holding that (i) Basic Structure Doctrine applies to the Constitution of Lesotho, (ii) 'Responsible Government' is an essential feature of Westminster-style parliamentary democracy and a basic structure of the Lesotho Constitution, and (iii) the Ninth Amendment to the Constitution, passed last year, violates the basic structure of the Constitution and is therefore invalid. However, the COA applies another doctrine that has found roots in Indian and other commonwealth constitutional jurisprudence, i.e. the doctrine of prospective overruling, while invalidating the Ninth Amendment. I also analyse this aspect of the judgement.

The Ninth Amendment to the Lesotho Constitution

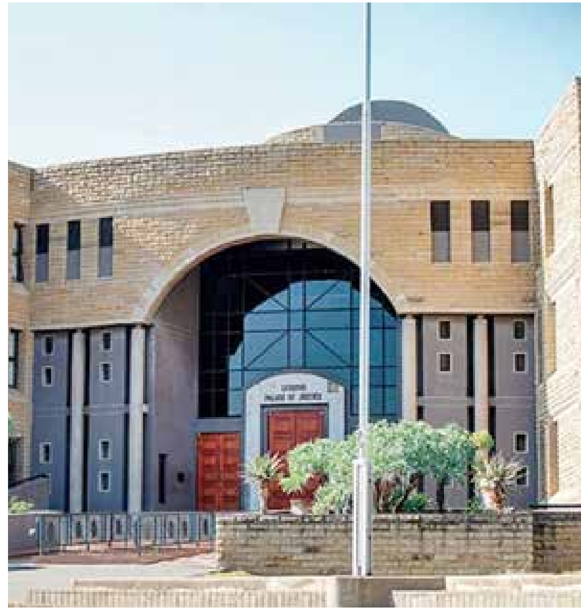
Section 1 of the **Lesotho Constitution** declares it to be a "sovereign democratic kingdom." The King of Lesotho is the Head of the State who acts on the aid and advice of the Council of State (equivalent

King Letsie III of Lesotho.

to the Council of Ministers in India). Prior to the **Ninth Amendment**, if a resolution of No Confidence in the government was passed, the Prime Minister had two options at his disposal – (a) resign within three days, or (b) advise the King to dissolve the parliament, thereby necessitating fresh snap elections [see Section 83(4)(b) and Section 87(5)]. The King, acting on the advice of the Council, could refuse to dissolve the parliament if he believes that the government can be carried on without need for dissolution, i.e. if another person could muster the necessary majority vote in the National Assembly, or if the dissolution was not in the national interest [see Section 83(4)(a)].

The Ninth Amendment changed this and allowed the Prime Minister only one option once a resolution of No Confidence in his government is passed and the name of another member of the National Assembly is proposed to be appointed the prime minister, i.e. resignation [see **Para 165** of the Judgement]. Put evocatively by Justice Damaseb, "a resolution of a vote of no confidence – accompanied by a proposed name of a new Prime Minister – seals the fate of the incumbent." [Para 167] After the amendment, the incumbent Prime Minister cannot advise the dissolution of parliament unless it is supported by a resolution of two-thirds majority of the members of the National Assembly (Lower House of the Parliament). At first blush, this may seem like a *bona fide* attempt at stabilising parliament and strengthening parliamentary performance by ensuring that snap elections are not frequently necessitated, especially in the political context that Lesotho has seen three elections in a span of five years between 2012 and 2017, due to dissolution of parliament recommended by prime ministers who had lost the vote of confidence.

However, the amendment results in a curious situation, which Justice Damaseb has captured in his concurring opinion. The vote of No Confidence itself does not require a two-thirds majority, but merely a simple majority. However, once a motion of No Confidence is passed against the incumbent's government, he is left with no option but to resign. He can only advise dissolution if he is supported by a resolution to that effect passed with a two-thirds majority of the National Assembly – the same body that had withdrawn its confidence in that same Prime Minister. This leads to an absurd situation where the prime minister is required to obtain the support of two-thirds majority in the same National Assembly where he had not even been able to garner the support of a simple majority to express its confidence in him – a feat patently impossible to achieve.



Court of Appeal of Lesotho

Justice Damaseb notes, "The Ninth Amendment has therefore made it so much easier for members of the NA to remove the Prime Minister through a vote of no confidence; and well-nigh impossible for the Prime Minister to test the strength of his popularity and acceptance by the general public, by means of a fresh election. The King's role and that of the Council of State in the dissolution process have also effectively been removed." [Para 170]

In typical Westminster-style Parliamentary Democracies, the dissolution of Parliament is a prerogative of the Head of the State (for example, the Monarch in the UK, and the President in India) acting on the advice of the Prime Minister and his council. The Ninth Amendment to the Lesotho Constitution makes a "stark revolutionary departure" from that feature of a typical Westminster-style democracy and ultimately endangers the Constitution's Basic Structure.

Importing the basic structure doctrine to the Lesotho constitutional landscape

Although the Amendment has been declared invalid by a 3:2 majority (President Mosito, and Justices Damaseb and Musonda writing for the majority; while Justices Van der

Westhuzein and Chinhengo dissent), the majority and minority both have recognised the existence an implied limitation on the amending power of the parliament, i.e. the basic structure doctrine [Para 190 and 191]. President Mosito, writing for the majority, notes, after a careful and thorough analysis of legal literature as well as judicial precedent, like *Kesavananda Bharati and Minerva Mills from India and Anwar Hussain Roy Chowdhury* from Bangladesh, that "certain fundamental features of Lesotho's Constitution… form part of the basic structure and cannot be abrogated or diminished through the amendment process." [Para 65] Similarly, Justice Musonda, in his concurring opinion, refers to the BSD as a doctrine of "Indian ancestry" and refers *Kesavananda Bharati*, Minerva Mills and Waman Rao to discuss the doctrine of basic structure, or the doctrine of implied limitations on amending power of the parliament. The minority judgement by Justice Van der Westhuzein also refers to Kesavananda Bharati and recognises the Basic Structure Doctrine and extends its application to Lesotho's constitutional landscape [Para 334]. Where the minority differs from the majority is in determining whether the Ninth Amendment is destructive of the Basic Structure of the Constitution. Therefore, on the point of adoption of the Basic Structure Doctrine to the constitutional landscape in Lesotho, there is unanimity between all the judges on the bench.

Ninth Amendment: Revolutionary departure from typical Westminster model and disturbance to the delicate balance of power

An engaging discussion on the aspect of basic structure is found in the judgements authored by President Mosito and Justice Damaseb. The core argument against the validity of the Ninth Amendment, in the opinion of the majority, rests on the premise that the Amendment endangers the "delicate balance of power" between the Legislature and the Executive. For President Mosito, it also strikes at the heart of the principle of Responsible Government. In the opinion of Damaseb, J, the amendment makes a revolutionary departure from the typical model of Westminster-style parliamentary democracy. Let us unpack these concerns one by one.

Holding that the principle of Responsible Government is the foundation of Lesotho's parliamentary democracy and is, therefore, a basic feature of the Lesotho Constitution, President Mosito embarks upon a careful analysis. He writes, "[t]he impugned amendment, by denying the Prime Minister the crucial power to request a dissolution of Parliament when faced with a no-confidence vote, effectively allows a government to remain in power despite losing the confidence of the National Assembly. This undermines the essence of responsible government…" [Para 114]. This outcome is necessitated if the National Assembly expresses no confidence in the incumbent government, but does not recommend the name of a member who may be appointed the prime minister instead. The resignation of the Prime Minister, as required by the amended Section 83, is only mandatory if an alternative name is recommended – but what if, President Musito seems to ask, such a name is not agreed upon? This outcome would be what Mosito foresees and holds to be an unconstitutional possibility.

President Mosito further relies on the diminution of the King's role as a mere symbolic head, since he no longer has the prerogative of dissolving the parliament without the parliament itself recommending such a dissolution by a 2/3rd majority of the National Assembly. This point – and its unconstitutionality – is emphasised more clearly in Justice Damaseb's words. Justice Damaseb argues that the power of dissolution is exercisable by the King in audience with the Prime Minister through whom he exercises his powers under Section 86 of the Constitution. This is in

line with the tradition of Westminster-style parliamentary democracies, where the power of dissolution of parliament normally rests with the Monarch or the President, acting on the advice of the Prime Minister. The Constitution empowered the Monarch to refuse such a dissolution, as discussed above [also see Para 174]. Therefore, there existed a delicate balance and division of powers within the constitutional scheme. The Ninth Amendment disturbs this delicate balance, since, as Justice Damaseb cogently points out, "the Prime Minister may no longer dissolve Parliament so that the electorate choose a new Government: the Legislature has in effect usurped that power. They [the Legislature] will tell the nation and their King who will be their next Prime Minister." [Para 177] The legislature, thus, arrogates itself to exercise a power that is traditionally reserved for the Monarch and the Prime Minister, which strikes at the heart of the doctrine of separation of powers [see Justice Musonda, at Para 223].

The doctrine of prospective overruling

After holding the Amendment destructive of the Basic Structure Doctrine, the Court asks another crucial question: does the declaration of invalidity apply ex nunc (prospectively) or ex tunc (retrospectively)? Much turns on this, because since the amendment had already come into effect, the then-Prime Minister has been ousted by no-confidence and, in his place, another member of the NA has been appointed the PM. If the Amendment is held unconstitutional from its inception, this would necessarily have to be undone. After referring to *Linkletter v. Walker and Stovall v. Denno*, American landmarks on Doctrine of Prospective Overruling – but, alas, not the Indian milestone in *I C Golaknath*, which, in the author's opinion, has more direct application since that case also concerned an invalid amendment – President Mosito notes that the Court must consider potential disruption to ongoing governance and the delivery of essential public services. He notes, "[a] retrospective application of the declaration could potentially paralyse the government's ability to function effectively, leading to a vacuum of leadership and decision-making when the nation may face critical challenges or emergencies." Thus, the majority holds that there are "compelling reasons" to justify *ex nunc* (prospective) invalidation of the Amendment, which would ensure that the sanctity of the actions taken under presumed constitutionality of the amendment is preserved while also ensuring that the future actions conform to the court's judgement [Para 128].

Conclusion

The judgement of the Lesotho Court of Appeal is a significant landmark in Lesotho's constitutional landscape, opening the door for the scrutiny of all future amendments to the Lesotho constitution on not just procedural but substantive grounds, including the Basic Structure Doctrine, which is often the only effective weapon in the arsenal of a constitutional court to preserve (or guard, if you will) the Constitution. The judgement contains erudite opinions and cogent analysis by the majority as well as the minority. Holding the Ninth Amendment unconstitutional, the judgement restores the delicate balance of power between the Executive and the Legislature. However, one may be moved to ask that once an amendment is found to be destructive of the Basic Structure of the Constitution and thus invalid, can the Court exercise its discretion in holding that the amendment would be invalidated henceforth and not since its inception? Can expediency justify condonation of unconstitutionality?

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