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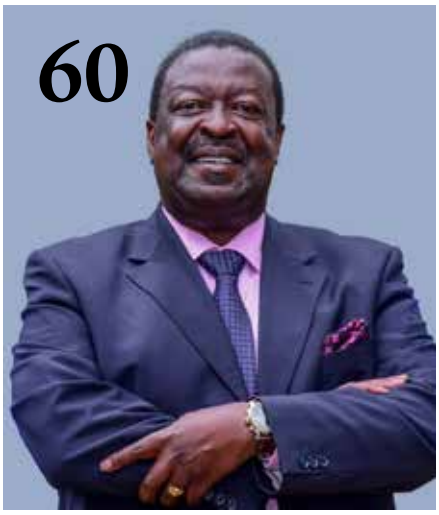

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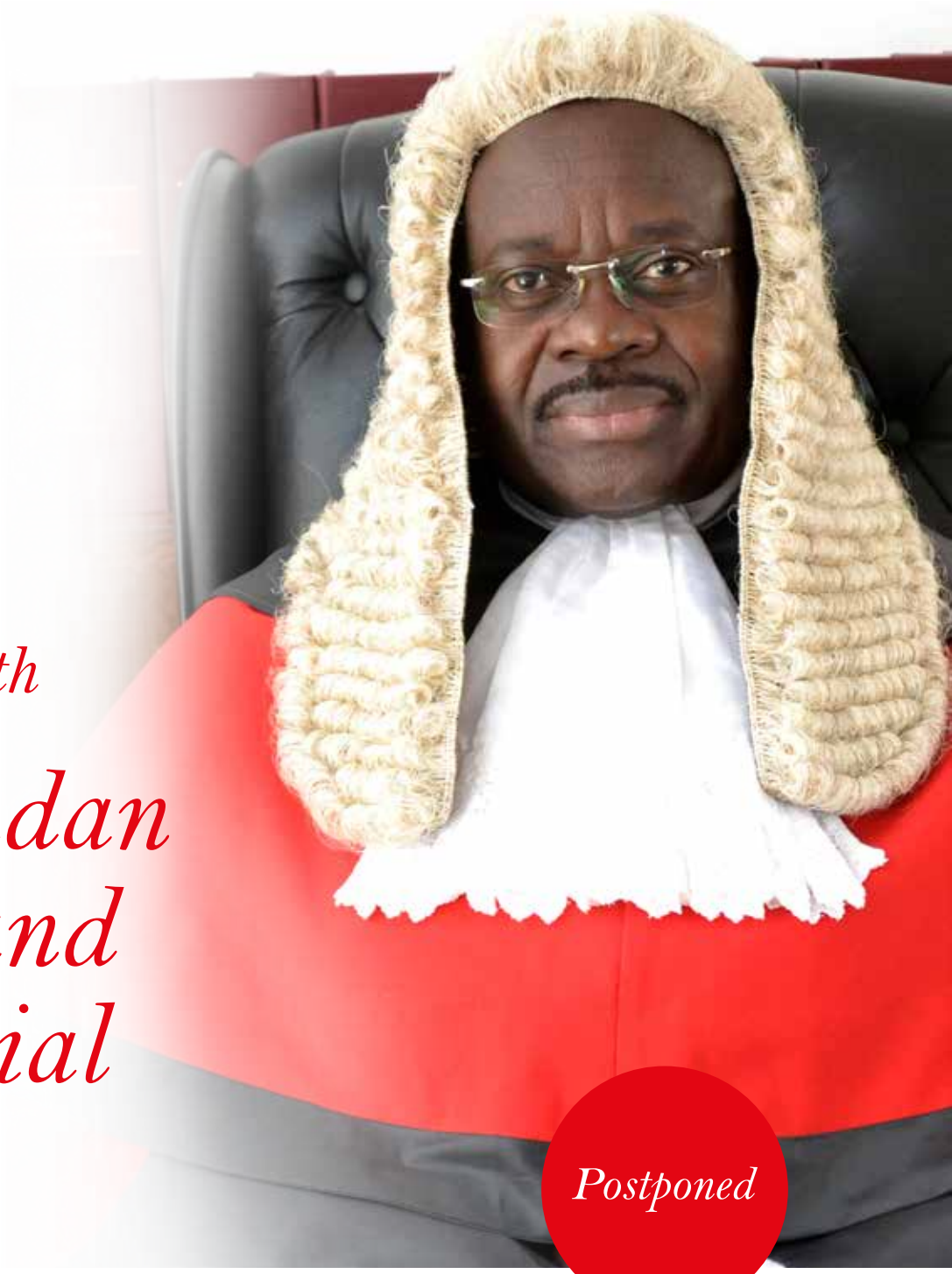

The 10th CB Madan Prize and Memorial Lecture

Postponed

Due to unavoidable circumstances, the C.B Madan Memorial Lecture and Awards Ceremony has been moved to early 2023, at a date to be annouced.
The C.B Madan award shall be conferred on Professor Phoebe Okowa and the Memorial Lecture shall be delivered by his Lordship Honourable Chief Justice Emeritus Andrew K.C Nyirenda, SC, Republic of Malawi

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OUR OPINION

Perceptions of judicial independence: a niggling concern

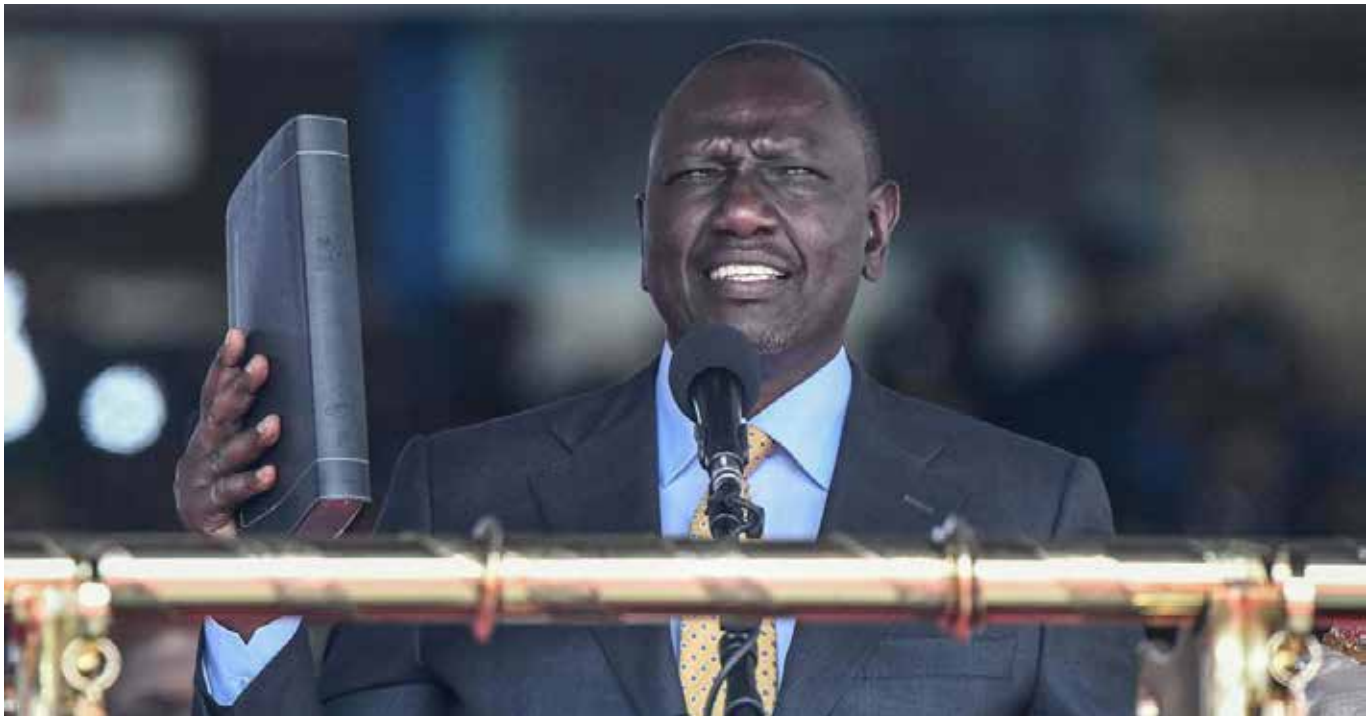
Kenyan Supreme Court Justices

The Constitution of Kenya divided the Government into several branches principal amongst these being the legislature, the executive and the judiciary. The division is important because it gives specific powers to each branch and sets up a scheme of an arrangement called checks and balances. The essence of checks and balances is to make sure no one branch would be able to control too much power. It creates a separation of powers allowing each branch to specialize in its area of competence.

Separation of powers as an unenumerated constitutional principle strives to protect another important constitutional good: the principle of judicial independence. Judicial independence protects individuals and the public in general. The protection of judicial independence is enforced so that the parties will know they are dealt with fairly, that they will receive a fair trial, and a fair hearing from a judge, who is insulated from any improper outside influence and who is bound only by his or her oath of office, which is to render justice according to law.

Related to judicial independence is an argument, for the existence of a causal relationship between judicial independence and the perception of judicial independence. The perception of judicial independence hinges on how the population or large segments thereof construes the independence of the judiciary. Courts may be argued to be fully independent but if the independence is not seen by the public in general, then the causal relationship is thrown into disarray.

It is against this background that this publication broaches the importance of the perception of judicial independence for the umpteenth time. It had been reported that the President of the Republic Dr. William Ruto had been invited to attend the Environment & Land Court tenth anniversary



President William Ruto

celebrations held between November 28 and December 2 at the Pwani University in Kilifi County. Although he did not attend the function, sending a member of his cabinet to represent him, the invitation extended to the President raised fundamental concerns about the perception of judicial independence, bearing in mind that the court ceremony was not a state or national event that warrants the attendance of the President. State functions are ceremonies that embody national rituals and celebrations that are a manifestation of collective identities, glorifying the nation and strengthening the national community.

The marking of the ten years of the existence of the Environment and Land Court is certainly not a national celebration necessitating the attendance of the President in his capacity as head of state. This celebration event is uniquely a judicial affair and not a state event. Protocol handlers in the judiciary should have known this obvious fact. The President and indeed all politicians should have no reason therefore to attend the anniversary marking ten years of the existence of the Environment and Land Court, which ironically was put in place as a specialized court at Article 162 of the Constitution as a bold constitutional statement, signifying a departure from the politics and murk that has characterized land as a factor of production since independence. Luckily for Kenya, national events have subtle constitutional hints as a marker of a radical departure from our charred and erratic constitutional past.

The judiciary should be alive to the imperative that its interactions with politicians must be carefully calibrated and that it should not be seen as getting too cozy with the politicians. That there is a need for the judiciary to organize its affairs separately from public and of course private interests needs not be overemphasized. This separation of the judiciary creates an autonomous environment that is imbued with strong professional culture and traditions, expressed in professional and ethical standards, a radical departure from the cultural and moral attributes that exist in the political branches. The pragmatic adage that is oft-cited when interacting with politicians should not be forgotten; '*Politicians are like fire. Remain close enough to them so that you get warm but stay far enough so that they do not scorch your skin.*'

The perception of independence is one of the most fundamental institutional dynamics of constitutionalism and as such, the judiciary must be intellectually and situationally alert to its multipronged responsibilities in our democratic framework; the court is an educator, a protector of acquired rights and past interests and the court as an arbitrator. These solemn responsibilities mean that the court must be alive of the importance of cultivating strategic behaviour in protecting the Constitution, since the protection of the Constitution, primarily significant as this obligation bestowed on the judiciary, forms the basis of the court's institutional power.

Therefore, it behooves the judiciary to ensure that it properly demarcates its lines of interaction with the political branches. The interaction should be restricted to the formal and necessary. The subjective feelings of the public and the consumers of justice must always guide any dealings the judiciary may have with the politicians, remembering always that principle ought to be constant for the judiciary; interest is always constant in the calculations of a politician. Principle predicates long-term thinking. Interests demand instant gratification. In the interests of the Republic in the long term, it is safe to err on the side of principle.

Examining private international law adjudication through the lens of the High Court of Kenya decision in Dari limited & 5 others versus the East African Development Bank high court commercial cause number 1 of 2020

"We should always be willing to compromise preferred solutions in order to achieve justice for the individuals involved. But there is no need for us unthinkingly to accept foreign solutions or approaches to the problems of private international law. There is no need for us to be like the weathervane flipping one way or the other as the winds from abroad blow. The truth is that the challenges we face are those of resources and interest."[1]

By Evans Ogada

The case of East African Development Bank v Dari Limited & 5 others [2020] eKLR presents an opportunity for the examination of Private Law adjudication in the Kenyan context. In this matter, the Applicant Bank, the East African Development Bank had applied through Originating Summons (O.S.) seeking the recognition and registration of a judgment of High Court of Justice Business and Property Courts of England and Wales, Queen's Bench Division, Commercial Court (hereinafter, the English Court) which decision sought to execute the decision of the English Court in so far as a loan facility extended to the Respondent by the Applicant bank is concerned.

This paper will examine the adjudication of Private Law matters in Kenya in light of the decision in East African Development Bank v Dari Limited & 5 others [2020] eKLR

Introduction

The province of private international law deals with a case that incorporates a private element. It is a body of rules that should help a court decide on a case with foreign elements.[2] Some of the rules that private international law guides on include rules on the jurisdiction of a local court, in the sense of its competence to hear and determine a case; rules on the selection of the appropriate rules of a system of law, local or foreign, which it should apply in deciding a case over which it has jurisdiction (the rules governing this selection

are known as 'choice of law' rules); and the recognition and enforcement of judgments rendered by foreign courts or awards of foreign arbitrations.[3]

In the context of the recognition and registration of a judgment entered abroad such as was the case in the case of High Court of Kenya Decision in Dari Limited & 5 Others versus The East African Development Bank,[4] the pertinent questions that a court grapples with are under what circumstances will judgments of foreign courts be recognised or enforced? Suppose that a plaintiff, having obtained a judgment against a Kenyan defendant in an Afghan court for damages for negligence, decides to enforce it against the defendant's assets in Kenya. Will the Kenyan court recognise and enforce the Afghan judgment, or will the action have to be re-tried in the Kenyan court? [5]

[1]C. Forsyth, The Provenance and Future of Private International Law in Southern Africa' (2002) Journal of South African Law 60 at 68.
[2]J. G. Collier, Conflict of Laws (2004), Cambridge University Press, 3
[3]Ibid
[4]H.C.C.C No. 1 of 2020, reported as East African Development Bank v Dari Limited & 5 others [2020] eKLR
[5]A. J. Mayss, Principles of Conflict of Laws (1996), Cavendish Publishing Limited, 2

The effectiveness of the judgment of a court is territorially constrained. State sovereignty prevents the judgment of one country from having direct force or effect in the territory of another sovereign state and as such, to be effective abroad a foreign judgment must obtain the approval of a public authority, usually the courts, within the country where that is sought.[6] It is to facilitate this process that a regime for recognition and enforcement of foreign judgments is an essential feature of most legal systems. The enforcement of foreign judgments can be pursuant to either rules contained in a statutory regime or common law rules.

In Kenya, the enforcement of foreign judgments is carried out under the auspices of Foreign Judgments (Reciprocal Enforcement) Act and the subsidiary rules thereunder, essentially a statutory rule regime.

Events leading to the decision in Dari Limited & 5 others versus the East African Development Bank

The decision of the High Court of Kenya (Okwany J) in Dari Limited & 5 Others versus The East African Development Bank follows a chronology of events. In 2015, the East African Development Bank approached the defendant company, Dari Limited, offering a proposal to fund a construction project that the defendant had in mind in Nairobi.[8] The initial agreement involved the advancement to the Defendant by the Plaintiff Bank, a loan facility towards the construction of houses in the Karen area in Nairobi that was to be dispatched in two instalments. In a series of twists and turns, the Defendant bank (Plaintiff at the High Court), it is alleged, did not dispatch the second instalment as a result of the falling out of the parties and consequently, leading to the Plaintiff bank filing suit in the High Court of Justice Business and Property Courts of England and Wales, Queen's Bench Division (Commercial Court) in accordance with the terms of the facility (hereinafter, the High Court in England), seeking to enforce its power of sale.

In a summary decision by Daniel Toledano QC sitting as Deputy Judge, the High Court in England rendered its judgment and orders dated 19th June 2019, leading to the Plaintiff bank seeking its recognition and enforcement in Kenya, the judgment and orders having been given in England. The defendant contested the recognition and enforcement of the decision of the High Court in England on several grounds.

The defendant states that they had no opportunity to advance their case in the United Kingdom (a fact deponed to by one Lynne Elizabeth Well) leading to the summary judgment by the High Court in England. Secondly, the defendant was not granted the opportunity to present its evidence during the course of the trial. Thirdly, that the recognition and reinforcement of the English decision will be contrary to section 10(2) of the Kenyan Foreign Judgments (Reciprocal Enforcement) Act.[9]

Justice Wilfrida Okwany

Recognition and enforcement of foreign judgments in Kenya

The recognition and enforcement of foreign decisions must accord to the terms and conditions enumerated under the Foreign Judgments (Reciprocal Enforcement) Act. The adjudication capacity of recognition and enforcement of a foreign judgment is an exercise of state sovereignty and generally, a state's sovereign authority is restricted to certain restricted and identifiable basis under international law. In essence, whereas jurisdiction is not co-extensive with state sovereignty, jurisdiction and sovereignty enjoy a close relationship.[10] That jurisdiction is based on sovereignty does not mean that each state has in international law a sovereign right to exercise jurisdiction in whatever circumstances it chooses.[11] The exercise of jurisdiction may impinge upon the interests of other states and what one state may see as the exercise of its sovereign rights of jurisdiction , another state may see as an infringement of its own sovereign rights of territorial or personal authority.[12]

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[6]R.F. Oppong, Private International Law in Commonwealth Africa, (2013) Cambridge University Press, 313

[7]Ibid

[8]This uncontroverted assertion is contained in para. 8 to 10 of the Defendant's Supplementary Affidavit sworn by Raphael Tuju dated 27th January 2020 contained in Volume 4 of the Appellant's(Defendant) Record of Appeal.

[9]This section provides as one of the grounds for non-registration and recognition of a foreign judgment as being the denial of enforcement of any judgment would be manifestly contrary to public policy in Kenya.

[10]T. Hiller, Sourcebook on Public International Law, (1998), Cavendish Publishing Limited, 250

[11]Ibid

[12]Ibid

It must be remembered that courts are not bound to enforce any foreign judgments as a general rule,[13] and Kenyan courts have stated that the theoretical basis for recognition and enforcement of foreign judgments to be the 'principle of reciprocity and the advantage to be drawn therefrom.'[14] Courts elsewhere s have made references to comity and acquired rights as basis for the enforcement of foreign judgments.[15]

The recognition and enforcement of judgments from the United Kingdom are pursuant to a statutory scheme which sets out the conditions for recognition and enforcement. The United Kingdom is one of the countries identified under the schedule to the Foreign Judgments (Reciprocal Enforcement) subsidiary rules as states to which the Foreign Judgments (Reciprocal Enforcement) Act applies. Recognition is necessary for without it a foreign judgment can have no effect in the Kenyan legal order.

In addition to the conditions captured in statute, common law principles can be used to augment the statutory conditions available to a Kenyan court for the recognition and enforcement of a foreign judgment.[16] The recognition and enforcement of any foreign judgment is therefore not automatic. The foreign judgment is subject to judicial scrutiny so as to discover whether it comports to the statutory scheme enumerated for recognition and subsequent enforcement. A foreign judgment in the circumstances of conditional reception through statutorily enshrined rules cannot be deemed ipso facto as legally effective and directly enforceable, as if it were not a foreign judgment at all. This understanding resonates with constitutional edict that only parliament has the authority to make any provision having the force of law in Kenya and no other body can make any item of law except under authority conferred by the Constitution.[17]

Therefore, and in seeking to recognise and allow for enforcement of a foreign judgment, one of the preliminary issues that a court must engage in is the question of international competence. The principle that a foreign court should be internationally competent before its judgment is enforced appears well entrenched. What then is meant by international competence? International competence denotes three occurrences; presence, residence and submission and that importantly, submission can be express, such as through jurisdiction agreements, or inferred from conduct.[18] The capacity of international competence attaches to the question as to whether the foreign court had jurisdiction over the matter. Buckley LJ in the celebrated case of **Emanuel v Symon (1908)**,[19] stated thus in terms of a court being jurisdictionally competent:

> *"In actions in personam, there are five cases in which the courts of this country will enforce a foreign judgment: (1) where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained."*

Whatever claims to jurisdiction that may be made, the onus is on the plaintiff seeking to enforce a judgment to show that indeed the foreign court had jurisdiction.[20]

Analysing the high court decision-making in Dari Limited & 5 others versus the East African Development Bank

Having examined the broad principles entailed in recognition and enforcement of a foreign judgment, it is important to examine the course of decision-making by the High Court. In a 4-page decision, the High Court allowed the Originating Summons by the Plaintiff seeking to enforce the judgment of the High Court in England of case No. CL-2018-000720. What stands out in the ruling is that there is no analysis at all and equally puzzling, no interrogation at all

[13]Oppong n_6, 316
[14]See the case of Italframe Ltd v. Mediterranean Shipping Co. [1986] KLR 54 at 62, [1985] LLR 236 which made this observation in the context of an application to register a foreign judgment under the Foreign Judgment (Reciprocal Enforcement) Act 1984.
[15]See the South African decisions of Duarte v. Lissack 1973 (3) SA 615 at 621; Commissioner of Taxes, Federation of Rhodesia v. McFarland 1965 (1) SA 470 at 471; Laconian Maritime Enterprises Ltd v. Agromar Lineas Ltd 1986 (3) SA 509 at 513–16.
[16]Common law principles in a supplementary capacity apply by dint of section 3(1) c Judicature Act, Cap 8 Laws of Kenya
[17]Article 94(5) Constitution of Kenya, 2010
[18]Oppong n_6, 326
[19][1908] 1 KB 309
[20]See the case of Adams v Cape Industries plc (1990) Ch. 433

of principles that undergird recognition and enforcement of a foreign judgment. The court proceeds as if it is automatic that the decision must be recognized as a fait accompli.

In an affidavit filed by Lynne Elizabeth Wells and dated 12th January 2020 on behalf of the Respondent bank, the deponent, a legal consultant with the Respondent bank, raises certain pertinent issues of concern; that the Appellants had raised concerns about the Judge in the High Court in England, Deputy Judge Daniel Toledano QC sitting in the same chambers as the Barrister for the Respondent bank, Michael Sullivan QC and in deed not recusing himself in the matter.[21] Equally, the Respondent bank argued that the question of recusal of Judge Daniel Toledo QC was a procedural question that should and can only be dealt with in accordance with the lex fori, the law of England and Wales.[22] From the deposition by M/s Wells, it's important to recall two important principles that govern the recognition and enforcement of foreign judgments; one that there is no obligation to enforce any foreign judgment and that two, there is an obligation on the part of the Judgment Creditor (Respondent) as Plaintiff in the enforcement cause to show that the foreign court had jurisdiction.

These rules, on the face of them, require that the affidavit statements on the question of impartiality of Judge Daniel Toledo QC should have been a triable issue and that the Respondent bank should have proven in court that indeed the issue of impartiality should or should not have informed the High Court of Kenya's considerations on the question of international competence(jurisdiction).

Bearing in mind that the Kenyan High must satisfy itself that the High Court in England had jurisdiction over the matter sought to be recognized and endorsed, the issue of impartiality of Judge Toledo should have been considered as a fact in issue. A fact in issue is *'any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows.'*[23] The "necessary constituents" of a right or liability called 'facts in issue', manifest if their existence is asserted by one party and is denied by the other. Thus, a contest or a dispute may be called the soul of facts in issue.[24] A fact in issue has been explained further thus; ' whenever, under the provisions of the law, for the time being in force relating to civil procedure, any court records an issue in fact, a fact to be asserted or denied in the answer to such issue, is an issue in fact.'[25] Section 4 of the Foreign Judgments (Reciprocal

Deputy Judge Daniel Toledano

Enforcement) Act on jurisdiction lays down rules on examination of international competence, rules the High Court of Kenya did not bother to interrogate.

Secondly, Kenya has a statute in place that enumerates certain conditions that must be met before any foreign judgment is enforced. In essence, any person who seeks to enforce a foreign judgment must satisfy the enforcing court's rules on jurisdiction in international matters.[26] The jurisdictional rules of the forum for dealing with claims involving foreign elements must be satisfied.[27]

Section 10 of the Foreign Judgments (Reciprocal Enforcement) Act (hereinafter, the Act) titled 'Setting Aside', as one of the grounds for which a judgment may be set aside is if 'the enforcement of the judgment would be manifestly contrary to public policy in Kenya.'[28] This is a point that has been raised in appeal by the Appellant in relation to the fact that Deputy Judge Daniel Toledano QC sat in the same chambers as the Barrister for the Respondent bank, Michael Sullivan QC and that he did not recuse himself in the matter. The Act does not define what is meant by public policy. It appears that recognition of any foreign judgment is voided by application of the envisaged public policy test on setting aside any registered judgment, if any foreign judgment is against public policy. Recognition of any such judgment is on the face of the provision of setting aside on the grounds of public policy an academic exercise.

[21]Para. 28 to 29 of the Replying Affidavit by Lynne Elizabeth Wells, Vol. 2 Record of Appeal
[22]Ibid, para.30
[23]Section 2, Evidence Act, Cap 80 Laws of Kenya
[24]M. Monir, Textbook on the Law of Evidence, (2006) Universal Law Publishing, 45
[25]SC Sarkar, Sarkar Law of Evidence in India, Pakistan, Bangladesh, Burma, Ceylon, Malaysia and Singapore (2016), Lexis Nexis, 54
[26]Oppong n_6, 318
[27]Ibid, 320
[28]Section 10 (2) n, Foreign Judgments (Reciprocal Enforcement) Act, Chapter 43 Laws of Kenya

In the absence of statutory definition, what then amounts to public policy? Scholarly definition proximate the term public policy to stand for 'a system of laws, regulatory measures, courses of action, and funding priorities concerning a given topic promulgated by a governmental entity or its representatives.'[29] Public policy has also been generally defined as 'any actions taken by governments that represent previously agreed responses to specified circumstances.'[30] Perhaps the best known definition of public policy is by Thomas Dye who offered a particularly succinct formulation, describing public policy as 'anything a government chooses to do or not to do.'[31]

Having examined the scholarly definition of the term public policy, it is then important to examine whether the presiding over of a matter by Daniel Toledano QC in which a Mr. Michael Sullivan QC alleged to sit in the same chamber with him fits within the meaning of public policy as argued by the Appellants, for purposes of valuating the principle that a foreign court should be internationally competent before its judgment is enforced, which is an entrenched principle of private international law. It is public policy that a judge should not sit and preside over matters where impartiality concerns or likely bias may be imputed. The principle of impartiality is a demand of judicial salubriousness.

Indeed, public policy and the principle of natural justice can be relied on in terms of making a decision on international competence.[32] In the Zimbabwe case of Steinberg v. Cosmopolitan National Bank of Chicago,[33] the court determined that the judgment against the Respondent should be recognised since it would either be against public policy to allow the defendant to rely on his own criminal act, or against natural justice to make the plaintiff re-litigate the matter in Rhodesia. In this matter, an Illinois court whose decision was sought to be recognized and enforced, assumed jurisdiction on the basis that the cause of action arose in Illinois and that the defendant also had assets there, albeit insufficient. However, the defendant, an American, who was served in Rhodesia, could not be served in the United States. This was because he was a fugitive from justice with respect to criminal proceedings founded on the same facts that gave rise to the civil cause of action. Therefore, the court deemed it not proper for the defendant to benefit from his criminal actions, a public policy consideration.
The argument by the Appellant that failure by Deputy Justice Toledano QC to recuse himself is a material question that affects international competence and may find grounding in section 10 of the Foreign Judgments (Reciprocal Enforcement) Act in its requirement that a judgment can be set aside if it is against policy. The attendant response by the Respondent bank that the question of recusal of Mr. Toledo QC was a matter of lex fori ought to have formed basis for judicial interrogation in any case and an informed finding made on the issue.[34] The High Court of Kenya skirts this important issue.

Three material points emerge from the competing arguments; did the Mr. Toledo QC preside over a matter that was argued by a person who sits in the same chambers with him? Secondly, if it is true that Mr. Toledo QC and Mr. Sullivan QC sit in the same chamber, would the failure by Mr. Toledo to recuse himself amount to a violation of policy within the meaning of section 10 of the Foreign Judgments (Reciprocal Enforcement) Act? Thirdly, the failure by Mr. Toledo QC to recuse himself, is it a matter for the lex fori or does it touch on international competence of the English High Court?

Being that the term policy is not defined in the Act, reliance on scholarly definition examined hereinabove,[35] inevitably leads to the conclusion that the term policy connotes that the failure by Mr. Toledo QC to recuse himself would offend the principle of judicial impartiality, rules of natural justice and Kenya's Judicial Code of Conduct for example, which may be argued to be a statement of policy *expressis verbis.*

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[29]G. Kilpatrick, Definitions of Public Policy and the Law available at https://mainweb-v.musc.edu/vawprevention/policy/definition.shtml#:~:text=Public%20policy%20can%20be%20generally,governmental%20entity%20or%20its%20representatives. accessed on 3/12/2022 at 1142 hours
[30]M. Mintrom and C. Williams, Public Policy debate and the rise of policy analysis in Eduardo Araral Jr. et al (eds.), Routledge Handbook of Public Policy, (2013) Routledge Publishing, 4
[31]Michael Howlett and Benjamin Cashore, Public policy: definitions and approaches in Giliberto Capano and Michael Howlett (eds.), A Modern Guide to Public Policy, (2020) Edward Elgar Publishing, 10
[32]Oppong n_6, 325
[33]1973 (4) SA 564.
[34]Supra_n.26. See the Respondent bank's averments contained in para. 30 of the Replying Affidavit of Lynne Elizabeth Wells, a legal consultant for the Respondent Bank.
[35]Supra¬_ n. 29-31

The Judicial Code of Conduct states that a judge shall use the best efforts to avoid being in situations where personal interests conflict or appear to conflict with the judges' official duties.[36] Equally, it is a requirement that a judge may recuse himself/herself where the impartiality of the judge is questioned where the judge has a personal interest or is in a relationship with someone who has interest in the outcome of the matter.[37]

The requirement of recusal, as a corollary to the right to fair hearing, in circumstances where there is bias or there is perception of likely bias, is recognized under common law as well. In the English case of Porter v. Magill,[38] the test for recusal was stated thus by the House of Lords:

> *"The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was real possibility that the tribunal was biased."*

With regards to statutory interpretation and bearing in mind that the recognition and enforcement of a foreign judgment is not automatic, the treatment and interpretation of the Foreign Judgments (Reciprocal Enforcement) Act takes the ordinary course of similarly placed statutes. Statutory interpretation like all law in Kenya MUST be conducted in accordance and within the value-laden framework of the Supreme Constitution, which is the highest law of the land.[39] Apart from the constitutional values (Article 10), the interpretation of statutes was transformed by six provisions of the Constitution, in particular: article1 (the foundational provision), article 2 (supremacy of the Constitution),article 3 (the obligation clause) article 10(1)(the application clause), article 24 (the limitation clause) and article 259 (the interpretation clause).

Therefore, the function of interpretation of any statute must reckon with the potent normativity of constitutional norms. The South African Constitutional Court has had the occasion to pronounce itself on the importance of the constitution in the context of statutory interpretation. In the case of Holomisa v Argus Newspapers Ltd,[40] Cameron J summarized the principle of constitutional supremacy thus in the context of statutory interpretation:

> *"The Constitution has changed the 'context' of all legal thought and decision-making in South Africa."*

Ngcobo J said the following in the case of Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism:[41]

> *"The Constitution is . . . the starting point in interpreting any legislation. . .. first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and, second, the statute must be capable of such interpretation . . . The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous."*

In the case of Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit,[42] Langa DP explained the constitutional foundation of the 'new' interpretation methodology based on the Constitution as follows (emphasis added):

> *"Section 39(2) of the Constitution . . . means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the*

[36]Section 19(1), The Judicial Code of Conduct and Ethics, Judiciary of Kenya, (August 2018)
[37]Ibid, section 20 (1) e
[38](2002) 1 All ER 465
[39]Article 1, 2, 10(1) and 160(1), Constitution of Kenya, 2010
[40]1996 (2) SA 588 (W) 618
[41]2004 (4) SA 490 (CC) paras 72, 80 and 90
[42]2001 (1) SA 545 (CC) para 21

David Makali

> *process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole."*

In placing reliance on the constitution as the constant north in guiding statutory interpretation, the Constitution of Kenya as a value-laden parchment requires that judicial processes observe high standards of impartiality. From the foregoing analysis, it would be difficult to find that the English High Court was internationally competent if the term policy (broadly defined) required the recusal of a judge in circumstances that required the maintenance of the pristineness of the judicial decision making through recusal so as to respect the principle of impartiality.

The Constitution of Kenya, as a requirement of appearance of fair trial would frown on a judge presiding over a matter where a person who sits in the same chamber with him or her. It is a principle in the Kenyan context that a judge will recuse himself or herself whenever the appearance of bias on the basis of relationships is established. In the case of Stephen Njoroge Gichuha v Fred Nyagaka Ongarora & another,[43] an application for disqualification of the presiding judge was made on the basis that one of the witnesses for the Defendants' case was the husband to the judge and a brother-in-law to the second defendant.

The Court allowed the application stating that an independent and honourable judiciary must maintain and enforce a high standard of conduct so that integrity and independence of the judiciary is preserved. Generally, the appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in R v David Makali and Others,[44] and reinforced in subsequent cases such as R v Jackson Mwalulu & Others,[45] where the Court of Appeal stated that:

> *"…When courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established…"*

On the argument by the Respondent bank that recusal of Deputy Judge Toledo is uniquely a matter for lex fori, this was a matter that should have been analyzed and determined by the High Court of Kenya. The fact of the presiding over the matter by Deputy Justice Toledo can be a matter examinable through the lens of international competence, thereby giving the Kenyan Court opportunity to pronounce itself over the matter or the Court could, by use of rules of private international law deem the matter to have been an issue of lex fori. The High Court of Kenya remains silent on either limb of assessment.

Lex fori (the law of the court in which a proceeding is brought) is said to govern procedural issues as opposed to lex causae (the law of the case) which deals with issues of substance.[46] What then are considered procedural matter according to English law for example? The question whether an intending litigant has such personality and other competence as to allow it to sue or be sued in an English court is a matter of procedure and governed by English law.[47] The trial process, its nature and form, relating to concerns such as the question whether or upon what matters witnesses may or may not be compelled to give evidence or issues of whether procedure relating to trial is that of interim and interlocutory relief, are all deemed matters of procedure to be conducted pursuant to English law.[48]

[43][2014] eKLR
[44]C.A Criminal Application No Nai 4 And 5 of 1995 (Unreported)
[45]C.A. Civil Application No Nai 310 Of 2004 (Unreported)
[46]A. Briggs, The Conflict of Laws (2013) Oxford University Press, 189-190
[47]Ibid, 190
[48]Ibid, 191

From the English context, it appears that there is no firm and irrefutable conclusion that recusal is a matter for determination on the basis of lex fori. If such firm and incontrovertible conclusion existed, then the Kenyan High Court would merely be required to take judicial notice of such a provision of law. As such, that assertion remains bare and merely an opinion. The assertion by the Respondent bank on the issue of recusal is one that should have been proven to the court once asserted as a matter of law. It is important to remember that the deposition was made by a consultant working for the Respondent bank and as such, remains a one-sided opinion. In any case, the comment on the status of the recusal question should have been rendered by an admitted expert not by a consultant working for one of the parties. That is what the law requires.

The Canadian Courts have had the opportunity to render its self on opinions not issued by experts. In the case of Chamberlain v. School District No. 36 (Surrey),[49] the Court stated thus: *"In general, opinion evidence is not admissible except when authored by an expert witness. Nor is it proper to submit argument in the guise of evidence. Personal opinions or a deponent's reactions to events generally should not be included in affidavits; argument on issues from deponents serves only to increase the depth of the court file and to confuse the fact finding exercise …"*

In Home Equity Development Inc. v. Crow,[50] the Court stated thus on the issue of opinion: *"Opinion evidence is inadmissible unless given by an expert witness. Personal opinions or a description of the deponent's or another person's reaction to events is inappropriate and is nothing more than argument in the guise of evidence. It should not be admitted, and those portions of the affidavits containing opinion and reaction will be struck unless the plaintiffs did not object to them."*

The inevitable conclusion after analyzing the High Court of Kenya's determination in East African Development Bank v Dari Limited & 5 others is that the findings of the Court fall far short of established principles of law generally and does not meet the principled standpoints that govern private international law adjudication. What is particularly disturbing about the High Court of Kenya ruling is the lack of analysis of the issues and the law. The Court puts no effort at all in analyzing the issues and law at stake in the matter. That lack of rigour in analysis is a profound indictment on the part of the Court. In a matter where so much is at stake, the Court ought not to appear so flippant. The casualness in treating such serious questions raises profound concern about judicial capacity and the confidence reposed in the judiciary.

Conclusion

Is judicial decision-making an art or a science? This age old question can be answered in two ways, depending on ideological leanings of the respondent. Judicial decision-making as an art sees judging as an objective system which judges should follow, while the latter sees it more as an intuitive process and as a science, judicial decision-making being generally understood as requiring that judging is not based on the subjective views of judges.[51] However examined, judicial decision-making entails giving reasons and explaining them away cogently and clearly. Reason giving is a question of justice. Judicial decision-making involves both an epistemic and ethical assessment of a case. Indeed, it is argued that judicial ethos is 'best reflected in legal reasoning and the persuasive arguments of opinion, combined with the binding character of judicial order, which is linked with the authority of the court (balance and sword)'.[52] And whereas this paper does not pretend to make a global assessment of the contradictions and differences between private international law and municipal law systems, any dialectic tensions between the two can only be resolved through sound and principled judicial decision-making. It can only be hoped that judicial decision making can improve and the need for such improvement is dire particularly when the stakes are high.

Evans O. Ogada, LL. B (U.o.N), LL.M (U.o.N) (Public International Law) PGD (K.S.L.) is a Practicing Advocate and a Lecturer in Public International Law at the University of Nairobi. He can be contacted through his email address which is ogadae@yahoo.com

[49](1998), 60 B.C.L.R. (3d) 311 (S.C.) at para. 28:
[50]2002 BCSC. 546 at para. 30
[51]T. Capeta, Do Judicial Decision-Making and Quantum Mechanics Have Anything in Common? A Contribution to the Realist Theories of Adjudication at the CJEU in Martin Belov (ed), The Role of Courts in Contemporary Legal Orders (2019) Eleven International Publishing, 83
[52]Ibid, 2

Kenya's GMOs controversy: some thoughts on the law

We have so many things that can kill us in the country. Being in this country, you are a candidate for death. And because so many things compete for death, there is nothing wrong with adding GMOs to that list. That is why we have deliberately allowed Genetically Modified Organism until we are satisfied that we have enough maize, the staple food.[1]

Moses Kuria, Cabinet Secretary of trade, industrialization and investments

By Odhiambo Jerameel Kevins Owuor

Introduction

A cabinet meeting chaired by late Kenya's President, Mwai Kibaki, on 8th November 2012, directed the then public health minister to ban Genetically Modified Organism imports until the country was able to certify that they have no negative impact on people's health. In a statement to the press, the cabinet said there was a "lack of sufficient information on the public health impact of such foods". "The ban will remain in effect until there is sufficient information, data and knowledge demonstrating that GMO foods are not a danger to public health," it added. The directive came just three years after the government's establishment of the National Biosafety Authority (NBA), tasked with exercising general supervision and control of the transfer, handling and use of GMOs.

The then Ministry of Public Health (MOPH) Beth Mugo ordered Public Health Officials to remove all genetically modified (GM) foods from the market and to enforce a ban on GM imports. She pointed out that the ban undermines Kenya's legal and regulatory system for agricultural biotechnology codified in its National Biosafety Act of 2009.[2]

This ban wasn't applauded by many a mass of persons. One of the critics named Richard Okoth who was a biotechnology scientist based at Kenyatta University felt that the government's imposition of a ban while continuing to fund research on biotechnology through the National Council for Science and Technology was a contradictory position. According to him, "The essence of GMO research

is to provide a product that can complement efforts towards food security. This ban will discourage research, as the product for which the research is being conducted has been placed on import ban". He added that courtesy of the ban on GMOs biotechnology research funding was going to be compromised as international donors could be reluctant to provide funds following the ban.[3]

Interestingly, there was another camp of persons who praised the move by the government to ban GMOs. African Biodiversity Network (ABN), a regional research network based in Kenya, supported the step taken by the government and called for the ban's strict implementation. "The ban should be strictly implemented and the regulatory institutions should be empowered to enable them to do assessment on all imports to safeguard against the bypassing of the law. Kenya only has three biosafety officers, and poor infrastructure and human capacity may make implementing the ban very challenging," Gathuru Mburu, ABN's coordinator stated.

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[1]Moses Kinyanjui, Moses Kuria's Woes Deepen As Catholic Church Demands Apology Over Controversial GMO Remarks (21st November 2022) Retrieved from https://www.citizen.digital/news/moses-kurias-woes-deepen-as-catholic-church-demands-apology-over-controversial-gmo-remarks-n309754 Accessed on 27th November 2022.

[2]Agatha Ngotho, Ruto lifts ban on GMO products (3rd October 2022) Available at https://www.the-star.co.ke/news/2022-10-03-ruto-lifts-ban-on-gmo-products/ Accessed on 27th November 2022.

[3]Otieno Owino, Scientists torn over Kenya's recent GM food ban (3rd December 2012) Accessed on https://www.nature.com/articles/nature.2012.11929 Accessed on 27th November 2022

Cabinet Secretary Moses Kuria

That was the position ten years ago; this article is premised on the recent move by the Kenya Kwanza administration's decision to lift the ban on GMOs. In a Cabinet memo dated Monday, October 3, 2022, President Ruto said the ban has been lifted in accordance with the recommendation of the Task Force formed to Review Matters Relating to Genetically Modified Foods and Food Safety.[4] ***"In fidelity with the guidelines of the National Biosafety Authority on all applicable international treaties including the Cartagena Protocol on Biosafety (CPB), Cabinet vacated its earlier decision of November 8, 2012 prohibiting the open cultivation of genetically modified crops and the importation of food crops and animal feeds produced through biotechnology innovations. The Cabinet has effectively lifted the ban on Genetically Modified Crops,"*** read the memo. The memo indicated that by dint of the executive action, open cultivation and importation of White (GMO) maize is now authorized.[5]

It is said that the Cabinet lifted the ban after consulting widely, talking to various experts and looking at technical reports on the adoption of biotechnology. On the other hand, proponents of organic farming were furious terming the decision rushed and that more time was needed for public participation.[6]

Following the memo by the Cabinet, the incumbent Cabinet Secretary in charge of trade, industrialization and investments stated that the government was going to allow the importation of duty-free Genetically Modified Crops and non-GMO maize for the next six months. According to him, the move was aimed at mitigating the food crisis ravaging the country.[7] This move by Moses Kuria attracted scathing criticism ranging from religious leaders, Azimio leaders and politicians who hail from Kenya's maize basket, the Rift Valley region.

Uasin Gishu Senator Honourable Samson Kiprotich Cherargei in a press conference (on behalf of Members of Parliament from maize-producing regions) noted as follows:

> *We, demand for an immediate cessation of importation of 10 million bags of duty free maize into the county given that no official notice has formally and legally been issued. We are aware that there are plans by the ministry of trade to import 10 million bags of duty free maize into the county while this is the season of maize harvesting in major parts of the country. It has never happened before that maize is imported into the country during harvest season yet we understand that local maize production is always the first remedy. As members of Parliament from maize producing regions, we seek to know the reason as to why ships are already docking in Mombasa port without the laid down legal procedures in place. We are aware there was no cabinet approval on the importation of duty-free maize into the country. This will undermine the intention of guaranteed minimum return to framers which was championed by CS Moses Kuria.*
>
> *The projection of the bumper harvest of maize this season is projected to be 42 million bags despite the high cost of fuel, ploughing, in fact we request that the cost of fertilizer of Ksh 7,000 should match the price of Kshs 7,000 per bag of maize. It seems there is a deliberate move to continue killing the maize farming in the country as was seen in the previous regime where even the sugar sector and other farming sectors were killed. It seems the cartels are now back into business and this time round, they appear more aggressive and ruthless. On the GMO issue, we don't need to rush until we have proper laws, policies, rules and regulations to govern the use and importation of GMOs into the country, including but not limited to agricultural products. As parliament, we are ready to provide necessary support on the issue of GMO debate in the country with necessary consultations with necessary stakeholders, including members of the public.*

Azimio leaders while commenting on the GMO issue called on President Ruto to re-impose the ban on Genetically Modified Crops. While citing a lack of public participation, Musyoka stated that should President Ruto fail to do so, Azimio will seek redress in the National Assembly. "On

[4]Ibid
[5]Ibid
[6]Betty Njeru, Trade CS Moses Kuria to allow duty-free import of GMO maize for six months. Available at https://www.standardmedia.co.ke/article/2001460886/government-to-allow-duty-free-import-of-gmo-maize-for-six-months Accessed on 27th November 2022
[7]Ibid

such a weighty matter especially as concerns food security, there should have been nationwide discourse through public engagement, education and participation. The government did not engage in public participation," he said. He appealed to the President to reconsider his stand re introduction of GMOs saying the initiative is not a sustainable solution to reduce food shortage and it will have diverse health effects on Kenyans. [8]

"It is therefore important that we demystify the impacts of GMOs and expose their propensity to be an existential threat to the biodiversity we pride in as a country and our health," Musyoka stated. The Azimio La Umoja One Kenya Principal further called out the church on their silence following the lifting of the GMO ban yet they were among vibrant crusaders who called for the effecting of the ban in 2012. "Could it be that they have been pacified by this new administration and blinded to the moral and ethical question around GMOs that go against the 4 orders of nature? We urge our religious leaders and faith-based organizations not to sell their souls," he posed. Musyoka also warned that the lifting of the ban will adversely affect trade with neighbouring countries since most have effected a ban on GMOs.[9]

Minority Leader in the National Assembly, Honourable Opiyo Wandayi as well opposed the lifting the ban on GMOs. Wandayi said GMOs are not a solution to fighting hunger which has ravaged several parts of the country. "There is no consensus on the safety of GMO foods to humans and their impact on the environment," Wandayi said. Commenting on Moses Kuria statement that all and sundry are candidates of death he said, 'That there is a falseness about this administration; a lack of empathy; a coldness and an arrogance that are at odds with the times Kenyans find themselves in. Kenyans deserve better.[10]

He added that the famine witnessed in the country is being used as an excuse to reintroduce GMOs. The Ugunja Constituency lawmaker further faulted the government for using the GMO issue to have ill-doings. "To defraud the country in a scheme very much similar to the Goldenberg scam of the 1990s," he said. Wandayi, therefore questioned the rationale for imports of maize and also the duty-free imports. "Why has there been no effort to get ordinary maize from other parts of the world or was the importation of GMOs part of the pre-election deal between President William Ruto and foreign backers?" Wandayi posed. He also inquired into the future of local maize farmers.[11]

National Assembly Minority Leader, Opiyo Wandayi

Nyeri Diocese Catholic Archbishop, Anthony Muheria, on his part called for 'sober' engagements between the government and food experts to unlock the gridlock surrounding Genetically Modified Organisms (GMOs). Archbishop Muheria argued that the GMO debate should not be trivialized like it has and that an open forum bringing together experts in the field of agriculture and food should be engaged to offer a clear direction that the country should take before embracing the consumption of GMOs.[12]

"When we speak about GMOs, it is a matter that deserves deep, strategic, respectful and sober engagements. It is not for us to embrace them wholeheartedly without reservations nor do we want a situation where we reject their use even if it could be for a specific period of time," said Arch Muheria. "We call for a good moment of engagement by government and the agriculture and food experts so that we may find the right path. We also need to discuss the dangers that Kenyans are exposed to, sometimes it is exaggerated, sometimes it can be contained and mitigated, we should not just discuss emotions, let us discuss scientific facts," he added.[13]

The Nyeri Archbishop also weighed in on the food sufficiency matter and said that there was a need to find a long-term solution to the perennial drought situation. According to Muheria, the current famine situation was as a result of poor planning and the lack of strategy adding that

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[8]Irene Mwangi, Azimio Urges President Ruto To Reconsider Lift On GMO Ban (12th October 2022) Retrieved from https://www.capitalfm.co.ke/business/2022/10/azimio-urges-president-ruto-to-reconsider-lift-on-gmo-ban/ Accessed on 27th November 2022

[9]Ibid

[10]Laura Shatuma, Azimio opposes GMO, say no consensus on safety (19th November 2022) Available at https://www.the-star.co.ke/news/2022-11-19-azimio-opposes-gmo-say-no-consensus-on-safety/ Accessed on 27th November 2022

[11]Ibid

[12]KBC, 'Muheria calls for sober discussions on GMOs' Available at https://www.kbc.co.ke/muheria-calls-for-sober-discussions-on-gmos/ Accessed on 27th November 2022

[13]Ibid

the government should change its approach in order to make the country food secure. Further, he also called for improved agricultural and water harvesting practices which he said would contribute towards making the country food secure.[14]

Much has been said on this GMO issue internationally by authorities in the field of science. This piece will not regurgitate what experts have noted on GMOs but will only make an inference on the same. Of concern to this piece surround the legalities of the GMO spectacle.

Towards demystifying the origin of GMOs

A genetically modified organism (GMO) is an animal, plant, or microbe whose DNA has been altered using genetic engineering techniques. For thousands of years, humans have used breeding methods to modify organisms. Corn, cattle, and even dogs have been selectively bred over generations to have certain desired traits. Within the last few decades, however, modern advances in biotechnology have allowed scientists to directly modify the DNA of microorganisms, crops and animals.[15]

Conventional methods of modifying plants and animals selective breeding and crossbreeding can take a long time. Moreover, selective breeding and crossbreeding often produce mixed results, with unwanted traits appearing alongside desired characteristics. The specific targeted modification of DNA using biotechnology has allowed scientists to avoid this problem and improve the genetic makeup of an organism without unwanted characteristics tagging along. Most animals that are GMOs are produced for use in laboratory research. These animals are used as "models" to study the function of specific genes and, typically, how the genes relate to health and disease. Some GMO animals, however, are produced for human consumption. Salmon, for example, has been genetically engineered to mature faster and the U.S. Food and Drug Administration has stated that these fish are safe to eat.[16]

Put differently, genetically modified organisms (GMOs) can be defined as organisms (like plants, animals or microorganisms) in which the genetic material (DNA) has been altered in a way that does not occur naturally by mating and/or natural recombination. The technology is often called "modern biotechnology" or "gene technology", sometimes also "recombinant DNA technology" or "genetic engineering". It allows selected individual genes to be transferred from one organism into another, also between nonrelated species. Foods produced from or using GM organisms are often referred to as GM foods.[17]

GM foods are developed and marketed because there is some perceived advantage either to the producer or consumer of these foods. This is meant to translate into a product with a lower price, greater benefit (in terms of durability or nutritional value) or both. Initially, GM seed developers wanted their products to be accepted by producers and have concentrated on innovations that bring direct benefit to farmers (and the food industry generally). One of the objectives for developing plants based on GM organisms is to improve crop protection. The GM crops currently on the market are mainly aimed at an increased level of crop protection through the introduction of resistance against plant diseases caused by insects or viruses or through increased tolerance towards herbicides.[18]

While our ancestors had no concept of genetics, they were still able to influence the DNA of other organisms by a process called "selective breeding" or "artificial selection." These terms, coined by Charles Darwin, describe the process of choosing the organisms with the most desired traits and mating them with the intention of combining and propagating these traits through their offspring. Repeated use of this practice over many generations can result in dramatic genetic changes to a species. While artificial selection is not what we typically consider GMO technology today, it is still the precursor to modern processes and the earliest example of our species influencing genetics.[19]

A ginormous quantum leap in GMO technology came in 1973, when Herbert Boyer and Stanley Cohen worked

[14]Supra
[15]National Geographic, Genetically Modified Organisms. Retrieved from https://education.nationalgeographic.org/resource/genetically-modified-organisms Accessed on 27th November 2022
[16]Ibid
[17]Retrieved from https://www.who.int/news-room/questions-and-answers/item/food-genetically-modified Accessed on 27th November 2022
[18]Ibid
[19]Gabriel Rangel, From Corgis to Corn: A Brief Look at the Long History of GMO Technology (9th August 2015) Available at https://sitn.hms.harvard.edu/flash/2015/from-corgis-to-corn-a-brief-look-at-the-long-history-of-gmo-technology/ Accessed on 27th November 2022

together to engineer the first successful genetically engineered (GE) organism[20]. The two scientists developed a method to very specifically cut out a gene from one organism and paste it into another. Using this method, they transferred a gene that encodes antibiotic resistance from one strain of bacteria into another, bestowing antibiotic resistance upon the recipient. One year later, Rudolf Jaenisch and Beatrice Mintz utilized a similar procedure in animals, introducing foreign DNA into mouse embryos.

Although this new technology opened up countless avenues of research possibilities, immediately after its development, the media, government officials, and scientists began to worry about the potential ramifications on human health and Earth's ecosystems.[21] By the middle of 1974, a moratorium on GE projects was universally observed, allowing time for experts to come together and consider the next steps during what has come to be known as the Asilomar Conference of 1975.[22] At the conference,[23] scientists, lawyers, and government officials debated the safety of Genetically Engineered experiments for three days. The attendees eventually concluded that the GE projects should be allowed to continue with certain guidelines in place.[24]

For instance, the conference defined safety and containment regulations to mitigate the risks of each experiment. Additionally, they charged the principal investigator of each lab with ensuring adequate safety for their researchers, as well as with educating the scientific community about important developments. Finally, the established guidelines were expected to be fluid, influenced by further knowledge as the scientific community advanced. Due to the unprecedented transparency and cooperation at the Asilomar Conference, government bodies around the world supported the move to continue with GE research, thus launching a new era of modern genetic modification.[26]

The rationalization for and against GMOs
Arguments for GMOs
Manufacturers use genetic modification to give foods desirable traits. Potential advantages of GMO crops include increased attractiveness to consumers, for example, apples and potatoes that are less likely to bruise or turn brown, enhanced flavour, longer shelf life and therefore less waste, greater resistance to viruses and other diseases which could lead to less waste and increased food security; greater

tolerance to herbicides, making it easier for farmers to control weeds; increased nutritional value, as in golden rice, which can boost the health of people with limited access to food, greater resistance to insects, allowing farmers to reduce pesticide use; ability to thrive in a harsh climate, such as drought or heat ability to grow in salty soil. Growing plants that are more resistant to diseases spread by insects or viruses will likely result in higher yields for farmers and a more attractive product. All these factors contribute to lower costs for the consumer and can ensure that more people have access to quality food.

According to Bayer, GM crop technology enables farmers to adopt more sustainable agriculture practices. This includes innovations like no-till farming, which pulls carbon out of the atmosphere and stores it in the soil where it supports healthier crops. That's better for crops and the environment. Additionally, because no-till allows farmers to make fewer passes through the field using machinery, they also reduce their fuel use to curb their carbon emissions[27]. Thus, addressing the issue of climate change.

Damaging insects, invasive weeds and emerging diseases can have a devastating impact on farmers' crops. To address this, GM innovation provides targeted protection against these specific threats without adversely impacting other organisms or the environment. But it doesn't end there. In fact, because GM plants are better able to protect themselves, they require less pesticide. That helps farmers save time fuel and money. GM crops are helping farmers around the world accomplish more with less because these innovations are specifically

[20]Cohen, S. et. al. "Construction of Biologically Functional Bacterial Plasmids In Vitro." PNAS, November 1973. http://www.ncbi.nlm.nih.gov/pmc/articles/PMC427208/ Accessed on 27th November 2022
[21]Committee on Recombinant DNA Molecules, "Potential Biohazards of Recombinant DNA Molecules." PNAS, July 1974. http://www.ncbi.nlm.nih.gov/pmc/articles/PMC388511/?page=1 Accessed on 27th November 2022
[22]Berg, P. et. al, "Summary Statement of the Asilomar Conference on Recombinant DNA Molecules." PNAS, June 1975. http://www.ncbi.nlm.nih.gov/pmc/articles/PMC432675/pdf/pnas00049-0007.pdf Accessed on 27th November 2022.
[23]Ibid
[24]"Biotechnology." Encyclopedia Britannica, 2015. Available at http://www.britannica.com/technology/biotechnology#ref926019 Accessed on 27th November 2022
[25]Ibid
[26]Supra
[27]Bayer, 'The Many Benefits of GM Crops' Available at https://www.bayer.com/en/agriculture/article/benefits-gm-crops Accessed on 27th November 2022

developed to use precious natural resources like land and water more efficiently. By enabling farmers to meet the increasing global demand for food on their existing farms, GM crops are enabling them to preserve rainforests, prairies and other natural habitats.

Genetically modified crops have been successful in many countries, including Canada and the US, where they have increased yields, lowered labour and cultivation costs, and reduced the use of chemical inputs. Genetic engineering has the potential to enhance food security and nutritional quality in ways not possible with conventional technology. Because the technology is contained in the seed, it is easy to distribute to farmers.

Cons of GMOs

Slow food did present a position paper on demerits of GMO. The organization made reference to an array of demerits of GMO of which I will discuss below. Where they are grown, GM crops occupy large surface areas and are linked to intensive monoculture systems that wipe out other crop and ecosystems. Growing only one kind of corn for human consumption will mean a reduction in flavours, traditional knowledge and food security.[28]

Most GM crops fall into one of two categories: either engineered to resist chemical herbicides or engineered to produce insecticides themselves. When herbicides are used on resistant crops, over time the weeds develop resistance, leading to the use of even more chemicals. Crops engineered to produce insecticides on the other hand produce toxins that are not only harmful to pests but other insects such as butterflies, moths and insect pollinators.[29]

GM crops are patented, which allows a few multinational companies such as Monsanto, Bayer, Syngenta, DuPont and Dow to control the entire GM food chain – from research to breeding to commercialization of seeds. The multinational companies that patent and produce GMO seeds control the majority of the seed market and often also produce herbicides and fertilizers. Patenting genetic material has shifted the balance of economic power towards big business in their aggressive pursuit of profit.

GM crops denature the role of farmers, who have always improved and selected their own seeds. GM seeds are owned by multinationals to whom the farmer must turn every new season, because, like all commercial hybrids, second-generation GMOs do not give good results. It is also forbidden for farmers to try to improve the variety without paying expensive royalties. Furthermore, farmers risk being sued by big corporations if their crops are accidentally contaminated with patented GM crops. Pollen from crops like oilseed rape is easily spread via wind and insects to neighbouring fields. Hundreds of these farmers in the US have been sued by Monsanto, Syngenta, BASF and DuPont for illegally growing patented crops.

The role of small-scale agriculture in food sovereignty and security, protection of local areas and economies, the preservation of landscape and sustainability is becoming increasingly clear to consumers, governments and scientists. Governments should support these productions instead of heeding to the demands of big business.

Little is understood yet about the health effects of GMOs, but recent studies have shown animals fed with GM-containing feed can develop health problems. In many parts of the world including the EU, studies on GM crops can be carried out by the same companies that produce them, casting doubt on the quality and bias of data.

GM products do not have historical or cultural links to a local area. In Italy for example, a significant part of its agricultural and food economy is based upon identity and the variety of local products. Introducing anonymous products with no history would weaken a system that also has close links to the tourism industry.

Crops that are genetically modified will create seeds that are genetically modified. Cross-pollination is possible between GMO crops and non-GMO crops as well, even when specified farming practices are followed. Because many of

[28]Slow Food is a global, grassroots organization, founded in 1989 to prevent the disappearance of local food cultures and traditions, counteract the rise of fast life and combat people's dwindling interest in the food they eat, where it comes from and how our food choices affect the world around us. Since its beginnings, Slow Food has grown into a global movement involving millions of people in over 160 countries, working to ensure everyone has access to good, clean and fair food. Slow Food believes food is tied to many other aspects of life, including culture, politics, agriculture and the environment. Through our food choices we can collectively influence how food is cultivated, produced and distributed, and change the world as a result.

[29]Beyer, P., et al. Golden rice: Introducing the β-carotene biosynthesis pathway into rice endosperm by genetic engineering to defeat vitamin A deficiency. Journal of Nutrition 132, 506S–510S (2002)

the crops and seeds that produce GMO crops are patented, farmers that aren't even involved in growing these foods are subjected to a higher level of legal liability. Farmers that do grow GMO crops could also face liabilities for letting seeds go to other fields or allowing cross-pollination to occur.

Some genetically modified foods may present a carcinogen exposure risk. A paper that has been twice published, but retracted once as well, showed that crops tolerant to commercial pesticides greatly increased the risk of cancer development in rats. The information from this research study, though limited, has been widely circulated and creates the impression that all GMO foods are potentially hazardous.

Crops share fields with other plants, including weeds. Genetic migrations are known to occur. What happens when the genes from an herbicide-resistant crop get into the weeds it is designed to kill? Interactions at the cellular level could create unforeseen complications to future crop growth where even the benefits of genetically modified foods may not outweigh the problems that they cause. One example: dozens of weed species are already resistant to atrazine.

GMO crops may cause antibiotic resistance. Iowa State University research shows that when crops are modified to include antibiotics and other items that kill germs and pests, it reduces the effectiveness of an antibiotic or other medication when it is needed in the traditional sense. Because the foods contain trace amounts of the antibiotic when consumed, any organisms that would be affected by a prescription antibiotic have built an immunity to it, which can cause an illness to be more difficult to cure.

Cabinet decision to lift the ban on GMOs: a legal disquisition

This section delves into an examination of whether there was adequate public participation before the move by the Cabinet to lift the ban on GMOs as well it interrogates whether biosafety concerns were considered at great length before the same decision was arrived at.

I. Biosafety concerns

According to Biosafety Act, biosafety means the avoidance of risk to human health and safety, and the conservation of the environment, as a result of the use of genetically modified organisms.[30] Biosafety describes the principles, procedures and policies to be adopted to ensure environmental and personal safety. Biosafety refers to containment principles, technologies and practices that are required to prevent unintentional exposure to pathogens and toxins, or their accidental release into the environment. Expressed differently, biosafety is a concept that refers to measures put in place to mitigate or protect human health and the environment from possible adverse effects of the products of modern biotechnology.[31]

A fundamental objective of any biosafety program is the containment of potentially harmful biological agents, toxins, chemicals or radiation. With the increasing emphasis on adoption of GE technique in different countries in their life science research and development activities, the biosafety issues are gaining importance to ensure safety of the public and the environment. Biosafety is not only a personal requirement,[32] but essential collective efforts to ensure biological safety for a clean and safe environment. This certainly requires awareness among the public along with rules, regulations, monitoring bodies etc. Awareness among the researchers is a must so that biological safety can be well-taken care of at the grass root level.

Recognizing the need of biosafety in GE research and development activities, an international multilateral agreement on biosafety "the Cartagena Protocol on Biosafety (CPB)"[33] has been adopted by 167 parties, including 165 United Nations countries, Niue, and the European Union. The Protocol entered into force on 11 September 2003, and its main objectives are (i) to set up the procedures for safe trans-boundary movement of living modified organisms, and (ii) harmonize principles and methodology for risk assessment and establish a mechanism for information sharing through the Biosafety Clearing House (BCH). Kenya adopted Cartagena Protocol on 29th January 2000.

The Cartagena Protocol on Biosafety provides a comprehensive and holistic regime designed to ensure that

[30]Biosafety Act

[31]Available at https://www.google.com/search?q=synonmn+of+put+differently&rlz=1C1BNSD_enKE977KE979&oq=synonmn+of+put+differently&aqs=chrome..69i57l2j69i59l2.5506j0j7&sourceid=chrome&ie=UTF-8 Accessed on 27th November 2022

[32]Prabhu KV, Use of GMOs Under Containment, Confined and Limited Field Trials and Post-Release Monitoring of GMOs In: Biosafety of Genetically Modified Organisms: Basic concepts, methods and issues. Chowdhury MKA, Hoque MI and Sonnino A (Eds.). pp. 157-220. © FAO 2009.

[33]Cartagena Protocol On Biosafety To The Convention On Biological Diversity, 2000

the development, handling, transport and use of products of modern biotechnology are undertaken in a manner that maximizes benefits while preventing or reducing risks to the environment and human health. The Protocol is a subsidiary agreement to the UN Convention on Biological Diversity (CBD).

Kenya signed the Biosafety Protocol in 2000 and fulfilled the ratification requirements in 2003. One of the key obligations expected from the Parties to the Protocol is promotion and facilitation of public awareness, education and participation in biosafety activities as stipulated in article 23. The Biosafety Act 2009 of the Laws of Kenya has established the National Biosafety Authority (NBA) as the competent authority to exercise general supervision and control over the transfer, handling and use of genetically modified organisms with a view to ensuring: safety of human and animal health; and provision of an adequate level of protection of the environment. The Authority coordinates all activities involving genetically modified organisms and consults with regulatory agencies.

Some of the roles of the Authority include receiving, reviewing and making approval or rejection decisions on applications to introduce biotechnology products for research or commercial purposes into the country based on risk assessment. Regulatory agencies include Kenya Plant Health Inspectorate Services (KEPHIS), Department of Public Health, Department of Veterinary Services (DVS), National Environment Management Authority (NEMA), Kenya Bureau of Standards (KEBS), and Pest Control Products Board (PCPB) among others. It is recommended that genetically modified organisms and derived products to comply with product specifications, labelling, codes of practice, food safety assessment and credible methods for detection and quantification prescribed by Kenya standards. Kenya standards are complementary to the Biosafety Act 2009 of the laws of Kenya.[34]

National Biosafety Authority is mandated to among other things: consider and determine applications for approval for the transfer, handling and use of genetically modified organisms, and related activities in accordance with the provisions of the act; co-ordinate, monitor and assess activities relating to the safe transfer, handling and use of genetically modified organisms in order to ensure that such activities do not have adverse effect on human health and the environment; co-ordinate research and surveys in matters relating to the safe development, transfer, handling and use of genetically modified organisms, and to collect, collate and disseminate information about the findings of such research, investigation or survey; identify national requirements for manpower development and capacity building in biosafety; advise the Government on legislative and other measures relating to the safe transfer, handling and use of genetically modified organisms; promote awareness and among the general public relating to biosafety; establish and maintain a biosafety clearing house to serve as a means through which information is made available facilitate the exchange of scientific, technical, environmental and legal information on, and experience with, living modified organisms.

Before the Cabinet Decision to lift the ban on GMOs the above-mentioned authority had not shared information on biosafety concerns relating to GMOs in the country. Even though it is said the cabinet decision was arrived at following wider consultations with the stakeholders' one finds it funny that the same information wasn't shared with the public, yet it is a public interest issue at stake. Moreover, the same information hasn't been shared with the general public so that the members can make an informed decision on matters of GMO debate. Leaving this matter to a few people to make decisions at the behest of the opinions and views of the wider majority is bad manners in the words of E. Z Ongoya.

The government as well has an overriding duty to ensure the safety of its citizens. Governments should make food safety a public health priority, as they play a pivotal role in developing policies and regulatory frameworks and establishing and implementing effective food safety systems. By the virtue that there are scientists who raise biosafety concerns on GMO, does it mean that the government is out to kill its citizens? More questions can arise, why is it that so many countries in Africa have not embraced GMO? What is their main contention? Why can't we learn from them? Maybe it is another plot for another scandal for this new government. For even before Moses Kuria signed a legal notice for importation of GMO maize there was a ship in Mombasa dock which had bags of maize.

Honestly, farmers from maize-producing regions are harvesting their maize yet the government is keen on making sure that GMO maize gets into the country. Is this government the key enemy of farmers in this country? How

[34]Supra

can one explain that phenomenon? Kenyan farmers should be protected from external forces who want to control the market. Since the ban on GMO as well no research has been shared to show whether the GMO can thrive in the country and be able to produce the desired results.

GMOs potentially have novel genetic traits that may impact the way in which these organisms interact with their environments. Potential human effects include allergens, transfer of antibiotic resistance markers, unknown effects, potential environmental impact: unintended transfer of transgenes through cross pollination, unknown effects on other organizations and loss of flora and fauna biodiversity. These potentially new interactions represent potentially new risks that have to be assessed and/or managed appropriately before a GMO is released into the environment. Unfortunately, the same wasn't carried out. I dare say it was a perfect dereliction and illegal move by the Executive.

II. On public participation

The promulgation of the constitution in 2010 ushered a new era of citizen participation in Kenya by embedding public participation as a principle of governance that binds all state and public officials. Public participation, therefore, refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms.[35]

Effective public participation has become an indispensable element of democracy and people-centred development. It is the very foundation for democracy which not only strengthens the state by legitimizing governmental actions but is also important for good and democratic governance. Robust participation is credited with a range of benefits—from strengthening individual behaviours and attitudes toward democracy, to shaping bargaining dynamics among political decision-makers, improving constitutional content, and strengthening longer-term outcomes for democracy and peace.

Recognizing the benefits of public participation, the constitution of Kenya created new spaces for interaction, declared the citizen sovereign, and demand that the public must be involved in every aspect of public governance. Article 10 of the constitution lists public participation as one of the national values and principles of governance that binds all state organs, state and public officers, and all persons in Kenya whenever any of them applies or interprets the constitution, enacts, applies or interprets any laws, or makes or implements public policy decisions.

The Supreme Court in ***Petition No. 5 of 2017***[36] delimited the following framework for public participation:

Guiding Principles for public participation

(i) As a constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance.

(ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.

(iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.

(iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is a need for both quantitative and qualitative components in public participation.

(v) Public participation is not an abstract notion; it must be purposive and meaningful.

(vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case-to-case basis.

(vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

(viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case-to-case basis.

(ix) Components of meaningful public participation include the following:

a. clarity of the subject matter for the public to understand;

[35]Kaps Parking Limited & another v County Government of Nairobi & another [2021] eKLR

[36]British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties);Mastermind Tobacco Kenya Limited (The Affected Party) [2019] eKLR

b. structures and processes (medium of engagement) of participation that are clear and simple;
c. opportunity for balanced influence from the public in general;
d. commitment to the process;
e. inclusive and effective representation;
f. integrity and transparency of the process;
g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.[37]

Chief Justice Emeritus, Dr. Willy Mutunga, expounded on the principle and traced the place of the People in the constitution-making process thus:

> *In the entire history of constitution-making in Kenya, the participation of the people was a fundamental pillar. That is why it has been argued that the making of Kenya's Constitution of 2010 is a story of ordinary citizens striving to overthrow, and succeeding in overthrowing the existing social order, and then defining a new social, economic, political, and cultural order for themselves. It is, indeed, a story of the rejection of 200 Parliamentary amendments by the Kenyan elite that sought to subvert the sovereign will of the Kenyan population. Public participation is, therefore, a major pillar, and bedrock of our democracy and good governance. It is the basis for changing the content of the State, envisioned by the Constitution, so that the citizens have a major voice and impact on the equitable distribution of political power and resources. With devolution being implemented under the Constitution, the participation of the people in governance will make the State, its organs and institutions accountable, thus making the country more progressive and stable. The role of the Courts, whose judicial authority is derived from the people of Kenya, is the indestructible fidelity to the value and principle of public participation.*[38]

The role of the public in the law-making process was as well reiterated in *Doctors for Life International v. Speaker of the National Assembly and Others [2006] ZACC 11.* In this decision the Constitutional Court of South Africa stated as follows:

> *"The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.*
>
> *Therefore our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our participatory democracy.*[39]

Having emphatically stated the vital role of public participation, in contextualizing the concept to this paper one may beg to ask the question of whether the public asked to give their views before the decision was arrived at. It was not given priority. Mind you Article 1 enumerates that sovereign will belongs to the people of Kenya and must be exercised as per their will. Moreover, the three of arms of government, including the Executive, are exercising delegated power to the extent that their power is merely donated and thus they must reflect the will of the populace.

Public Participation is the cornerstone of constitutional democracy. With this tenet vouchsafed in the constitution, the Executive cannot act whimsically and with bravado disregarding the views of the public and impose policies and decisions which insult the intelligence of the citizens. The decision by the Cabinet to lift the ban on GMO fails

[37]British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties);Mastermind Tobacco Kenya Limited (The Affected Party) [2019] eKLR
[38]In the Matter of the National Land Commission
[39]British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties);Mastermind Tobacco Kenya Limited (The Affected Party) [2019] eKLR

this test. Actually, what the Cabinet did can be equated to mangling the constitution. Mind you the Constitution is the grund norm. The Constitution outlines the rights and duties of both the state and the citizens and limits thereof.

Petition by Kenyan Peasants League over cabinet's position on GMO and the ruling by the High Court

Kenyan Peasants League did file a petition in the High Court, the petitioners opposed the importation, cultivation and consumption of GMO crops and foods arguing that they pose a deadly health hazard to Kenyans, particularly the poor and those of low income. In his affidavit, Mr Cidi Otieno who is the Leader of the Kenyan Peasants League relied on the recent statements by Moses where the CS stated that 'there was nothing wrong with adding GMOs to the list of the things that can kill Kenyans.' He argued that such statement from the Cabinet Secretary meant that GMOs were indeed dangerous for human consumption and that the actions of the government threaten the health and human life contrary to the provisions of the Constitution of Kenya.

Cidi Otieno further argued that if indeed the government was keen on combating hunger, it was free to import safe maize from neighbouring Tanzania or other countries, rather than import food that would lead to long-term diseases unto the consumers.

Lady Justice Mugure Thande delivered her ruling on this issue on 28th November 2022. She ordered that pending the hearing and determination of the application filed by Kenyan Peasants League, the government and the Cabinet Secretary in charge of Agriculture, livestock and fisheries is temporary prohibited from gazetting or acting upon the contents of dispatch from the Cabinet authored by the Executive Office of the President of Kenya, regarding the lifting of the ban on the genetically modified organisms (GMO Crops). The lady Justice went further to issue conservatory orders, pending hearing and determination of the suit, preventing the respondents or their agents or through such other person acting under their instructions from allowing or permitting the importation of the GMO crops and food into the country as well as distributing GMO crops and food in the country.

Mr Kevin Oriri who is the lawyer representing Kenyan Peasants League stressed that the injunctive orders prohibiting the government from gazetting the Cabinet decision that lifted the ban on GMOs in Kenya are spot on. The orders also prohibit the government, either directly or through any other entity from importing or distributing any GMO crops and foods in the country. He further stated that no public participation led to the lifting of the ban on GMOs in Kenya. Mr. Otieno Cidi declared that the Kenyan Peasants League shall push on with the struggle to promote peasant agroecology for food sovereignty and that they will continue fighting against the neoliberal tendencies that kill local agriculture, threaten food safety and alienate ordinary producers and consumers from decision-making on agriculture and food.

The ruling by the High Court is timely due to the current events taking place in the country. What will be interesting to watch is how the President and his lieutenants will react to the said decision by Learned Lady Justice Thande. The President promised to abide by the rule of law and his sentiments on the same will be worth noting.

Conclusion

As candidates of death, it is imperative to note that GMOs are emerging as very important tools to solve several current problems so they say. However, the adoption of modern biotechnology products needs to be balanced with adequate biosafety safeguards. So far, information regarding the safety of GMOs has not been availed to the wider public. Ann Maina notes that there is no sufficient evidence that GM technology would help the country combat food insecurity and have socio-economic benefits. Kenya also lacks sufficient capacity to regulate GM because the National Biosafety Authority is limited in human and financial resources. Be it as it may, one persuaded to be for or against GMOs should take a keen interest in the legalities of embracing GMOs in Kenya.

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

Platform wins gold award for digital production

The Platform is honored to have been recognized during the 2nd Edition of Global Awards by KeOnline held on the 25th November 2022 at Movenpick Hotel, Nairobi. On our behalf, the award was gracefully accepted by Ms. Muthoni Nkonge and Mr. Nyaga Dominic who attended the Gala Dinner and Awards Ceremony.

Following a nomination and public participation stages, the award sought to recognize and reward companies, brands and businesses that have and continue to create an impact through their work and online presence. Therefore, while the award is a kind recognition of the positive impact of a "digitally fit publisher" in society, it is a timely reminder of our dedication to offering an informed and critical discussion of the national values and principles of governance now set out under Article 10 (2) of the Constitution of Kenya.

As it was rightly noted by our 2018 C.B Madan Laureate, Justice Mumbi Ngugi, "an award makes the society take notice. It makes the world look up, expectantly". With the continued support of our guest columnists, partners and a wide readership across all fields of knowledge in the world, we continue to explore the idea of The Platform as a modern-day agora for examining performance and contribution to the rule of law and constitutionalism by different actors.

As the editorial team, we remain indebted to the steady leadership of our Founder and Editor-in-chief, Hon. Gitobu Imanyara, who has demonstrated in his stellar career courage in the face of adversity to uphold and innovatively defend fundamental constitutional values. He is a role model within and beyond The Platform and for future generations who aspire to leave a legacy of institutional independence, integrity in administration and credibility of leadership. Not only are these values integral to the rule of law and democracy, but they also spring confidence across any real or perceived divide to promote the common good for the people.

The fallacy of 'toothlessness' at the *Sports Disputes Tribunal*: a comprehensive analysis of the tribunal's far-reaching jurisdiction

By John Ohaga, SC

By Charity Ouma

Introduction

There has been, in recent times, criticism of the Sports Disputes Tribunal, with said critiques supposing the tribunal to be powerless against the onslaught of complex sports disputes in the country. Primarily, concern for the extent of the tribunal's jurisdiction stems from section 58 of the Sports Act, which provides that the tribunal may exercise jurisdiction in matters concerning sports organizations in Kenya only if their rules provide for the same and with regard to private parties only if they all agree. This, according to the concerned individuals, significantly limits the tribunal's jurisdiction. On the contrary, such narrow reading of section 58 of the Sports Act presents only a snippet of what the Sports Dispute Tribunal is enabled in law to do. Without regurgitating relevant legal provisions, the following is a fuller picture of the far-reaching jurisdiction of the Kenya Sports Disputes Tribunal.

Preliminarily, it is important that Kenyan legal scholars note that the Sports Disputes Tribunal has powers to determine questions of its own jurisdiction, a mandate akin to the principle of *kompetenz-kompentenz* in arbitration. This power is granted in Part VII of the Sports Act, 2013, as well as the Sports Disputes Tribunal Rules 2022, (Legal Notice No. 49 of 2022) and has been exercised whenever counsel has challenged the authority of the Tribunal to hear a matter.[1] In pursuance of such mandate, the Tribunal has in its decisions utilized the following mechanisms to bypass any constraint occasioned by section 58 of the Sports Act:

I. Application of the principle that the Sports Disputes Tribunal is the first recourse before appealing to the Court of Arbitration of Sports

While deciding a case against the National Olympic Committee of Kenya in 2015, the tribunal stated in no unclear terms that the Court of Arbitration of Sports "has been domesticated vide the Sports Disputes Tribunal in Kenya."[2] This seems like an innocuous statement until one considers that it essentially brings all matters that can be adjudicated by the Court of Arbitration of Sports within the jurisdiction of the Sports Disputes Tribunal in Kenya.

II. Strict definition of scope

Section 58 (b) seems like a particularly troublesome provision as it requires the consent of all parties to a dispute for it to be adjudicated by the tribunal. Indeed, most sports professionals have cited this provision as being the number one reason why sports disputes are unlikely to end up before the tribunal. However, the tribunal has taken a purposive approach to interpreting this provision, essentially positing that the legislators could not have possibly intended for claimants to be held hostage by their unwilling respondents. As such, the tribunal in Charles Wambugu Kariuki v National Olympic Committee of Kenya opined as follows:

[1]Chemilil Sugar FC and Kenyan Premier League Limited v. Nick Mwendwa, Barry Otieno and Football Kenya Federation, Petition No. 7 of 2020.; Sports Disputes Tribunal Appeal No. 2 Of 2015, Charles Kariuki Wambugu v. The National Olympic Committee of Kenya (NOCK).

[2]Ibid

We hold the view that this section gives room to the parties who would have had other avenues but opt as a final resort, to choose the tribunal as the ultimate arbiter, get this opportunity.[3]

Simply put, the rationale in this argument is that the discharge of justice is the foremost and ultimate goal of tribunals and courts in the country.[4]

III. Interpretation of the nature of parties to a proceeding

It goes without saying that statutes are to be applied to the particular parties they refer to. Pursuant to this principle, the tribunal has taken the step of interrogating whether a party is of a nature that would bar it from hearing its case in such terms:

Section 59(b) of the said Act does not relate to disputes between or among national sports organizations or national umbrella sports organizations. It relates to disputes that may arise between such organizations and third parties relating to for example, the performance of contractual obligations between the national sports organizations and the third party.[5]

By this interpretation, the tribunal is then enabled to hear disputes between or among national sports organizations or national umbrella sports organizations without making reference to their rules.

IV. Assertion of umbrella jurisdiction as granted in the Sports Act

In delimiting the nature of sports disputes that can be heard by the Tribunal, Section 58 (b) of the Sports Act provides that the Tribunal handles 'sports-related disputes'. For this reason, when Counsel for the Respondent in Maqbull Abdi Karim -v- Gor Mahia Football Club attempted an argument that a sports-related employment matter should be referred to the Employment and Labour Relations Court, the Tribunal proceeded to give a lesson on the latin maxim *Generalia Specialbus non derogant* translating loosely to 'a general law does not prevail over a special law'. This essentially means that the Employment and Labour Relations Act, being a general law on all employment matters, cannot triumph the Sports Act which is a special law for all matters sports.[6]

For the avoidance of doubt, the same matter clarified that:

''…where a remedy provided to an athlete is ineffective or ineffectual ***or involves a resort to a municipal court,*** *the Tribunal will accept jurisdiction in order not to leave an athlete or sportsman without a remedy or otherwise offend the principles which* ***most international sporting organizations have put in place which prohibits sporting disputes from being ventilated in courts of law''***[7]

Gor Mahia football players

V. Reliance on the requirement in law that organizations should subscribe to the tribunal's jurisdiction in their constitutions

Section 46 (5) as read together with the Second Schedule of the Sports Act requires that as part of the bare minimum requirements for the registration of a sports organization, its constitution should contain subscription to the jurisdiction of the Sports Disputes Tribunal as well as the Court of Arbitration of Sports. For this reason alone, one can give warning and require that at no point should counsel appearing before the Sports Disputes Tribunal defend their preliminary objection against the jurisdiction of the Tribunal while stating that the constitution of the concerned sports organization does not provide for reference of matters to the Sports Disputes Tribunal. Such an advocate would be admitting a constitutional defect on the part of the organization and proposing that it be deregistered until such adherence is achieved!

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[3]Charles Wambugu Kariuki v National Olympic Committee of Kenya, Sports Disputes Tribunal Nairobi Appeal No. 2 of 2015.

[4]Constitution of Kenya, 2010, Article 159.

[5]Supra n3; N.B. Reference to section 59 of the Sports Act pre-2017 is to be interpreted as referring to section 58 as the 2017 and 2019 revisions renumbered the provision to section 58 without a change in its content.

[6]Maqbull Abdi Karim -v- Gor Mahia Football Club, Sports Disputes Tribunal Nairobi Appeal No. 6 of 2018.

[7]Ibid; Also see Article 59 (2) of the Fifa Statute


Milton Nyakundi

VI. Appellate jurisdiction after exhaustion of internal remedies

The case of Maqbull Abdi Karim -v- Gor Mahia Football Club is informative of the principle that the tribunal forms an automatic forum for a second appeal once the arbitral and internal organization mechanisms of a Sports Organization have been exhausted.[8] Drawing from the clarity of this principle, Sports men and women should be aware that non-existent or ineffectual internal dispute resolution mechanisms cannot bar the resolution of their disputes as the Tribunal can hastily come to their rescue.[9]

VII. Consideration of public interest

In Milton Nyakundi -v- FKF Electoral Board and 4 others where the bone of contention were the elections carried out by the Respondents, the tribunal relied on, among other factors, the public interest doctrine to determine that while its adjudication of the matter would not prejudice the Respondents who had objected to its jurisdiction, elections form a matter of public interest as the public is concerned with the leadership of a sports organization.[10]

VIII. Application of arbitration as a method of dispute resolution

On the subject of the methodology to be applied in the determination of sports-related disputes, nothing is more telling than the titling of Part VII of the Sports Act which reads "Arbitration of Sports Disputes Tribunal". This deliberate choice of wording translates through the literal method of interpretation of statutes to the position that the Tribunal is expected in law to depart from the litigious mechanisms of the Kenyan courts to the more friendly arbitral alternative dispute resolution mechanism.

This *modus operandi* is, once again, advantageous to the Kenyan sportsmen, whose sports are often subject to international statutes that forbid reference of sports disputes to courts and other judiciary proper governmental bodies.

In football, for instance, Article 59 (2) of the FIFA Statute reads:

> *Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited.*

The provision goes on further to allow recourse only to the Court of Arbitration of Sports and other arbitral mechanisms. As the international court is expensive and too involving for the ordinary sportsperson, Kenyan footballers are fortunate to have the Sports Disputes Tribunal as an alternative that does not offend the FIFA principles since it applies arbitration in the resolution of disputes.[11]

Recommendations: a comparative analysis

As the Kenyan Sports Disputes Tribunal manoeuvres the potential impediments in its establishing statute, the idea of a sports disputes tribunal is, unfortunately, alcove in the rest of the world as only a few jurisdictions have a comparative body, *inter alia* New Zealand, England, and South Africa.

In New Zealand, the Sports Tribunal is established and governed by the Sports Anti-Doping Act, 2006. The tribunal's striking similarity to Kenya's Sports Disputes Tribunal is reflected in its mandate which includes determining anti-doping violations, appeals on decisions from national sports organizations and New Zealand Olympic Committee, sports-related disputes referred to it by private parties, and references from the Board of Sport New Zealand.[12]

As if reading from the same script as its Kenyan counterpart, the New Zealand legislature includes a precondition to the tribunal's exercise of jurisdiction in appeals from national sports organizations and the New Zealand Olympic Committee, which precondition is that the bodies'

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[8]Sports Disputes Tribunal Nairobi Appeal No. 6 of 2018.
[9]Peter Omwando -vs- Nick Mwendwa & others (sued as officials of Football Kenya Federation) SDT Pet No. 25 of 2016
[10]Milton Nyakundi -v- FKF Electoral Board and 4 others, Sports Disputes Tribunal Nairobi Appeal No. 11 of 2020.
[11]Chemilil Sugar FC, Kenyan Premier League Limited v. Nick Mwendwa, Barry Otieno and Football Kenya Federation, Petition No. 7 of 2020.
[12]'Guide To The Sports Tribunal – Sports Tribunal NZ' (*Sportstribunal.org.nz, 2022*) <https://sportstribunal.org.nz/guide-to-the-sports-tribunal/> accessed 20 July 2022.

constitutive documents must allow for an appeal to the Tribunal. The problematic constraint found in section 58(b) of the Kenyan Sports Act that individual parties must both agree to the tribunal's jurisdiction is also reflected in New Zealand.[13]

As has been done in Kenya, nevertheless, the New Zealand Sports Tribunal has worked through and despite these provisions using some of the mechanisms highlighted above as being important for the Kenyan Sports Tribunal to adjudicate most of the claims brought before it. Markedly, the New Zealand Sports Tribunal utilises its position as the first recourse before appeal to the Court of Arbitration of Sports to adjudicate on majority of the matters, although litigants are still at liberty to seek audience with the court first.[14] Notably, quite a large number of cases from the country are heard at the Court of Arbitration of Sports as compared to the negligible number from countries in Africa, a fact which speaks to the centralisation of the court's activities and forms a question deserving of its own comprehensive treatise.

Australia forms an interesting case for decentralised sports disputes tribunals as such bodies have been established under different sporting leagues in the country. Collective bargaining agreements and players' contracts will often include clauses that the relevant tribunal has exclusive jurisdiction or that it is the avenue of first instance before approaching the court.[15] Kenya fairs better comparatively as the Australian tribunals are sport-specific and their decisions may be subject to appeal in the international bodies for the different sports such as the International Cricket Council for the cricket sport and FIFA for football.

England does not particularly provide for a sports dispute tribunal, but is nevertheless comparable to Kenya's tribunal in so far as it provides for non-court mechanisms for the resolution of sports disputes. Specifically, arbitration is available to sports professionals who are party to agreements providing for the same. The redemptive fact for this avenue is that many sports have such agreements requiring reference of disputes to arbitration and where there lacks a standard procedure then the general United Kingdom Arbitration Rules of Sports Resolution kick in. The country can thus form a good example of universal alternative dispute resolution. Other countries with the arbitral model include Brazil, Canada, Denmark, France, Germany, Hungary, Israel, Netherlands, Poland, Portugal, Singapore, Spain, Sweden, Switzerland, the United Arab Emirates, and the United States to mention but a few.[16]

All in all, the idea of a sports disputes tribunal is an acclaimed one globally, with countries such as Nigeria and South Africa receiving proposals from sports stakeholders to benchmark and borrow from Kenya.[17]

[13]Ibid.
[14]András A Gurovits, *The Sports Law Review* (Law Business Research Ltd 2017).
[15]Ibid.
[16]Supra n13.
[17]'Committee Told That Sport Arbitration Tribunal Is Much Needed - Parliament Of South Africa' (*Parliament.gov.za*, 2022) <https://www.parliament.gov.za/news/committee-told-sport-arbitration-tribunal-much-needed> accessed 20 July 2022; Kariuki Muigua, Promoting Sports Arbitration in Africa; A discussion Paper for the Chartered Institute of Arbitrators (Kenya Branch) (2nd Annual Lecture on the theme 'Promoting Sports Arbitration in Africa' held on Thursday 28th November, 2019 in Nairobi).

Conclusion

From the foregoing, it is clear that the Sports Disputes Tribunal will not suffer a claimant to go without having their dispute adjudicated. To this end, the judicial body has employed such pertinent tools as drawing from its relation to the Court of Arbitration of Sports, strict definition of the terms of provisions that would otherwise limit its jurisdiction, assertion of umbrella jurisdiction, reliance on legal compulsion of parties, and the public interest doctrine. The same mechanisms are reflected in comparative jurisdictions that have the tribunal avenue for sports-related conflicts. The tribunal has indeed shaped itself over the years into a conducive and level playing field where sports persons can petition an unbiased umpire with as little as a letter and be back to the games they love within the shortest possible time. Considering how expensive and long-winding proceedings before both national courts and the Court of Arbitration of Sports can be, it is indeed the welcome reprieve it was meant to be to all sports men and women in Kenya.

Be that as it may, the fact that the Tribunal could do that much more with a clearer enabling statute that further mandates it cannot be understated. The author's recommendation then, is that the Sports Act should be revised to reflect the needs and exigencies of sports disputes in Kenya.

John Ohaga, SC is the Chairman of the Sports Disputes Tribunal. He has a passion for sports and was a rugby international having played for Kenya at fly half from 1987 to 1995 including at the All-Africa Games held in Nairobi, Kenya in 1987. John now utilizes his great passion for sports in trying to inculcate a culture of proper governance and integrity in the management of sports.

Mr Ohaga is a Senior Counsel. His full-time job is as Managing Partner in the renowned law firm of TripleOKlaw Advocates LLP. He is an experienced litigator and has a particular passion for commercial litigation. He advises several blue-chip companies listed on the Nairobi Securities Exchange as well numerous private companies in addition to some of Kenya's largest state corporations. Moreover, he also has significant experience in other aspects of civil litigation.

He has been recognized for his high-quality work and expertise in dispute resolution by Legal 500 (https://www.legal500.com/firms/51034/offices/51944), Chambers Global (https://chambers.com/lawyer/john-m-ohaga-global-2:278964) among others.

Ms. Ouma is an Advocate Trainee at the firm of TripleOKLaw LLP Advocates and a holder of an LLB degree from the University of Nairobi. Charity is due for admission to the bar upon completion of her pupillage and hopes to be a constant face in the Kenyan courts, passionately submitting and fighting for justice.

The budding litigant has horned her trial advocacy skills through participation in both national and international moot court competitions, notably the 2019 Nuremberg International Moot Court Competition held in Nuremberg, Germany; the 9th Justice P.N. Baghwati International Humanitarian Law Moot Court Competition held in Pune, India; and the national rounds of the Phillip C. Jessup Moot Court Competition where her team emerged the national winners. Ms. Ouma is inspired by the lustrous career of former International Criminal Court Prosecutor, Fatou Bensouda.

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Towards new frontiers of justice: re-evaluating the place of small claims court in Kenya: solace for the indigent?

By Miracle Okoth Okumu Mudeyi

Abstract

This paper examines access to justice in Kenya through small claims courts. The Small Claims Court (SCC) in Kenya was established by the Small Claims Court Act, of 2016, which is now fully operational. The SCC's concept is to provide access to justice through a quick, inexpensive, and expeditious informal process. However, the Small Claims Court (Amendment) Act, 2020 amended the Principal Act to make changes to the SCC's operations. The changes pertain to the SCC's monetary jurisdiction, party representation, and adjournment of matters before the SCC. This paper also considers the progress made by small claims courts in providing expeditious justice in Kenya. The strengthening of access to justice is relevant in all societies, not only in a fragile context. This article argues for a more radical and comprehensive approach to access to justice that emphasizes social justice and systemic change by fully utilizing the Small Claims Court. This strategy necessitates a significant shift in focus, a reimagining of what is required to meet the needs of low-income litigants in poor people's courts (SCC).

Keywords: Small Claims Court, Access to justice, alternative dispute resolution, jurisdiction

1.0 Introduction

Litigation has been complicated for the country's impoverished citizens. This is due to the legal technicalities used in court, complex procedures, high costs, and delays in resolving disputes.[1] Furthermore, there are impediments that the poor, as well as the marginalized and uneducated, face in their quest for justice. They include long distances to the courts, illiteracy, high advocacy fees, a lack of court infrastructure, and a lack of information.[2] As a result, the rights and fundamental freedoms of this group of individuals are denied, violated, or infringed upon, causing

dissatisfaction and bias against the courts, which are mandated to administer justice to all regardless of social status. Resolving disputes is fundamental to the peaceful existence of society. The Constitution of Kenya in Articles 21, 47,48, and 50 guarantees the right of every person to access justice and calls for the state to take appropriate policy, statutory and administrative interventions to ensure the efficacy of justice systems. It is not in question that most disputes in Kenya are resolved at the community level through the use of community elders and other persons mandated to keep peace and order.[3]

The Small Claims Court sought to cure this problem and promote quick access to justice for the indigent. Small claims courts can be referred to as the people's claims courts because they aim to provide an informal, uncomplicated forum for resolving small disputes that do not involve large amounts of money to justify the cost of formal litigation.[4] The Small Claim Court derives its authority from Article 169 (1)(d) of Kenya's 2010 Constitution, which establishes subordinate courts.[5] According to Section 4(2) of the SCC Act, 2016, and Article 6(3) of the Constitution, the Chief Justice has the authority to designate any court station as an

[1]Kariuki Muigua & Kariuki Francis., 'Alternative Dispute Resolution, Access to Justice and Development in Kenya.'.p 1-2.

[2]Kariuki Muigua, 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya'.p 4.

[3]K. Muigua, Resolving Conflicts through mediation in Kenya, 9glenwood Publishers, 2012),pp.21-22.

[4]Texas Young Lawyers Association and the State Bar of Texas, 'How to Sue in Small Claims Court' Page 1.

[5]Article 169(1) of the Constitution also creates other subordinate courts, which include: (a) the Magistrates courts; (b) the Kadhis' courts; (c) the Courts Martial; and (d) local tribunals established by an Act of Parliament.

SCC and specify the geographical jurisdiction of any such Court through a Gazette notice.[6] The SCC is thus a facet of the multi-door approach towards accessing justice.

Chief Justice Hon. Martha Koome has lauded the place of Small Claims Court in the expeditious delivery of justice stating that: ***"Having witnessed the revolutionary potential of the Small Claims Courts over the last one year, we project that if we have in place One Hundred (100) such courts operational in the country, this will mark a turning point for the efficiency of the Justice sector. In fact, if we get adequate support, we are thinking of having a night shift operation of the Small Claims Court with some adjudicators sitting from 5p.m. – 8p.m. in Nairobi and Mombasa cities, which would be a first for any public sector institution in Kenya and regionally. This will certainly place our country on the path to claiming the top spot in the continent in terms of efficiency in commercial disputes resolution hence enhancing the country's attractiveness as a business and investment destination."***[7]

Chief Justice Hon. Martha Koome

2.0 The concept of access to justice in Kenya

Nicholas Orago aptly captures the hope of the Constitution 2010 in this manner: 'The struggle for a new constitutional dispensation in Kenya was underpinned by the desire for a new political, economic and social dispensation capable of eradicating poverty, inequality, and marginalization. The aim of the Kenyans who struggled for the new political and socio-economic dispensation was the entrenchment of a just system of government that will enhance access to the basic socio-economic goods and services for the Kenyan people, especially the poor, vulnerable, and marginalized.[8]

Access to justice in Kenya is dependent on several instruments and institutions, including the judiciary, the legislature, policy, and international human rights, among others. Further, Article 22(1) of the Constitution of Kenya provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated, or infringed, or threatened.

Article 22(3) of the Constitution of Kenya thereof further provides that the Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy amongst others the criteria that: formalities relating to the proceedings, including the commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation; and the court while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities.[9]

Besides, Article 48 thereof is to the effect that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. Article 159 (1) of the Constitution provides that judicial authority is derived from the people and is vested and exercised by courts and tribunals established under the constitution. In exercise of that authority, the courts and tribunals are to ensure that justice is done to all, is not delayed, and that it is administered without undue regard to procedural technicalities.[10] It echoes the right of all persons to have access to justice as guaranteed by Article 48 of the constitution. It also reflects the spirit of Article 27 (1) which states that "every person is equal before the law and has the right to equal protection and equal benefit of the law."

The decision of the court in ***Dry Associates Limited v Capital Markets Authority & another [2012] eKLR***, enumerated and expounded on the tenets of access to justice including the enshrinement of rights in the law; awareness of and understanding of the law; access to information; equality in the protection of rights; access to the justice system, particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability

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[6]Article 6(3) of the Constitution states that; "A national State organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service."

[7]Speech delivered by Hon. Justice Martha Koome, EGH, Chief Justice and President of the Supreme Court of Kenya during presentation of the Annual State of the Judiciary and Administration of Justice (SOJAR) Report FY 2021/2022, 4th November 2022.

[8]Nicholas Wasonga Orago, Socio-economic rights and the potential for structural reforms: A comparative perspective on the interpretation of the socio-economic rights in the Constitution of Kenya, 2010 in Morris Kiwinda Mbondenyi, Human rights and democratic governance in Kenya: A post-2007 appraisal Pretoria University Law Press (2015).

[9]Article 22(3)(b)(d) Constitution of Kenya, 2010.

[10]Ibid, Article 159(2)(d).

of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay. Chief Justice Martha Koome in promoting her vision of Social Transformation through Access to Justice posits that: ***"The Judiciary contributes to social transformation by providing a forum where the concerns of litigants, parties and vulnerable groups are raised as legal claims and redressed. In addition, the redress of such legal claims ought to be individually and socially just. A major challenge in achieving this objective is that access to justice is still limited for certain sectors of the Kenyan society. This category of persons includes those in most need of judicial protection, persons belonging to vulnerable groups, who tend to lack the means to engage in lengthy and costly judicial proceedings. It is for this reason that my vision is centred on delivering to the Kenyan people an accessible, efficient, expeditious and cost-effective justice system. This can only be enabled if systemic and informal barriers to access justice are removed."***[11]

3.0 Small claims court as the pathway toward expeditious access to justice in Kenya

Due to the nature of the cases they hear, Small Claims Courts have occasionally been viewed as having a low status. In addition, they have been accorded a very high priority and significance because they are so widespread and have the potential to affect all people and all stages of life.[12]

The Small Claims Act of 2016 established Small Claims Courts, which are subordinate courts meant to expedite the resolution of disputes involving small monetary claims through informal and affordable avenues while adhering to the principles of law and natural justice. The need to incorporate these conceptual imperatives into civil justice administration stems from the fact that complicated procedural rules, systemic delay, and excessive expense impede civil justice delivery. The Small Claims Court Act of 2016 sought to improve access to justice by expanding the reach of the formal justice system to areas underserved by existing courts, as well as to facilitate access to justice for a category of claimants who are currently unable to access judicial services for a variety of reasons. The primary purpose of the court is to ensure the right of access to justice enshrined in Article 48 of the Constitution through the simplicity of the procedure, prompt disposition of proceedings, procedural fairness, and reasonable court fees.[13] Since the Small Claims Courts promotes the use of informal conflict management mechanisms it promotes the concept of access to justice, brings justice closer to the people and it is more affordable.[14] According to Lima and Gomez, "access to justice guarantees that people can petition the courts for the protection of their rights, regardless of their economic, social, political, migratory, racial, or ethnic status, or their religious affiliation, gender identity, or sexual orientation." People's ability to seek and obtain a remedy through formal or informal institutions of justice in accordance with human rights standards is another definition of access to justice.[15] Legal framework, legal protection, legal awareness and knowledge, legal aid and representation, access to justice institutions, fair procedure and adjudication, enforceable solutions, and civil society and parliamentary oversight are necessary for effective access to justice.

Justice is not primarily found in official justice-dispensing institutions, just as health and knowledge are not primarily found in hospitals and schools, respectively. In the end, access to justice entails more than just bringing cases before a court of law; it also entails enhancing the quality of justice in people's relationships and transactions.[16] The purpose of establishing the SCC is to enable judicial institutions to provide easy access to informal, cheaper, and expeditious resolution of debt recovery disputes. Since the law allows people who are not legal practitioners to represent parties to proceedings in Small Claims Court ensures the expedient delivery of justice in an inexpensive way.[17] Access to justice goes beyond merely having the presence of formal courts in a country, it also entails the opening of these formal systems and legal structures to the disadvantaged groups in

[11]Chief Justice Martha Koome's Vision for the Judiciary – Social Transformation through Access to Justice (STAJ).
[12]Eric H. Steele, 'The Historical Context of Small Claims Courts' American Bar Foundation Research Journal (1981), 293.
[13]"Small Claims Courts – the Judiciary of Kenya" https://www.judiciary.go.ke/courts/surbordinate/small-claims-courts/ accessed November 23, 2022.
[14]See Kariuki Muigua and Kariuki Francis, 'ADR, Access to Justice and Development in Kenya', Paper Presented at Strathmore Annual Law Conference 2014 held on the 3rd and 4th July, 2014 at Strathmore Law School, Nairobi.
[15]Gutterman, Alan, Older Persons' Access to Justice (February 17, 2022). A. Gutterman, Older Persons' Access to Justice (Oakland CA: Older Persons' Rights Project, 2022), Available at SSRN:https://ssrn.com/abstract=3889752
[16]Marc Galanter, 'Justice in Many Rooms' in M Cappelletti (ed.), Access to Justice and the Welfare State, 1981, Sijthoff, Alphen aan den Rijn, 147–81 at pp 161–2.
[17]See The National Assembly Report on the Consideration of the Small Claims Court(Amendment) Bill, 2020.

society, removal of legal, financial, and social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal instruments.[18]

Access to justice is viewed as an important pillar for poverty alleviation and sustainable development.[19] Conventional wisdom, dictates that improving access to justice can be accomplished by lowering the costs for litigants using the formal court system. According to Rankin, the inability to access justice and obtain legal representation may place burdens on courts and judges, undermining the independence of the formal legal system.[20] Baldwin argues that raising the jurisdictional limit of small claims courts is generally welcome but recognizes potential problems if lay litigants do not have access to adequate legal advice.[21] Many impoverished Kenyans who could not afford expensive legal battles to recover their hard-earned money have found solace in the Small Claims Court.[22]

4.0 Attributes of small claims court

The Small Claims Court Act's dispute resolution procedure places a strong emphasis on the timely disposition of suits that are both simple and cost-effective. For the resolution of disputes within the claim being lodged, a strict time limit of sixty (60) days is imposed.[23] Furthermore, cases may be heard and decided on the same day or on a daily basis until a decision is reached. Such judgments must be delivered on the same day, and no later than three (3) days after the hearing date. The strict evidentiary rules that apply in other courts are not fully applied in Small Claims Court, and parties to proceedings are not required to be represented by an advocate but may do so. Furthermore, in contrast to the complex pleadings filed in other courts, the Act provides a simplified form and structure for claims.

After hearing the claim, the Adjudicator shall deliver a decision within a reasonable time frame. An order for the restitution of any movable property; an order for the recovery of any sum in relation to the performance of a contract; an order dismissing the claim to which the proceedings relate; or any such orders as the Court may deem necessary, including any stipulations or conditions for the enforcement of its orders are among the orders that the Court may issue concerning any matter before it.

Toward facilitating the amicable settlement of claims, the Small Claims Court uses Alternative Dispute Resolution

(ADR) and other dispute resolution mechanisms, such as settlement agreements and consent judgments.[24] This will also ensure expedited suit disposition, fairness, flexibility, cost-effectiveness, and party satisfaction, as well as foster relationships between the parties.

Appeals from Small Claims Court judgments or orders may be filed in the High Court only on matters of the law.[25] In contrast to other suits filed in Magistrates' courts, which may be appealed to the Court of Appeal, no further appeals are available with regard to the High Court's decision in Small Claims Court appeals.

The Adjudicator may review any Small Claims Court order on several grounds, including that it was made ex parte without notice to the applicant; the claim or order was outside the Court's jurisdiction; the order was obtained through fraud; there was error of law on the face of the record; or either party discovers new facts not before the court. Applications for review must be made within thirty (30) days of the order or award sought for revision, or within such time as the court deems appropriate. However, unless expressly ordered by the Adjudicator, the filing of an application for review does not result in an automatic stay of execution of an order. When a stay of execution is issued, it may be subject to costs, payment into court, security, or other conditions as determined by the Adjudicator.

The SCC operating mechanism is predisposed such that once the suit is set down for hearing, it shall not be

[18]"Global Alliance Against Traffic in Women" *(Working Papers - The Global Alliance Against Traffic in Women (GAATW)*https://www.gaatw.org/atj/index.php?option=com_content&id=105&catid=18%3ASpecialized+articles+on+anti-trafficking+legal+issues&Itemid=116 accessed November 23, 2022.
[19]"Access to Justice in Kenya "(IDLO October 7, 2019)< https://www.idlo.int/what-we-do/initiatives/access-justice-kenya&gt ; accessed November 23, 2022.
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[22]KNA , "Small Claims Court Comes to the Rescue of Small Businesses" (*Capital Business* October 19, 2022) https://www.capitalfm.co.ke/business/2022/10/small-claims-court-comes-to-the-rescue-of-small-businesses/ accessed November 23, 2022 .
[23]Section 34 of the Small Claims Court Act of 2016.
[24]Section 18 of the Small Claims Court Act of 2016.
[25]Ibid at Section 38.

adjourned unless a party applying for adjournment satisfies the Court that it is just to grant for adjournment, and when the Court deems it fit to grant that adjournment, it shall give a date for further hearing or directions per section 34 of the SCC Act, 2016.

5.0 Jurisdiction of the small claims courts

The subject matter jurisdiction of the Small Claims Court is limited, primarily to contractual and tort claims.[26] The SCC's jurisdiction over contractual claims is limited to civil disputes relating to a contract for the sale and supply of goods or services, a contract relating to money held and received, or set-off and counterclaim under any contract. In contrast, the SCC's jurisdiction over tort claims is limited to civil disputes relating to liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property, and compensation for personal injuries. Small Claim Court has a pecuniary jurisdiction of up to one million shillings.[27] An Adjudicator appointed by the Judicial Service Commission hears and determines cases before this Court. The adjudicator must be an advocate of the High Court of Kenya, with at least three years of experience.[28] Furthermore, pursuant to Article 172 (1) of the Constitution, the Judicial Service Commission shall appoint as many Adjudicators, Registrars, and other SCC officers as may be required for the effective discharge of the Court.

The Registrar's role is to establish and maintain a register in which all Court records are kept, to enforce Court decisions, and to facilitate access to Court judgments and records. The SCC registrar will consider or dispose of procedural or administrative matters in accordance with the Rules or on the Adjudicator's direction.[29] If a party to a claim is dissatisfied with the Registrar's decision on matters pertaining to the Court's judicial functions, he or she may request a review by an Adjudicator of that court.[30]

No proceedings relating to the same course of action may be brought before any other courts after a claim has been lodged with the SCC, and no claim which is before another court may be instituted before the SCC, unless the claim

[26]Ibid. section 12(1).
[27]See Small Claims Court (Amendment) Act No. 5 of 2020 Accessed at http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2020/SmallClaimsCourt_Amendment__Act_No.5of2020.pdf
[28]Section 5 of the Small Claims Court Act.
[29]Ibid at Section 9.
[30]Ibid at Section 10.

has been withdrawn before the other court.[31] The SCC shall have a separate Registry and case register at the Court, so that the parties may be assisted by the registrar in filling out forms during the filing process.

6.0 Towards achieving the promise of justice; strides made by the small claims court so far

The gospel of the dispensation of justice via the Small Claims Court has been spreading throughout the whole country.[32] Recognizing that the SCC improves access to justice by extending the reach of the formal justice system to a group of claimants who were previously unable to access mainstream judicial services for a variety of reasons, the Judiciary has continued to carry out its ambitious rollout plan for the establishment of Small Claims Courts across the country.[33] Twenty two Resident Magistrates were also designated as Adjudicators to preside over Small Claims Court.

Kajiado, Machakos, Nyeri, Naivasha, Nakuru, Eldoret, Kakamega, Kisumu, Mombasa, Thika, and Meru Small Claims Courts, as well as one virtual sub-registry, were established and operationalized for 2021-2022(Eleven new small claims courts). To improve understanding of the court's processes and requirements, information, education, and communication (IEC) materials on the Court have been developed and disseminated to the public in English and Swahili.[34]

Furthermore, the SCC designated twenty-five Resident Magistrates as adjudicators, with efforts being made to expand the Judiciary ICT infrastructure, such as e-filing and the Case Tracking System (CTS), to these courts. The Nairobi Metropolitan Services (NMS) and the Judiciary collaborated to build five SCC in Kasarani, Makadara, Dagoretti, Mathare, and Embakasi. The Judiciary is committed to strengthening and expanding the SCC because it is critical to providing justice to more Kenyans and reducing case backlogs.[35] The Chief Justice also carrying out her ceremonial and appointive duties swore in 19 small Claims Court Adjudicators to hear and determine disputes. The SCC has radically transformed the adjudicatory space by opening new doors to justice, resolving 9,315 cases worth Ksh 1.431 billion so far.

There were 1,239 matters pending in various SCC stations at the end of the reporting period. This is displayed based on the station and case type. Milimani Station had the most pending cases, with 650. Thika Station had 170 pending cases, Eldoret had 101, Kakamega had 49, Nakuru had 32, Nyeri had 27, Naivasha had 22, and Kajiado had 18 pending cases.[36]

7.0 Convenience of using the small claims court in Kenya

Due to the relatively low monetary threshold for small claims matters, self-represented litigants are discouraged

[31]Ibid at Section 10.
[32]Sam Kiplagat , "Boost for Small Claims Courts as CJ Gazettes 20 Adjudicators" *(Boost for small claims courts as CJ gazettes 20 adjudicators | Business Daily* January 10, 2022) https://www.businessdailyafrica.com/bd/news/counties/boost-for-small-claims-courts-cj-gazettes-20-adjudicators-3676844?view=htmlamp accessed November 23, 2022.
[33]2022 (State of the Judiciary and the Administration of Justice Annual Report FY 2021-2022) 16.
[34]Ibid.[35]Ibid, SOJAR.
[36]2022 (State of the Judiciary and the Administration of Justice Annual Report FY 2021-2022) 91.

from initiating frivolous or vexatious cases involving amounts less than one million Kenyan Shillings. The Court structure and case management practices, which include the quasi-judicial functions of the Registrars in making initial determinations, allows for a direct right of appeal that is less expensive, less complex, and more efficient than in the higher Courts. This essentially safeguards the legal rights of all parties involved. With the option to include or exclude legal representations, more claims will fall under the jurisdiction of the SCC, as not only will the procedure be less formal, but the costs associated with initiating and maintaining the claim is also lower. Since technical rules of representation and evidence and procedures are discouraged, it enables claimants to seek judicial relief in a shorter period of time. The purpose of the SCC is to improve access to justice in a timely manner. The SCC is more inquisitorial than adversarial in nature, it facilitates a better resolution of disputes. It is already anticipated that SCC will increase public confidence in Courts that are viewed as detached, mysterious, and corrupt.

8.0 Impact made by the small claims court in Kenya today

During the fiscal year 2020/21, 1,023 cases were filed in the SCC. During the same time period, 637 cases were resolved. Cases involving breach of contract accounted for 30% of all filed cases, followed by liquidated claims (26%). Civil miscellaneous applications accounted for 2% of all cases filed. In terms of resolved cases, liquidated claims accounted for 35% of the total, with personal injury cases accounting for 25%. For the fiscal year 2020/21, the most cases filed were breach of contract cases (307), followed by liquidated claims (261 cases). Liquidated claims accounted for 221 of the total resolved cases, followed by personal injury cases at 159. The SCC took 53 days to resolve cases, which is less than the minimum statutory requirement of 60 days under SCC Act No. 2 of 2016. At the end of fiscal year 2020/21, the SCC had 386 pending cases. The majority of pending cases (51%), followed by commercial suits (28%), were for breach of contract. These findings were derived from the State of the judiciary and the Administration of Justice Annual Report for the year 2020/2021.

The Small Claims Court had 386 cases pending as of June 30, 2021. In fiscal year 2021-22, 8,503 cases were filed, with 8,226 of those cases resolved. As of June 30th, 2022, 1,239 cases were still pending. The Judiciary conducted an audit in 23 court stations, including the Supreme Court, Court of Appeal, Nairobi Employment and Labour Relations Court, Milimani Commercial, JKIA, Kisumu, Wang'uru, Hamisi, Meru, Isiolo, Gatundu, Narok, Ruiru, Nyando, Kikuyu, Kapsabet, Eldoret, Mavoko, Kericho, Ngong, Mandera, Kahawa and The audit revealed that the automation of many court processes has made it easier to issue court orders, assess court fees, and generate e-receipts. This includes standard forms for filing court processes (including pleadings in Small Claims Courts) as well as notification to parties via email and SMS. These findings were derived from the State of the Judiciary and The Administration of Justice Annual Report for the year 2021/2022.

9.0 Possible and emerging challenges facing the small claims court in Kenya

Sadly, the operationalization of the Small Claims Courts in Kenya is underfunded, despite being a means for Kenyans to access justice. It was allocated only Ksh.150 million for the fiscal year 2021/22, despite being a very critical area. There is a need for Parliament to amend the law to guarantee the judiciary at least 2.5% of the national budget to safeguard the financial autonomy of the judiciary as envisaged in the constitution in order to support the operationalization of the Small Claims Courts.

10.0 Concluding thoughts

The Small Claims Court (SCC) is a novel and innovative approach to not only reducing case backlogs but also facilitating hampered citizens' access to justice and opening the court institution to public participation. The SCC is at the forefront of eliminating the time-consuming procedures that delay the process of getting to trial and the practice of attorneys regularly adjourning hearings for dubious reasons. The registration system of the SCC also ensures that records are kept due to a system put in place to ensure that the status quo of cases is known in a transparent manner. As a result, I contend that small claims courts may be paradigmatic of governmental responses to social problems.

Miracle Okoth Mudeyi is a final-year law student at the University of Nairobi. His research interests include but are not limited to transformative constitutionalism, mental health law, and public international law, third-world approaches to international law, dispute resolution, administrative law, and sexual and reproductive health rights. He can be reached via mudeyi_miracle@uonbi.ac.ke

The place of alternative dispute resolution mechanisms on felony matters

By Clarkson Otieno

The debate around the use of Alternative Dispute Resolution (ADR) methods in criminal matters in Kenya has for some time now persisted to the extent that its applicability has been normalized as one which does not apply to criminal matters, more so in felony cases.[1] As such, this article tries to find the balance on the applicability of ADR in criminal-felony cases.

The debate intensely sparked in the country in 2013 when the court, in ***Republic v Mohamed Abdow Mohamed [2013] eKLR***, acquitted the accused, who was charged with murder. In that case, the prosecution counsel orally applied to court for acquittal of the accused based on the fact that the complainant's family had accepted compensation from the accused family following reconciliation held under Islamic and traditional laws. The prosecution counsel, Mr. Kimanthi, cited article 159(1) of the constitution, which allows courts and tribunals to be guided by Alternative Disputes Resolution, including mediation, reconciliation, arbitration, and traditional dispute resolution mechanisms. The court allowed the application under article 157 of the Constitution, which mandates the Director of Public Prosecutions (DPP) to exercise state powers of prosecution, and in that exercise, the DPP may, at any stage, discontinue any criminal proceedings against any person.

In ***Republic v Abdulahi Noor Mohamed (alias Arab) [2016] eKLR***, the accused was, like in the first case above, charged with murder contrary to section 203 as read with 204 of the Penal Code. However, the court dismissed the Applicant's/Accused's chamber summons application, where the accused sought to have the court grant him and the deceased family time to reconcile and settle the matter. The court declined the application because:

a) As the custodian of prosecutorial powers, the DPP was not consulted/involved in the process and thus could not be bypassed. The Accused/Applicant and the deceased's family reached an agreement to reconcile and settle the matter out of court,
b) The charge against the accused is a felony, and reconciliation as a form of settling the proceedings is prohibited.
c) The request was made too late in the day when the case had been heard to its conclusion.

Before arriving at its conclusion, in the latter decision, the court reasoned as follows:

> *"... the constitutional recognition of alternative justice systems as one of the principles to guide courts in exercising judicial authority does not exclude criminal cases. This recognition restated the place of alternative justice systems in the administration of justice. Article 11 recognizes culture as 'the foundation of the nation and the cumulative civilization of the Kenyan people and nation .'As noted above, statutory provisions only limit to a certain category of offenses, which does not extend to capital offenses..." (Emphasis added)*

It is worth noting that even though the court recognized that alternative justice systems as one of the principles to

[1]Penal Code section 4: "felony" means an offense declared by law to be a felony or, if not declared to be a misdemeanor, is punishable, without proof of previous conviction, with death, or with imprisonment for three years or more.

Professor Joel Ngugi

guide the court in the exercise of judicial authority does not exclude criminal matters, it still relied on the provisions of section 176 of the Criminal Procedure Code (CPC) and section 3(2) of the Judicature Act[3], to disallow the accused's application. The court was supposed to make great steps towards aligning the said provisions with the constitution in a manner that promotes its principles, values, and ideals.

Clause 7(1) of the transitional and consequential provisions in the sixth schedule to the constitution provides that ***all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications, and exceptions necessary to bring it into conformity with this constitution.*** One such construction would be the reality that ADR is now applicable to all criminal matters regardless of whether they are misdemeanors or felonies. The court ought to have declared sections 176 of the CPR and 3(2) of the Judicature Act unconstitutional for being inconsistent with the constitution or recommend to Parliament to amend them within a specified period to conform to the constitution. All laws, whether passed before or after promulgation, derive their authority from the constitution.

Further, suppose you look at the case of ***Republic v Abdulahi Noor Mohamed (alias Arab) [2016] eKLR*** decision. In that case, the other argument the court made against the use of ADR in felony matters is:*"… there are, however, no policy guidelines on how to incorporate the alternative justice systems in handling criminal matters.* The court proceeded to note that:

> *"… There is also no formalized structure on how informal justice systems can be applied to handle criminal matters and their scope of operation. Policy engagement is paramount to provide guiding principles on such aspects as the types of cases that can be determined through the alternative justice systems, the interrelation of such application (if any) with the court process, how and when the alternative process is to be invoked in the course of proceedings among others..."(Emphasis added).*

Also, the court said:

> *"… some efforts are underway with the appointment of the task force on traditional, informal and other mechanisms used to access justice in Kenya (Alternative Justice Systems) in line with the Judiciary's plan to develop a policy to the mainstream alternative justice system to enhance access to and expeditious delivery of justice… ".*

Well, the task force, led by Professor Joel Ngugi, was formed, and this is what it had to say in the report, while quoting Nwabueze, on matters of traditional, informal, and other mechanisms used to access justice (Alternative Justice Systems), during the launch of the report on Katiba day the 27th August 2020:

> *"… judicial power includes the following attributes: (i) the existence of a dispute between two or more parties about some existing legal right; (ii) a compulsory jurisdiction at the insistence of one party to inquire into the dispute; (iii) a power to determine the facts of the dispute authoritatively; (iv) a decision arrived at by the application of the relevant law to the facts, and which, by declaring the rights in question, finally disposes of the whole dispute; (vii) a power to enforce compliance with or obedience to the decision. … "*[4]

Wherein the task force argues that: the attributes and policy postulated above propose an Agency Theory of Jurisdiction as the constitutionally permissible modality to determine the acceptability and propriety of a particular dispute, controversy, or issue to be before an AJS mechanism. On the first attribute mentioned by Nwabueze – the existence of disputes between parties– the Agency Theory does not require a dispute or controversy as a prerequisite for jurisdiction. Additionally, the theory does not classify

[2]Chapter 75 Laws of Kenya: in all cases, the Court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or any other offense of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the Court, and may thereupon order the proceedings to be stayed or terminated.

[3]Chapter 8 Laws of Kenya, the Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court, and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law. They shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and undue delay.

[4]Task Force on the Traditional, Informal and Other Mechanisms for Dispute Resolution In Kenya, "Alternative Justice System: Baseline Policy" 2020.

disputes based on whether they are criminal or civil. Furthermore, the Agency Theory does not distinguish jurisdictional reach based on the gravity of the offense in criminal matters. The important question is whether the concerned parties have consensually and voluntarily submitted themselves to this mode of dispute resolution. The foundational question is thus whether there is a dispute that is ripe for resolution. Whether the third parties involved have the power to resolve the dispute is irrelevant. What needs to be determined is whether the parties' consent is informed, mutual, free, and revocable. These are the fundamental prerequisites of this theory.[5]

The Agency Theory also explained the endorsement of the High Court decision in ***Republic v Mohamed Abdow Mohamed*** as constitutional and lawful because the accused was discharged in keeping with the Agency Theory since the Court established that there was consent in the withdrawal of the matter. Further, it was mutual in that both parties had agreed to the withdrawal of the matter. Moreover, consent was given freely; no party was coerced into it. This case demonstrates how citizens retain power even when delegated to another arm of government.[6]

The Task Force also explained whether Agency Theory might open floodgates. It stated that:

> *"… the fear of opening a 'Pandora's box, as Pravin Bowry contends, for applying AJS in sensitive cases such as defilement is, thus, addressed sufficiently by the Agency Theory. This theory also challenges us to go beyond the narrow view in criminal law of taking these cases as disputes between the State and the individual and not between two individuals. Indeed, this theory addresses this concern as well. Further, it recognizes the involvement of the ODPP as the representative of State-based interests in criminal cases. In instances where the ODPP has consented in a free, informed, and mutual manner with the victim and other stakeholders, it is reasonable and lawful to contend that AJS mechanisms can be deployed in the criminal justice system …"*[7]

Conclusion

Taking stock of the above, it is clear that the place and use of Alternative Resolution Mechanisms is deeply entrenched in our constitutional landscape and have gone beyond the traditional conception that ADR cannot apply to felony matters. However, what is key in its use is whether the parties and stakeholders in question have mutually, freely, based on informed opinion, consented to the process. Thus, locking the accused persons and family of the complainant (s) and DPP who wants to try the path of reconciliation only amounts to denying access to justice and curtailing restorative justice.

Last, since there is already a policy, Agency Theory, which guides the applicability of ADR in criminal matters, it can be used to weigh matters ripe for ADR. If used, the Policy above can help to achieve desired results in the criminal justice system without denying a party or representative of a party to dispute access to justice and restorative justice whereby all parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future.[8]

The author is a lawyer at the firm of Naikuni, Ngaah & Miencha Co. Advocates.

[5]Ibid.
[6]Ibid.
[7]Supra n 4.
[8]S. Kirschner, "*What does ADR mean in the criminal justice context?*" 2018 relying on Australian Institute of Criminology (AIC), 'Restorative Justice in Australian Criminal Justice System', (2014) 127 *Research and Public Policy Series*, 23-28.?

Will win-win win? Opening Pandora's box of fMRI vis-a-vis mediation dispute resolution in Kenya

By Bonface Isaboke Nyamweya

Abstract
Functional magnetic resonance imaging (fMRI) measures the small changes in blood flow that occur with brain activity. It takes pictures of a person's brain while the person is engaged in a task, a kind of watching the brain think. It threatens thus the autonomy of the disputants in the mediation process and the neutrality of the mediator as it can give fine details like one's thoughts, intentions, the training one has undergone, the places one has visited, and such other details that are otherwise too personal. This shakes the confidentiality foundation of mediation. However, fMRI promises to have the keys to truth hence certainty in conflict resolution because in its findings, when a person is telling a lie, the brain areas linked with effort or conflict are activated and they can actually be identified in an individual brain; whereas, when one is telling the truth, few areas can be activated as one relies on just memory without conflicts or calculations as such. This paper will therefore examine the concept of confidentiality in mediation, the legal framework of mediation in relation to the parties' autonomy and the mediator's neutrality, how fMRI works, evaluate fMRI as a threat and remedy to mediation, make recommendations and a conclusion.

Key words: Functional magnetic resonance imaging (fMRI), mediation, confidentiality, autonomy, harmony, and truth.

I. Introduction

Mediation is one of the dispute resolution mechanisms in the scope of Alternative Dispute Resolution mentioned under article 159 (2)(c) of the constitution of Kenya 2010. "Mediation simply refers to the process of resolving conflict in which a neutral third party (mediator), assists

the disputants to resolve their own conflict. The process is voluntary and the mediator does not participate in the outcome of the mediation process (agreement)."[1] Section 2 of the Civil Procedure (Court-Annexed Mediation) Rules, 2022 defines mediation as the informal and non-adversarial process conducted physically or virtually where a mediator encourages and facilitates the resolution of a dispute between two or more parties but does not include any attempt by a judge or magistrate to settle a dispute within the course of judicial proceedings.[2] So it is a private settlement whereby the agreement is reached out of a mediation process conducted by a qualified mediator in respect to a dispute that is not the subject of a pending court case.[3]

Mediation is cheap and saves the disputants emotional stress[4] as they table their issues willingly and come to an agreement themselves in the presence of a mediator. It therefore reduces the legal costs, sustains the rapport between disputants, saves time as it is fast, and makes the disputants be in charge of the decision-making process.[5] By being fast, mediation acknowledges inherently that judicial time is an expensive resource[6] and that no person

[1]George Amoh, 'Mediation -The Preferred Alternative for Conflict Resolution' [2007]. Online article Available on: https://www.gdrc.org/u-gov/conflict-amoh.html (October 31, 2022).
[2]Civil Procedure (Court-Annexed Mediation) Rules, 2022, section 2.
[3]Civil Procedure (Court-Annexed Mediation) Rules, 2022, ibid.
[4]The Impact of Mediation in Construction Accessible at: https://www.adrodrintenational.com/the-impact-of-mediation-in-construction Accessed on October 23, 2021.
[5]Tarlow, 'Mediation of Construction Disputes' [2008]. Online article Available at: www.ramco-ins.com Accessed on October 23, 2021.
[6]*R v Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007* [2008] eKLR 728.

Rwandese Gacaca courts

ought to squander it.[7] Since it focusses on the establishment or restoration of the relationship between the disputants, mediation is often called a win-win[8] approach to a dispute.

Mediation was vivid for example in the Rwandese Gacaca (grassroots) justice system where people came together after the 1994 genocide and reconciled through the mediation of the Abunzi (mediators).[9] Even in Kenya, mediation plays a vital role in many disputes. According to the 2017 survey by the Judiciary, together with the Hague Institute for Innovation of Law, only 10% of Kenyans use the formal justice system to resolve their disputes.[10] Additionally:

> *The Justice Needs Survey established that two out of three Kenyans (68%) have encountered at least one dispute during the last four years. Of these, 81% sought resolution of their dispute. Models of dispute resolution range from non-institutional methods (personally resolved, customs and traditions, religious institutions) to institutional neutral third parties (police, chiefs, mediation). Out of the 81% of Kenyans who sought resolution, only 21% sought resolution in the courts. The remaining 68% sought to resolve their dispute through 'non-judiciary-based' forms of dispute resolution.*[11]

After the Post-Election Violence of 2007, mediation played a huge role in uniting Kenyans. Kofi Annan for example came as a mediator and indeed after his mediation, the tension that had heightened and threatened peace lowered.[12] The Kipkelion AJS project in Kericho was initiated in 2008 following the 2007/2008 post-election violence.[13] Maslah is the AJS mechanism used in Garissa.[14] Moreover, "Among the Burji, disputes involving members of the same *manyatta* are heard and determined within the *manyatta*.[15]" Mediation is thus key to harmony.

In the 2022 CIARB 1st Mediation conference, Lawrence Ngugi while speaking about developing a sustainable mediation marketplace through standardization of rules and practices, observed that mediation currently sits in the eyes of the beholder.[16] Judge George Odunga added that the process of mediation cannot be oversimplified in a document as each dispute is unique and demands a fresh view.[17] Nonetheless, the essential roles of the mediator include building, maintaining and improving communication between the disputants; facilitating information to and between the disputants; befriending the disputants in the mediation process to foster trust and confidence; and encouraging active mediation whereby the disputants are willing to engage in cooperation negotiation.[18]

Confidentiality is therefore crucial in mediation. However, modern technology *vide* fMRI threatens the autonomy of the disputants and the neutrality of the mediator as it can give fine details like one's thoughts, intentions, the training one has undergone, the places one has visited,[19] and such other details that are otherwise too personal. So, fMRI simply takes pictures of a person's brain while the person is engaged in a task, a kind of watching the brain think.[20] In itself, fMRI is an abbreviation of functional magnetic

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[7]*Muchanga Investiments Limited v Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No. 25 of 2002* [2009] eKLR 229.

[8]Kariuki Muigua, 'Mediation Practice in Africa: The Fusion of Modern Dispute Resolution and Traditional African Practices' *CIARB 1ST Mediation Conference at Radisson Blu Hotel Nairobi: The Coming of Age for Mediation, Encounter from Africa*, Session 1, October 28, 2022.

[9]Caroline Kendagor, 'Mediation Practice in Africa: The Fusion of Modern Dispute Resolution and Traditional African Practices' *CIARB 1ST Mediation Conference at Radisson Blu Hotel Nairobi: The Coming of Age for Mediation, Encounter from Africa*, Session 1, October 28, 2022.

[10]Alternative Justice Systems Framework Policy, Traditional, *Informal and other Mechanisms used to access Justice in Kenya (Alternative Justice Systems)* [2020], p. 3.

[11]Steve Ouma Akoth, Clara Otieno-Omondi, Florence Macharia et al, 'Alternative Justice Systems Baseline Policy' Traditional, *Informal and other Mechanisms used to access Justice in Kenya (Alternative Justice Systems)* [2020], 11.

[12]Kofi Annan Foundation, 'Back from the Brink: the 2008 mediation process and reforms in Kenya' [2008]. Online article: https://www.kofiannanfoundation.org/mediation-and-crisis-resolution/back-from-the-brink-2008-mediation-process-and-reforms-in-kenya/ [October 31, 2022].

[13]Steve Ouma Akoth, Clara Otieno-Omondi, Florence Macharia et al, op cit., 12.

[14]Steve Ouma Akoth, Clara Otieno-Omondi, Florence Macharia et al, 14.

[15]Steve Ouma Akoth, Clara Otieno-Omondi, Florence Macharia et al, ibid.

[16]Lawrence Ngugi, 'Developing a Sustainable Mediation Marketplace through Standardization of Rules and Practices' *CIARB 1ST Mediation Conference at Radisson Blu Hotel Nairobi: The Coming of Age for Mediation, Encounter from Africa*, Session 4, October 28, 2022.

[17]George Odunga, 'Developing a Sustainable Mediation Marketplace through Standardization of Rules and Practices' *CIARB 1ST Mediation Conference at Radisson Blu Hotel Nairobi: The Coming of Age for Mediation, Encounter from Africa*, Session 4, October 28, 2022.

[18]George Amoh, op. cit.

[19]60 Minutes Rewind: 2009 Report, Mind Reading [2019], YouTube: https://youtu.be/Qwk2pqfYQFc [October 31, 2022].

[20]Leo Kittany, 'Admissibility of fMRI in Lie Detection: The Cultural Bias Against Mind Reading Devices' *Brooklyn Law Review* [2007], p. 1351. Available at: https://brooklynworks.brooklaw.edu/blr/vol72/iss4/5 [November 1, 2022].

resonance imaging. "Functional magnetic resonance imaging (fMRI) measures the small changes in blood flow that occur with brain activity."[21] It is because of this ability to measure changes in the blood flow in the brain that it can tell one's intentions, places visited, training undergone, and the like. This paper will examine the legal framework of mediation in relation to the parties' autonomy and the mediator's neutrality, how fMRI works, evaluate fMRI as threat and remedy to mediation, make recommendations then conclusion.

II. The legal framework of mediation in relation to the parties' autonomy and the mediator's neutrality

The Civil Procedure (Court-Annexed Mediation) Rules, 2022 under rule 25 talks of confidentiality when it states that any person taking part in a mediation process under the rules shall be required by the mediator to execute a confidentiality agreement and shall be bound by the terms of such agreement.[22] Sub-rule 3 adds that any communication during mediation including the mediator's notes shall be confidential and not admissible in evidence in any ongoing or subsequent legal proceedings.[23] Furthermore, sub-rule 4 says that any person taking part in a mediation process shall maintain the confidentiality of any information obtained during the mediation and not disclose it unless that person is required by law to disclose the information; or the information relates to child abuse, child neglect, defilement, domestic violence, a sexual offence or any related criminal or illegal purpose.[24] This is echoed in rule 15 of the Mediation Rules, 2016 which stresses that:

(1) The parties and participants in a mediation shall keep all matters relating to or arising out of the mediation private and confidential unless—
  (a) the disclosure is compelled by law;
  (b) the disclosure is necessary to give effect to a mediation agreement or to enforce an agreement reached to settle or resolve the whole or any part of the dispute;
  (c) there is a written consent of the parties to the mediation.
(2) The parties and participants in mediation shall sign a confidentiality undertaking in the form set out in the Third Schedule.
(3) Any information submitted to the Mediator by a party in caucus or private session shall be considered as confidential information between the party providing the information and the Mediator unless the party providing the information consents to its disclosure to any other party to the mediation.[25]

The Civil Procedure (Court-Annexed Mediation) Rules, 2022, rule 25 (6) adds that subject to sub-rule (4), the mediator or any person present or appearing at a mediation session may not be summoned, compelled or otherwise required to testify or to produce records or notes relating to the mediation in any proceedings before any court of law.[26] Still, sub-rule 7 states that no person present or appearing at a mediation session whether in person or through a virtual platform shall use any electronic device of any nature to record the mediation session.[27] Sub-rule 8 cautions that any breach of this rule shall constitute contempt of court.[28]

Rule 26 (5) adds weight to confidentiality by stating that any person attending a mediation session under sub-rule 4 shall be bound by the rules of confidentiality set out in rule 25 and, at his or her first appearance, sign the confidentiality agreement.[29] According to the Guidelines for Mediators and Mediation, a mediator should not reveal any information arising from the mediation process except with the consent of the parties or where required by law.[30] The general rules for confidentiality include:

i. The mediator should at the outset discuss with the parties to the dispute their expectations regarding confidentiality.
ii. Confidentiality extends to the mediation proceeding, only those involved in the dispute

[21]Functional MRI (fMRI), Radiological Society of North America [2022]. Online article Available at: https://www.radiologyinfo.org/en/info/fmribrain?google=amp [October 31, 2022].
[22]Civil Procedure (Court-Annexed Mediation) Rules, 2022, rule 25.
[23]Civil Procedure (Court-Annexed Mediation) Rules, 2022, rule 25 (3).
[24]Civil Procedure (Court-Annexed Mediation) Rules, 2022, rule 25 (4).
[25]Mediation Rules, 2016, rule 15 (1)(2)(3).
[26]Civil Procedure (Court-Annexed Mediation) Rules, 2022, rule 25 (6).
[27]Civil Procedure (Court-Annexed Mediation) Rules, 2022, rule 25 (7).
[28]Civil Procedure (Court-Annexed Mediation) Rules, 2022, rule 25 (8).
[29]Civil Procedure (Court-Annexed Mediation) Rules, 2022, rule 26 (5).
[30]Ministry of Interior and Coordination of National Government, 'Guidelines for Mediators and Mediation', p. 15.

and proceedings may attend.

iii. Researchers may with the permission of the parties, be granted access to individual case files; observe the proceedings; and interview the parties.

iv. A mediator should edit and remove all identifying information from mediation material passed on for purposes of research or training.[31]

Moreover, the Code of Conduct for Mediators 2021 in principle 5 echoes all the foregoing restrictions on confidentiality, but adds an exemption to reveal such information when necessary to defend the mediator from any proceedings or charges for which (s)he risks incurring any liability.[32] In re *Estate of BM (Deceased)* [2019] eKLR, the respondent claimed that the mediator handwrote a basic template to be used as a framework for the preparation of a settlement that would be executed by the parties once all the terms were agreed upon. That was the template, according to the respondent, that the mediator filed in court. The respondent asserted that the filing was without the parties' knowledge and consent. The executor opposed the application noting that the mediation had succeeded and had resulted into a settlement on December 14, 2017 which the mediator had lodged in court. The court held that:

> *It is clear that the final deed of settlement had not been agreed upon. The parties hoped to agree before February 28, 2018. On this, the parties agreed and appended their signatures. But, the attached template (both handwritten and typed) was not signed by the parties. It could not have been signed because the deed of settlement was yet to be adopted. It was to be adopted later (to be ready for lodging in court before February 28, 2018). In conclusion, I find that the documents dated February 14, 2018 and December 14, 2017 did not amount to a mediation settlement agreement.*[33]

This means that confidentiality is key in mediation as it fosters trust among the parties. Lack of confidentiality therefore amounts to suspiciousness and this ruins the conducive environment of mediation often enjoyed when confidentiality is abundant. By showing one's intentions, thoughts, training, places visited, among such other details, fMRI throws a sword against confidentiality as the members will be suspicious about each other as they sit to dialogue, knowing that the other party or the mediator knows his/her intentions, thoughts, and such other personal details.

III. fMRI as threat and remedy to mediation

(a) How fMRI works

Although widely used to probe brain function, the mechanisms underlying the information produced are not fully understood by many. Among the systems employed in magnetic resonance imaging, there is a 5-10 ton superconductive magnet which is made to provide a powerful magnetic field with high homogeneity inside the bore where the object to be imaged is placed.[35]

To understand why it is possible for the fMRI to produce its images, it is important to understand some of the body properties that make such possible. Strictly, "Certain nuclei, including the hydrogen nuclei in water and lipids which compose a large proportion of most biological samples, display magnetic properties- they have a magnetic moment (due to the spin) which acts similarly to a bar magnet or compass needle exposed to the earth's magnetic field."[36] As such, the magnetic field of the MRI system establishes a situation in which the magnetic moment of a small percentage of these hydrogen nuclei align with the main magnetic vector.[37] For example:

> *...if a person is lying inside the magnet, each point within their body [which will be represented in the final image as a particular 'pixel' (picture element) or 'voxel' (volume element)] will have a certain number of protons (proportional to the water content of the tissue) aligned with the main magnetic field.*[38]

The alignment of the spins in turn yields a bulk magnetization. This magnetization "precesses (the circular motion that the axis of a gyroscope- or a child's spinning top- displays as it spins under the influence of gravity)

[31]Ministry of Interior and Coordination of National Government, 'Guidelines for Mediators and Mediation', pp. 15-16.
[32]Code of Conduct for Mediators, 2021, principle 5.
[33]In *re Estate of BM (Deceased)* [2019] eKLR.
[34]Edson Amaro Jr and Gareth J Barker, 'Study Design in fMRI: Basic Principles' [2006] *Brain and Cognition Journal*, 1.
[35]Edson Amaro Jr and Gareth J Barker, 2.
[36]Edson Amaro Jr and Gareth J Barker, ibid.
[37]Edson Amaro Jr and Gareth J Barker, ibid.
[38]Edson Amaro Jr and Gareth J Barker, ibid.

around the direction of the magnetic field."[39] The particular MR method mostly used to probe information associated with the brain is the blood oxygenation level dependent (BOLD) contrast imaging.[40] The underlying principle of this method is the MR images made sensitive to changes in the state of oxygenation of the hemoglobin.[41] Depending on the oxygen concentration, a hemoglobin molecule will display different magnetic properties.[42] For example, when replete with oxygen (oxyhemoglobin) it behaves as a diamagnetic substance, but when oxygen atoms are depleted (deoxyhemoglobin), it becomes paramagnetic.[43] Consequently:

> *Within any particular imaging voxel (representing a small part of the brain) the proportion of deoxyhemoglobin relative to oxyhemoglobin dictates how the MR signal will behave in a BOLD image: areas with high concentration of oxyhemoglobin give a higher signal (a brighter image) than areas with low concentration.*[44]

The variation of the levels of oxygen is affected by the activeness of that part at that moment. As a corollary, there is a local variation of the blood supply in accordance with local variations of the functional activity.[45] However, the details of neurovascular coupling involved are still largely unknown, regardless of the fact that it is employed in most neuroimaging modalities, including fMRI, basing on hemodynamic responses to neuronal activity.[46] Nonetheless, "The basic concept of fMRI is to have the person inside the scanner performing a series of cognitive tasks (the paradigm, which contains epochs or events) whilst BOLD images representing the brain are collected."[47] These images are then analysed and inferences are made.

fMRI is not perfect. It comes with challenges on the data analysis and its level of accuracy. Spatial and temporal limitations are the key challenges that face this method. For instance:

> *The temporal resolution determines our ability to separate brain events in time, while the spatial resolution determines our ability to distinguish changes in an image across spatial locations. The manner in which fMRI data is collected makes it impossible to simultaneously increase both, as increases in temporal resolution limit the number of k-space measurements that can be made in the allocated sampling window and thereby directly influence the spatial resolution of the image.*[48]

Functional magnetic resonance imaging (fMRI)

This means that it is hard to establish what brain activity was happening at a particular time in a particular part of the brain. As such, this makes the findings questionable with regards to the spatial and temporal resolution of the images obtained. Furthermore, "the neurophysiological mechanisms behind the BOLD/fMRI signal are only partly understood."[49] This obviously makes it hard to generalize the results or even to use it on an individual level for diagnostic purposes.

(b) How fMRI is a threat to the parties' autonomy and the mediator's neutrality

The first concern sparks from the autonomy of the disputants in mediation. Everyone wonders, "The thoughts and memories inside our heads have always been seen as private; are we ready to relinquish them and allow them to be used as potent information in courts?"[50] Of course, the right to privacy has been esteemed for example by the Supreme Court of the United States in the case of *Kyllo v United States* 533 US 27 (2001) where the use of thermal-imaging in the suspect's home was disallowed by the court.[51] fMRI is therefore, to some level, an infringement of privacy especially when used in lie detection without the consent of the subject.

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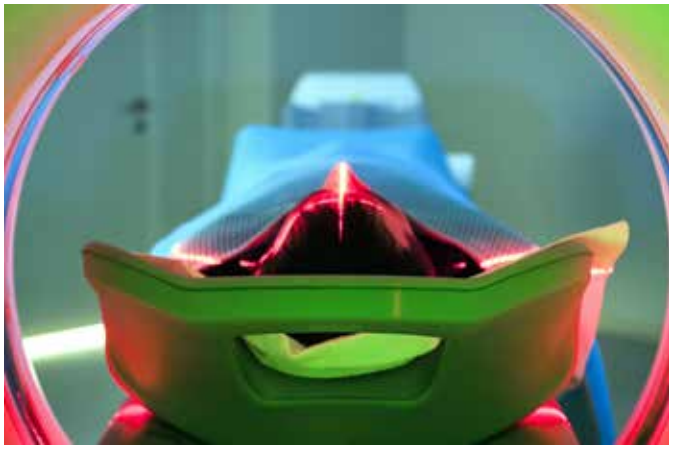
[39]Edson Amaro Jr and Gareth J Barker, ibid.
[40]Edson Amaro Jr and Gareth J Barker, ibid.
[41]Edson Amaro Jr and Gareth J Barker, ibid.
[42]Edson Amaro Jr and Gareth J Barker, ibid.
[43]Edson Amaro Jr and Gareth J Barker, ibid.
[44]Edson Amaro Jr and Gareth J Barker, ibid.
[45]Edson Amaro Jr and Gareth J Barker, ibid.
[46]Edson Amaro Jr and Gareth J Barker, ibid.
[47]Edson Amaro Jr and Gareth J Barker, 3.
[48]Martin A Lindquist, 'The Statistical Analysis of fMRI Data' Vol. 23, 2008, No. 4, pp. 439-464.
[49]Karsten Specht, 'Current Challenges in Translational and Clinical fMRI and Future Directions' *Frontiers in Psychiatry*, Vol. 10, January 2020, p. 2.
[50]Libby Rozbruch, 'Should Brain Scan Lie Detection be used as Evidence in Court?' *Penn Undergraduate Law Journal* [February 17, 2018], https://www.pulj.org/the-round-table-should-brain-scan-lie-detection-be-used-as-evidence-in-court [November 1, 2022].
[51]*Kyllo v United States* 533 US 27 (2001)



Aside, the subject whose brain is being scanned for court proceedings can fail to comply with the instructions hence the results will be faulty.[52] As a corollary, if say a mediator uses fMRI to investigate the disputing parties, there are high chances that they will be interested in the outcome hence this will easily affect their compliance with the instructions given during the scanning. Assuming the parties give accurate information because say the mediator investigates them unknowingly using fMRI, the mediator, although expected to be neutral, cannot be neutral because he/she will have known the 'truth' and will expect the parties to make a settlement consistent with this 'truth'. While the mediator is supposed to allow the parties to come to a settlement themselves, here the mediator will be sort of omniscient on the state of affairs and will find it inevitable to manipulate the settlement basing on the information obtained through the fMRI.

Indeed, this is why even the courts admit the fact that neuroimaging for lie detection is not yet generally accepted by the scientific community.[53] And even if fMRI becomes accepted in Kenya today, it will be an infringement of the Data Protection Act of 2019 because section 26 is categorical that a data subject has a right, *inter alia*, to be informed of the use to which personal data is to be put and to object to the processing of all or part of their personal data.[54] Moreover, section 28 (3) on collection of personal data is emphatic that a data controller or data processor shall collect, store or use personal data for a purpose which is lawful, specific, and explicitly defined.[55] Section 29 stresses that:

> *A data controller or data processor shall, before collecting personal data, in so far as practicable, inform the data subject of— (a) the rights of data subject specified under section 26; (b) the fact that personal data is being collected; (c) the purpose for which the personal data is being collected; (d) the third parties whose personal data has been or will be transferred to, including details of safeguards adopted; (e) the contacts of the data controller or data processor and on whether any other entity may receive the collected personal data; (f) a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data; (g) the data being collected pursuant to any law and whether such collection is voluntary or mandatory; and (h) the consequences if any, where the data subject fails to provide all or any part of the requested data.*[56]

Furthermore, the Evidence Act of 1989 [Rev 2014], in section 139 notes that no one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such other person consents to their production.[57] The personal information accessible by fMRI is no doubt in this category of information that the subject needs first to consent before access is granted. The Constitution of Kenya 2010 as well in article 31 (c) says that every person has the right to privacy, which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed.[58] fMRI penetrates into the brain and takes data about the person's thoughts, intentions, and such other personal information contrary to this provision.

The Civil Procedure (Court-Annexed Mediation) Rules 2022, rule 25 elaborates on confidentiality.[59] fMRI creates suspiciousness among the disputants as a result of its ability to encroach into their personal information, contrary to their wishes. Even in America, rule 403 of the Federal Rules of Evidence provides for the exclusion of evidence on the basis of, *inter alia*, prejudice.[60] In this case, the mediator who ought to be impartial will be partial because of the bias obtained through the fMRI lie detection of the disputants. This will ruin the conducive environment of mediation in the strict sense where the disputants and the mediator ought to be friends and not spies as is the case when fMRI comes in.

On the other hand, accuracy of data is not guaranteed in fMRI. This is because despite the distinction between truths and lies averred multiple subjects and trials, they

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[52]Zachary E. Shapiro, 'Problems with fMRI as a tool of lie detection' Harvard Law Journal [February 19, 2015], https://blog.petrief/om.law.harvard.edu/2015/02/19/problems-with-fmri-as-a-tool-of-lie-detection/ [November 1, 2022].
[53]60 Minutes Rewind: 2009 Report, Mind Reading, op. cit.
[54]Data Protection Act, 2019, section 26.
[55]Data Protection Act, 2019, section 28 (3).
[56]Data Protection Act, 2019, section 29.
[57]Evidence Act, 1989, section 139.
[58]Constitution of Kenya, 2010, article 31.
[59]Civil Procedure (Court-Annexed Mediation) Rules 2022, rule 25.
[60]Federal Rules of Evidence, rule 403.

nonetheless do not give the information whether the pattern of activation is common with other mental processes or experimental conditions.[61] In fact, scientists today question whether even these experiments actually examine lies.[62] A lie that has been often repeated or one that was told some years back is likely to look different from an unpracticed or recent lie.[63] Again, the images taken are not actually photos of the brain, rather "they are statistically built representations of blood flow changes believed to be associated with brain activity."[64] Interestingly, it is not clear what the term 'activity' in this case exactly means. Also:

> *There is some evidence to suggest that fMRI scanning will detect the subject's belief, even if that belief isn't borne out by the objective truth. In a 2010 memory experiment supported by the Research Network and conducted by neuroscientist Jesse Rissman and colleagues, the brain activity observed when subjects recognised a face was comparable to that observed when subjects believed they had seen a face before but hadn't.*[65]

Obviously, this will mislead the mediator in attempting to probe the disputants. This is because of the errors it will result in due to this confusion of beliefs. Aside, fMRI makes it impossible to infer a specific mental process solely on the basis of brain activity.[66] The reason for this is that, "A single brain region is often involved in a number of mental processes, and a mental process often involves multiple areas of the brain."[67] False conclusions will mostly be made and this can easily lead to a worsened relationship between the disputants instead of coming together. To this level, fMRI is dangerous in mediation because of this ambiguity created between real beliefs and imaginary ones and the inability to infer a specific mental process solely on the basis of brain activity in a particular region of the brain. Moreover:

> *A number of studies conform the idea that individuals tend to be persuaded by the seductive allure of neuroscience and that fMRI possess an "aura of certainty" in the eyes of jurors. These studies raise serious questions concerning jurors' ability and competency to understand expert scientific testimony. When evidence is highly complex, jurors tend to become confused and base their evaluation of the evidence on heuristic cues- or cognitive shortcuts- that often presume an "implied certainty and authority of science."*[68]

Nonetheless, if fMRI is given platform in mediation here in Kenya, it will have ripple effects. First, the mediators, some of whom are not educated, will blindly admit fMRI claims from say the disputant parties or any accompanying expert in fMRI. A recent study depicted that "75% of participants reached a guilty verdict when presented with fMRI evidence, while 45% of participants reached a guilty verdict when presented with polygraph evidence."[69] As such, mediation will be left in the hands of the manipulation of science and barely in the authentic probing of the neutral mediator. Secondly, it will ruin the trust bestowed by the disputants upon the mediator, once they discover that they are under an fMRI scan for lie detection. Thirdly, it will make the disputants lose their autonomy and right to privacy[70] as their thoughts, intentions, and such other personal information will be exposed without their consent.

(c) How fMRI is a remedy to the parties' autonomy and the mediator's neutrality

Recently, in the case of *United States of America v Lorne Allan Semrau* No. 11-5396 [2012], the United States Court of Appeals for the sixth circuit affirmed Dr Semrau's convictions that results from a functional magnetic resonance imaging lie detection test should have been admitted to prove the veracity of his denials of wrongdoings.[71] In this case, the court held that even the government did not seem to challenge the fMRI findings by Dr Semrau.[72] The court further held that, "...the magistrate judge qualified his conclusion by specifying such error rates are unknown specifically for fMRI-based lie detection in the

[61]Libby Rozbruch, op cit.
[62]Anthony Wagner, Richard Bonnie, Casey, et al, 'fMRI and Lie Detection' *Columbia Law School* [2016] https://scholarship.law.columbia.edu/faculty-scholarship/2015 [November 1, 2022].
[63]Anthony Wagner, Richard Bonnie, Casey, et al, ibid.
[64]Erica Beecher-Monas & Edgar Garcia-Rill, 'Overselling Images: fMRI and the Search for Truth' *UIC Law Review* Vol. 48, Issue 3, [2015], p. 653.
[65]Anthony Wagner, Richard Bonnie, Casey, et al, p. 2.
[66]Anthony Wagner, Richard Bonnie, Casey, et al, ibid.
[67]Anthony Wagner, Richard Bonnie, Casey, et al, ibid.
[68]Libby Rozbruch, op cit.
[69]Libby Rozbruch, ibid.
[70]Libby Rozbruch, ibid.
[71]*United States of America v Lorne Allan Semrau* No. 11-5396 [2012].
[72]*United States of America v Lorne Allan Semrau* No. 11-5396 [2012].

real world as opposed to the laboratory."[73] This is good news for fMRI because it shows that people are now appreciating the gist of fMRI's findings and this is crucial even for mediation sessions where fMRI can be used to establish the underlying issues that either disputing party may shy off from stating.

Although mediation suggests the disputants to find solutions by themselves and for themselves; nonetheless, it is difficult at times to get into these solutions even after a lengthy probing. fMRI will be a noble analytic tool in mediation since the mediator will be able to identify the best interests of the disputants through evaluating their thoughts and intentions, even when they are not aware, thus making the findings more accurate. fMRI can as well help to steer forward the mediation sessions when the disputants are stuck in one issue. According to Thomas Narciso Daniels, the founder of the Daniels Mediation and Alternative Dispute Resolutions, active listening and questioning are key skills in mediation.[74] He adds that the first thing to do in an impasse is to identify the impasse.[75] fMRI's prowess in monitoring the thoughts and intentions for example can easily unearth the impasse or still, help the mediator in his/her active listing and questioning to be aware of the real thoughts and intentions of the disputants.

When a person is telling a lie, the brain areas linked with effort or conflict are activated and they can actually be identified in an individual brain; whereas, when one is telling the truth, few areas can be activated as one relies on just memory without conflicts as such.[76]This obviously means that a person struggles to lie, since calculations are involved in the brain to see say the aftermath of each lie. But since truth is simply the state of affairs, one just parrots it with ease, without calculations as such. Hence in telling the truth, few areas of the brain are activated as compared to when one is telling lies. This is a great breakthrough of fMRI and it is significant in lie detection because the mediator in this case can easily know which disputant is telling lies and who is truthful. For example:

> *Neuroscientist Andrew Kozel and colleagues analysed data from three independent 'mock theft' experiments in which subjects were instructed to look at two objects, select one, take it from a drawer, hide it in a locker containing the subject's personal belonging, and then deny having taken either object. Accuracy rates for those mock theft experiments range from 71 to 90 percent*[77]

The only challenge with the mock theft experiments is especially the fact that when a subject has a vivid memory of one object than another, it is difficult to establish how much of what is being detected is deception and how much is memory.[78] There is as well a concern on whether undetected physical or mental strategies could interfere with patterns of neuronal activities or say signal strength.[79] Still, there is worry whether the brain activation is a result of deception or attention as observed in a 2008 experiment by neuroscientist Jonathan Hakun and colleagues where there was brain activation whenever the target or lie stimulus was presented, regardless of whether the involved subjects were lying about the stimulus at the time.[80]

Compared to traditional lie detection (polygraph) that usually measures an individual's physiological reactions to direct questions, fMRI measures brain activity as what causes the skin response, heart rate, blood pressure, respiration changes, and the like, registered by the polygraph.[81] In other words, polygraphs measure the secondary activities while fMRI goes for the fundamental causes of these secondary activities in lie detection. Consequently, "fMRI-based lie detection utilizes an objective and more reliable method for truth verification, as its results do not require subjective interpretation."[82] fMRI is therefore more objective than polygraphs.

Additionally, confounding influences like stress or anxiety cannot affect fMRI's results because these mental states create their own unique pattern that can be easily

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[73]*United States of America v Lorne Allan Semrau* No. 11-5396 [2012].
[74]Thomas Narciso Daniels, 'Mediator Tools and Skills, Peer to Peer Discussion on Lessons learnt, and strategic positioning for successful Mediation, Peace Building and Conflict Resolution' *CIARB 1ST Mediation Conference at Radisson Blu Hotel Nairobi: The Coming of Age for Mediation, Encounter from Africa*, Session 5, October 28, 2022.
[75]Thomas Narciso Daniels, ibid.
[76]David McCabe, Alan Castel and Mathew Rhodes, 'The Influence of fMRI Lie Detection Evidence on Juror Decision-Making' *John Wiley & Sons Ltd* [2011], p. 566.
[77]Anthony Wagner, Richard Bonnie, Casey, et al, op cit., p.2.
[78]Anthony Wagner, Richard Bonnie, Casey, et al, ibid.
[79]Anthony Wagner, Richard Bonnie, Casey, et al, p. 3.
[80]Anthony Wagner, Richard Bonnie, Casey, et al, p. 2.
[81]Libby Rozbruch, op cit.
[82]Libby Rozbruch, ibid.

distinguished from that created by a lie.[83] Moreover, "When an fMRI acquires a signal after an individual answers a question, the subsequent brain process measurement can potentially differentiate between an answer's veracity and its mendacity."[84] Veracity is the quality of truthfulness while mendacity is basically the act of not telling the truth[85], put simply as lying. This is possible through identifying the areas of conflicts[86] in the brain as earlier mentioned to draw a dichotomy between telling lies and telling the truth.

Nevertheless, fMRI can be a beacon of truth if the foregoing concerns are addressed hence it can foster mediation by availing the state of affairs on the disputes at hand as the mind of the disputants can be penetrated by the mediator who can then be a better midwife of harmony. It will make it possible for mediation to handle practically any case because the mediator will have powerful tools to delve into the intentions, thoughts, and such information with high accuracy. Due to fMRI, mediation's time of dispute resolution will be small since the truth will be readily available thus lessening the probing time. The mediator will be a sort of a diviner who will surprise the disputants with accurate truths on what they are thinking or intending to do, or still, what they did in relation to the dispute and hint at the best solutions for the most desirable common good of the disputants.

IV. Recommendations

- There is need for more research and innovation in the area of fMRI to establish more facts for example regarding the mechanisms underlying the information produced that are not yet fully understood.
- There should be a special set of laws for mediators to employ fMRI especially in cases that are hard to rely on mere probing and listening. This new mechanism as well can be used to establish an impasse, or the most desirable issues, or underlying issues, or the best solutions for the common good of both parties, tapping directly from their thoughts and intentions.
- Sensitization is necessary to all mediators on how fMRI can be used in mediation sessions. This will serve to erase any potential cultural bias against fMRI in its lie detection and precisely, its place in mediation to unearth the truth of the disputants in order to facilitate the mediator's accuracy in the probing.
- More sophisticated fMRI gadgets should be devised that say are not even identifiable by the disputants but by just a ray of light, they can tap into a person's thoughts and intentions, thus facilitating the dispute resolution's accuracy.
- fMRI sophisticated gadgets and reports should be linked with a team of experts within the mediation

sphere who can monitor everything and ensure that there is no manipulation of the data received through fMRI.
- Mediators should receive expert training on how to use fMRI sophisticated gadgets in lie detection as a way of facilitating their accuracy in probing thus saving time that would have been wasted in ambiguous probing with the hope to land on certainty.

V. Conclusion

Whereas mediation intends the mediator to be an active listener and a wise inquirer, it is evident that fMRI can accurately supplement these mediation tools as it taps into the thoughts and intentions of the disputants and this can help the mediator ask the right questions, or hint at the right issues or solutions in the process of mediation. However, there is a need to look into the laws regarding privacy and how fMRI can be accommodated among the exceptional modes permitted by law to use fMRI during probing. There is also a need to investigate the mechanisms of the working of fMRI so as to be sure that it is sufficient in lie detection in relation to its working mechanisms. Since fMRI is a new mechanism, there is need to enlighten the mediators and general public on how it works so as to minimize bias and prejudice regarding its methodology and findings. Therefore, fMRI can be a great complement to mediation as a win-win stride to harmony.

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

[83]Libby Rozbruch, ibid.
[84]Libby Rozbruch, ibid.
[85]Cambridge Dictionary [2022] Available online: https://dictionary.cambridge.org/dictionary/english/mendacity [November 2, 2022].
[86]David McCabe, Alan Castel and Mathew Rhodes, op cit.

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A caviling dissection of challenges facing court-annexed mediation in Kenya

By Odhiambo Jerameel Kevins Owuor

Abstract

The constitution of Kenya vouchsafes national values and principles of governance. Social justice is one of the values enshrined therein in Article 10 of the constitution. The Judiciary is given the authority by the constitution to administer justice. In exercising judicial authority the courts and tribunals are to be guided by an array of principles one of them being to promote alternative forms of dispute resolution such as adjudication, reconciliation, mediation, arbitration and traditional dispute resolution. These alternative forms of dispute resolution were included as means of enhancing access to justice among Kenyans and preventing overreliance on the court processes. Key to this paper is mediation as a form of alternative dispute resolution. The author contends that although mediation has been hailed as one of key components of solving disputes in Kenya; there are some roadblocks towards full enhancement of court annexed mediation in Kenya. It is against this backdrop that this paper delves on the challenges with a view of coming with tangible solutions. Overcoming these challenges will have positive impacts in making mediation a preferred tool of alternative dispute resolution.

1. Introduction

Interaction among humans is inevitable[1] and no man can ever survive without relating with fellow men. Thus, sentiment such as 'no man is an island.' In South Africa, Ubuntu Philosophy has it that 'I am because we are.' With interaction among different persons from different social, economic and political background it is beyond peradventure that there will be times when disputes will have to arise and human conflicts as well in equal measure. James Ngotho argues that: 'In a perfect world there would be no conflict, but the world today is far from perfect. In the society we live in today, conflict arises everywhere. Conflict

arises because of various reasons including but not limited to differing opinions or lack of respect for others' opinions which may also lead to a conflict'[2].

It is incumbent for such disputes to be solved in an amicable manner to ensure that there is peace for if the disputes aren't solved it will be a source of antagonism and unnecessary loss of property and resources[3]. Coming up with means of making sure that such disputes are solved in a timely manner is called for.[4] Solving such disputes should be in a setting where parties agree with the decision and the process is transparent not forgetting the process being cost-effective.[5] The concept of access to justice has been viewed more from a formal viewpoint. In the sense that, justice can only be served in court and not in any other sphere.[6]

This view has changed courtesy of the entrenchment of alternative dispute resolution into various laws. Moreover, Kariuki Muigua notes that courts over time have been inaccessible for many who wish for their cases to be addressed. He notes, 'these days the courts have become inaccessible due to various barriers such as poverty, social and political backwardness, ignorance, procedural formalities and the like. These are some of the challenges encountered by a person who refers a matter through the complex and costly procedures involved in litigation'[7].

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[1]K. Muigua, *"Settling Disputes through Arbitration in Kenya"*, (Glenwood Publishers, Kenya 2012)

[2]J. Ngotho, 'Access to Justice in Kenya: A Critical Analysis of the Challenges Facing Arbitration as a Tool of Access to Justice in Kenya,' Journal of Conflict Management and Sustainable Development Vol. 2(1) 2018

[3]L. Boulle, 'Mediation: Principles Processes Practices,' (LexisNexis Butterworths; 2005) p 348.

[4]K. Muigua; '*Alternative Dispute Resolution; Heralding a New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya*, 2013,' Vol. 1, No. 1

[5]F. Sander & W. Allen, '*Judicial (Mis)use of Alternative Dispute Resolution? A Debate,*' University of Toledo Law Review

[6]E. Mutua, *'Access to Justice in Kenya: A Critical Appraisal of the Role of the Judiciary in advancement of Legal Aid Programs'* (LLM Thesis, University of Nairobi 2014)

[7]K. Muigua, "Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010" Retrieved from http://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Article-159-Traditional-Dispute-Resolution-Mechanisms-FINAL.pdf Accessed on 5th May 2022

This is where the various forms of alternative dispute resolution come into the picture. The forms of alternative of dispute resolution include: mediation, adjudication, traditional dispute resolution mechanism, conciliation and settlement conferences. These forms are meant to administer justice and promote access to justice. Of concern to paper is mediation as a form of alternative dispute resolution.

Mediation has been referred to as, '"the interaction between two or more parties who may be disputants, negotiators, or interacting parties whose relationship could be improved by the mediator's intervention. Under various circumstances (determinants of mediation), the parties/disputants decide to seek the assistance of a third party, and this party decides whether to mediate. As the mediation gets underway, the third party selects from a number of available approaches and is influenced by various factors, such as environment, mediator's training, disputant's characteristics, and nature of their conflict. Once applied, these approaches yield outcomes for the disputants, the mediator, and third parties (other than the mediator)".[8]

Mironi, in a similar vein, defines mediation as an informal process, where a mediator who is a third party with no decision-making authority attempts to bring the conflicting parties to end their conflict by agreement. A mediator is not part of the conflict, but an outsider who strives to ensure that the process of the conflict resolution turns out to be a perfect picture in the estimation of the parties.[9]

The Civil Procedure Act defines mediation as an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings.[10] According to Kariuki Muigua, mediation entails negotiation in which the assistance of a third party is employed and the third party who is not party to the proceedings aid the two parties in coming up with an outcome without imposing his or her views on the parties.[11]

Having defined mediation as a concept,[12] this paper proceeds as follows: the next section of this paper gives an overview of court annexed mediation in Kenya so as to get the general overlook; the third section lays out the challenges facing court annexed mediation in Kenya; the fourth part presents solutions to the problems discussed in third part and lastly the paper ends with a conclusion.


Dr. Kariuki Muigua

2. A cursory look at court-annexed mediation in Kenya

Kariuki Muigua posits that: 'Court-annexed mediation may arise where parties in litigation can engage in mediation outside the court process and then move the court to record a consent judgment. It has also been defined as the mediation of matters which a judicial officer has ordered to go to mediation or which are mediated pursuant to a general court direction (e.g. a procedural rule that states that parties to a matter make an attempt to settle the matter by way of mediation before the first case management conference'.[13]

Court annexed mediation from the above quotation by Kariuki Muigua alludes to a process that is undertaken or conducted under the umbrella of the court.[14] That means that the court plays a vital role in the process in one way or another in making the parties come to an agreement perhaps in this case indirectly.[15]

Kariuki Muigua commenting on Court Annexed Mediation observed:

> *In Kenya, Court Annexed Mediation is conducted under the umbrella of the court. The project commenced in 2015 through legislative and policy reforms to accommodate*

[8]C. Kakoonza, *'Arbitration, Conciliation and Mediation in Uganda: A Focus on the Practical Aspects,'* Uganda Living Law Journal, Vol. 7 No. 2 December 2009, pp. 268-294
[9]M. Mironi, "From Mediation to Settlement and from Settlement to Final Offer Arbitration: an Analysis of Transnational Business Dispute Mediation", 73(1) Arbitration 52 (2007), p. 53
[10]Civil Procedure Act, Cap 21, Laws of Kenya
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[14]F. Shako, *"Mediation in the Courts' Embrace: Introduction of Court-Annexed Mediation into the Justice System in Kenya"* TDM 1 (2017)
[15]K. Cloke, "The Culture of Mediation: Settlement vs. Resolution", The Conflict Resolution Information Source, Version IV, December 2005

mediation in the formal court process. These included amendment to the Civil Procedure Act to provide for reference of cases to mediation. Under the Act, the court may direct that any dispute presented before it be referred to mediation: on the request of the parties concerned; where it deems it appropriate to do so; or where the law so requires. Where a dispute has been referred to mediation by the court, parties are required to select a mediator for that purpose whose name appears in the mediation register maintained by the Mediation Accreditation Committee. Such mediation is conducted in accordance with the mediation rules. An agreement between the parties shall be recorded in writing and registered with the court which referred the dispute to mediation; such an agreement is enforceable as a judgment of the court. No appeal lies against such an agreement. The Act also establishes the Mediation Accreditation Committee whose functions include inter alia maintaining a register of qualified mediators and setting up appropriate training programmes for mediators.

The Civil Procedure Rules also allows the court to adopt and implement, on its own motion or at the request of the parties, appropriate means of dispute resolution such as mediation for the attainment of the overriding objective envisaged under sections 1A and 1B of the Civil Procedure Act (emphasis added). Where a court mandated mediation adopted pursuant to the rule fails, the court is mandated to forthwith set the matter down for hearing and determination in accordance with the Rules.[16]

In 2015 Mediation Rules were enacted to reflect the necessary changes made to the Civil Procedure Act and provide legal bedrock for Court Annexed Mediation in Kenya. Pursuant to the rules each civil suit that has been brought before the court has to be subjected to a mandatory process so as to ascertain whether such a matter can be referred for mediation.[17] David Kariuki adds that: 'Where a case has been referred to mediation after the screening, the mediation Deputy Registrar is required to notify the parties of the decision within seven (7) days. Seven days after receipt of such notification, parties are required to file a case summary in the prescribed form. Such mediation is conducted by a person registered as a mediator by the Mediation Accreditation Committee who is selected by the parties from a list of three qualified mediators nominated by the mediation Deputy Registrar. The rules further prescribe a time limit of sixty (60) days from the date of referral to mediation within which the proceedings should be concluded'[18].

3. Quandary facing court-annexed mediation in Kenya

It is beyond reasonable doubt that to some extent Court Annexed Mediation has yielded positive results. This can be looked at from the rate at which disputes referred for mediation are addressed quickly than those of the court system. Another lens which is interrelated is mediation has reduced the backlog of cases in the courts. The backlog of cases has been the bane of the Judiciary and to combat the same the Judiciary came up with programs to entrench alternative dispute resolution systems so as to offset disputes and prevent overreliance on the formal justice system. However, it has to be noted that Court Annexed Mediation has been faced with problems which hinders full entrenchment of Court Annexed Mediation in the country. This section therefore is dedicated to highlight the challenges facing Court Annexed Mediation in Kenya.

a) Inadequate awareness of court-annexed mediation

The success of any project has a lot to do with the awareness of the general public on the same. When people are aware that a project exists they can be able to identify with it and as well explore on ways that they can benefit from the same. This will enable them embrace it fully and make use of it fully. Now contextualize the above sentiments to the subject of this paper, since its roll out in 2015 at Nairobi, court annexed mediation has expanded to 12 other counties in Kenya.[19]

Therefore it can be argued that more than half of the country is not aware of the process. Further, most court users are not aware of or are yet to fully embrace mediation and other ADR mechanisms. This demonstrates the reason why a high number of matters are still being filed in courts necessitating screening and referral of some of them to mediation. There is a need to create public awareness of the presence and

[16]K. Muigua, *'Enhancing the Court Annexed mediation Environment in Kenya,'* Retrieved from http://kmco.co.ke/wp-content/uploads/2020/03/Enhancing-The-Court-Annexed-Mediation-Environment-in-Kenya-00000002.pdf Accessed on 5th May 2022

[17]Ibid

[18]Ibid

[19]The Judiciary, State of the Judiciary and the Administration of Justice: Annual Report 2018-2019, Judiciary Innovativeness in Access to Justice: Unlocking the Potential of Court Annexed Mediation

operation of court-annexed mediation and other ADR mechanisms to enable Kenyans embrace these mechanisms and reduce backlog in courts. [20]

b) Capacity of mediators

Dr. David rightly notes that: 'Court annexed mediation deals with various disputes including commercial matters. Some of the mediators may not have the necessary skills and expertise in such areas making them ill equipped to facilitate the process. There is need for capacity building through training programmes for mediators to ensure that they are well informed and able to efficiently discharge their duties'[21].

c) Mediation cost

While ADR mechanisms have generally been hailed as being cost-effective, this characteristic may be defeated in court-annexed mediation. In court-annexed mediation, referral of a case to mediation may happen after parties have incurred costs such as legal fees through drafting pleadings and filing the same.[22] Currently, there is no framework for the recovery of costs where a case has been referred to mediation.[23] Thus, parties may end up incurring further costs in the process. Further, where parties fail to reach a settlement agreement and such case reverts back to the court, the costs of the entire process end up being higher than what the parties had intended. There is a need to ensure the efficiency of court-annexed mediation to enable parties to benefit from the attributes of mediation.[24]

d) Inadequate negotiation skills by the parties

Mediation flows from negotiation since the mediator merely facilitates discussions between the disputing parties [25] [26]Negotiation skills are thus of utmost importance in the process. Statistics from the judiciary show that nearly half of the matters that have been referred to court annexed mediation have ended up not being settled.[27] This can be attributed to among other factors, the lack of efficient negotiation skills by the parties. There may be need to provide basic negotiation skills to parties before they set down for court-annexed mediation[28].

e) Inadequate funding

On this issue Josephine Oyombe postulated as follows; 'The Court Annexed Mediation pilot and countrywide rollout overtime hasn't achieved financial independence from

normal dispute resolution mechanisms. At the pilot phase, no funds were specifically set aside for the project by the Judiciary, funds for payment of mediators, infrastructure and stationery and operational expansion were drawn out of the Registrar of High Courts budget. To rollout the Court Annexed Mediation project there has been lack of central funding for the various activities run at the mediation headquarters and the various mediation stations in the country'.[29]

In 2020 Mercy Okiro noted that courtesy of funding issues by the Judiciary mediators haven't been paid or attended refresher courses. Her concerns were shared by other practicing mediators. One can observe that the entire Court Annexed Mediation Process is threatened by the issue of lack of funds. The earlier it is addressed the better.

4. The panacea to the muddle facing court-annexed mediation in Kenya

I. Proper and adequate funding

This point can be overemphasized. Without funds no operation can take place. Funds are the engines that run or power machines. With that observation, funds are needed for: the expansion and rollout of mediation to the whole country for so far the rollout hasn't clocked the forty-seven counties yet; to sponsor training for the mediators and the staff; to buy various equipment necessary for use by the mediators and the secretariat; for paying the mediators and the staff who work tirelessly in their jobs in enhancing justice in the country.

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[20]Supra
[21]Supra
[22]Muigua K., 'Court Sanctioned Mediation in Kenya-An Appraisal, Op Cit
[23]P. Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," International Environmental Law Research Center (IELRC)
Working Paper 2005-1
[24]Supra
[25]Kariuki D, *'Resolving Conflicts Through Mediation in Kenya,'* 2nd Edition, 2017
[26]M. Mwagiru, Conflict in Africa; Theory, Processes and Institutions of Management, (Centre for Conflict Research, Nairobi, 2006)
[27]The Judiciary, State of the Judiciary and the Administration of Justice: Annual Report 2018-2019, Judiciary Innovativeness in Access to Justice: Unlocking the Potential of Court Annexed Mediation' Op Cit
[28]Supra
[29]Oyombe J, 'Court Annexed Mediation in Kenya: An Examination of Challenges and Opportunities' (LLM Thesis, University of Nairobi)

Oyumbe gives a wonderful suggestion on funding, she argues that; 'As currently set up, the Court Annexed Mediation project relies on the budget allocated to other organs of the Judiciary such as that of the Registrar of the High Court. To fully fund the operations of the project both the recurrent and development budget funds needs to be set aside for the project. Given the potential that Court Annexed Mediation has for reducing the backlog of cases in the courts, an argument could be made that instead of hiring more judges the funds should be diverted to Court Annexed Mediation. The funds could be sourced directly from the national treasury or be aside from the funds allocated to the judiciary.

II. Capacity building programmes

There is need for standardized form of training of mediators and the staff who work in the various mediation centres in the country. This will bring harmony as to how mediators resolve disputes. The situation at the moment is that the mediators use their professional background skills to address disputes. The mediators come from an array of fields which in turn brings about disharmony on how mediation is effected to different parties. A uniform method can be unrolled during training. Moreover, mediators should attend refresher courses or continuous professional development trainings to expose them to emerging issues and skillset needed to conduct their work efficiently. This shouldn't be done to only the mediators but also the staff working in the mediation stations in equal measure.

III. Massive publicity

Sensitization of masses on mediation is ideal so as to get the information as to many people as possible. This can be done via diverse channels like social media (Facebook, Twitter, Instagram), traditional media that is television stations, radio stations and print media. In addition, during open days of the courts, the same can be emphasized and the public learns on how mediation operates and make them embrace it.

5. Conclusion

The author is of the considered opinion that despite the challenges highlighted Court Annexed Mediation has played an integral role in enhancing justice in the nation. According to the records from the judiciary, cases that are referred for mediation are resolved faster than those that take up the normal formal justice system. This reveals how the Court Annexed Mediation can be an important asset if the solutions above are implemented.

Thus, this paper contends that if the challenges herein are addressed the future of mediation in Kenya will glow, unlike the current position in which it looks bleak. Once the challenges are addressed Kenyans will be able to solve their disputes in a timely manner, expeditiously and economically.

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

Is the position of the Prime Cabinet Secretary constitutional? an interrogation through the lens of the 2010 Constitution

By Adams Llayton Okoth

By Emma Ella Katiba

1.0 Introduction

Many opinions and counter-opinions have been expressed about the decision of the President to nominate and subsequently appoint Musalia Mudavadi as the Prime Cabinet Secretary. It is worthwhile to note at this point that the heart of this debate is not the suitability of the office-holder but rather the constitutionality of the office. Critics of the office hold that it has no constitutional backing while proponents so hold that the office is clearly backed by the constitution and other provisions of the law. This debate and uncertainty of the matter have left citizens and professionals, especially lawyers and jurists in a permanent state of confusion and imbroglio. It is important to strive, however, to make sure that our lens of assessment is right. In so doing, we must choose whether we comment on the matter from an emotional, political or legal standpoint.

The debate seemed to have been ignited during the vetting of the respective Cabinet Secretaries in the National Assembly. While commenting on the same, the Honorable Speaker empathically with a voice of authority noted that the position and the nomination were done in conformity with the constitution. He specifically addressed himself as to Article 152 (1)(d) of the constitution as the constitutional provision giving effect to the nomination. The article provides that the cabinet consists of not fewer than fourteen and not more than twenty-two cabinet secretaries. He proceeded to state that in line with this, the President exercised his constitutionally mandated duty under Article 132 (2) (a) to nominate, among others, Musalia Mudavadi as the Prime Cabinet Secretary. Article 132 (2) (a) on the Functions of the President provides that the President shall

Prime Cabinet Secretary Musalia Mudavadi

nominate and, with the approval of the National Assembly, appoint, and may dismiss the Cabinet Secretaries, in accordance with Article 152. With this, the Speaker declared the position to be constitutional and rested his case.

From the onset, this article declares that this was a flawed interpretation of the constitution and that this position has no legal backing. This paper endeavors to critically analyze the legality of the position of the Prime Cabinet Secretary in Kenya as currently framed and to form the basis for future references.

2.0 History of the office of the Prime Cabinet Secretary/ Minister

A lot of literature has been written on the importance of history in interrogating our present. Indeed, scholars have noted that we cannot truly understand our modern situation and the values and assumptions that inform it unless we know something of the historical conditions

[1]Ben Sihanya (forthcoming 2021) "Prime Minister and Deputy Prime Minister in Kenya," in Ben Sihanya (2021) Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa Vol. 1: Presidency, Premier, Legislature, Judiciary, Commissions, Devolution, Bureaucracy and Administrative Justice in Kenya, Sihanya Mentoring & Prof Ben Sihanya Advocates, Nairobi & Siaya.

that contributed to its production, and this cannot be an exception.

Ben Sihanya observes that the Office of Prime Minister has existed *at least* twice in Kenya's constitutional order.[1] First, immediately after Kenya got her independence in 1963, Kenya African National Union's (KANU) Jomo Kenyatta was appointed the Prime Minister and secondly, the Orange Democratic Movement's (ODM's) Raila Odinga became the Prime Minister after the signing of the National Accord and Reconciliation Act (NARA), 2008 which resulted into the *nusu mkate* government. He had been a Member of Parliament (MP) for Lang'ata since 1992.[2]

The office came to light again during the Building Bridges Initiative conversations, which were a result of the handshake between Raila Odinga and former President Uhuru Kenyatta with the intention to bury the hatchet and have a united nation.

Hon. Raila Odinga

2.1 Post 2007 elections

Following the sporadic election violence between 2007 and 2008, which left hundreds dead, and thousands displaced, the former United Nations Secretary General Kofi Annan successfully brought the two opposing sides together. On February 28th, 2008, Kibaki (PNU) and Raila (ODM) signed a power sharing agreement called the power-sharing Act 2008, which established the office of the Prime Minister and created a coalition government.[3] Kibaki was to remain the Head of State while Odinga would have a new role of Prime Minister and the head of government. The next step was to pass a new law creating these posts in a new unity government and set out the terms for power sharing in the cabinet.[4] Indeed, on 18th March 2008, the Kenyan Parliament amended the constitution to give legal effect to the agreement.

This post was however abolished following the promulgation of the new constitution 2010 which by design did not recognize it, hence officially repealed post-2013 general elections, leaving Kenya a purely presidential system.[5]

2.2 The building bridges initiative

The position featured again in the Building Bridges Initiative debates. The Building Bridges Initiative (hereinafter the BBI) among other recommendations, also recommended a restructuring of the government through an amendment that would have seen the reintroduction of the office of the Prime Minister. The report purported to introduce under Article 151A of the reviewed constitution, the office of the Prime Minister. The premier was to be appointed by the President if the proposal were adopted.[6] The BBI stated that its scheme was to *"Do away with a winner-take-all model for the Presidency and opt for a more consociational model that works best for ethnically divided societies."*

Under the new Law, the Prime Minister would have had the following functions:[7]

(i) Be the leader of government business in the National Assembly;
(ii) Oversee the legislative agenda in the National Assembly on behalf of government;
(iii) Supervise the execution of the functions of ministries and government departments;
(iv) Chair cabinet committee meetings as assigned by the President;
(v) Assign any of the functions of the Office to the Deputy Prime Ministers; and
(vi) Perform any other duty assigned by the President or conferred by legislation.

However, the amendment process was cut short when the Supreme Court upheld the decisions of the lower courts, to the effect that:

> "The Constitution Amendment Bill 2020 is unconstitutional for reasons *inter alia* that former President Uhuru Kenyatta initiated the amendments

[2]Ibid.
[3]The National Accord and Reconciliation Act of 2008 is an act of the National Assembly of Kenya that temporarily re-established the offices of Prime Minister of Kenya, along with the creation of two deputy prime ministers.
[4]"*Kenyan leader signs power-share law*". *Al Jazeera English. 19 March 2008. Accessed on November 16th 2022.* Odinga's party and Kibaki's coalition will each name a deputy prime minister, while the cabinet will be split evenly between both sides to form a unity government.
[5]"The Presidential System of Government in Kenya". Gīthīnji, Afro Cave, Accessed on 16th November 2022
[6]The Constitution of Kenya (Amendment) Act, 2020. Article 151A (1) There shall be a Prime Minister appointed by the President in accordance with Article 151B.
[7]Ibid. Art 151A. https://www.bbi.go.ke/_files/ugd/2ac70e_d879f92067a64003832df8db5a9d23d9.pdf


President William Ruto

through his creation of the Presidential Taskforce on Building Bridges to Unity Advisory, and vocal endorsement of the legislation crafted based on their findings.[8]

While a total of 30 out of 47 County Assemblies voted to advance the BBI Bill to the referendum stage, the proposed referendums drove a deeper wedge in an already deeply polarized political climate. This led to widespread criticisms on various facets. We shall look at a few.

2.2.1 Ruto's criticisms

President William Ruto was sharply critical of the Bill. He identified five key pieces of the proposal (particularly those that would expand the power and size of Kenya's executive branch) as concerning. He asserted that the President appointing a political ally to a Constitutionally-empowered Prime Ministerial position would not solve the "winner-takes-all question," pointing out that in Kenya's current Parliament, every powerful office under the BBI system would be held by then incumbent Jubilee Party.[9]

2.2.2 Legal and political criticisms

This was a divided battlefield. There were those that agreed with the President's arguments while a different faction seemed to be in agreement with the Bill and its recommendations.

Jill Cotrell Ghai, a professor of Law, for example argued that such a coalition (of President and Prime Minister who is an ally) would agree on who among them is to be the Presidential candidate and running mate, and who would stand for Parliament and become Prime Minister, assuming their coalition wins both presidency and most parliamentary seats. In other words, anybody who is anybody in politics would be on the same side.[10] He further opined that there are two obvious issues with this; the first is that it starts to look rather like a one-party state. The second is that the last three elections have seen heated competition between two rival coalitions of roughly equal size. It seems unlikely that the next three elections will see a much greater degree of political unity.[11]

On a different limb, Dr. Patrick Mbugua, an expert on Peace & Conflict Studies agrees with Professor Ghai's criticisms about too much concentrated executive power: He remarked that the proposal to appoint ANY of the MPs from the majority party or coalition of parties to be prime minister and any other persons as deputy prime ministers is a recipe for factional fighting because it undermines the authority of political parties to choose their own representatives.[12] Additionally, he argued that the proposed structure will perpetuate the current patron-client system and codify the president's ability to entrench patrimonial and clientelist rule[13] and that it indeed echoes the late Mobutu Sese Seko's strategy in Zaire of co-opting would-be opponents, letting them feed at the state trough, rotating them in and out of office, and encouraging them to become wealthy through corruption to neutralize them. But as the collapse of Mobutu's Zaire shows, such a strategy does not foster durable peace.[14]

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[8]Attorney General & 2 others v Ndii & 79 others; Prof. Rosalind Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent). The President could not initiate constitutional amendments or changes through the popular initiative under article 257 of the Constitution. (NS Ndungu, SCJ dissenting). The President initiated the amendment process in issue (NS Ndungu & I Lenaola, SCJJ dissenting). Under article 257 of the Constitution, the Constitution (Amendment) Bill, 2020 was unconstitutional (NS Ndungu & I Lenaola, SCJJ dissenting). See BBI 1 (High Court), BBI 2 (Court of Appeal) & BBI 3 (Supreme Court).

[9]Rushdie Oudia, 'BBI 'fraudulent and deceitful agenda', William Ruto says' Nation Africa. <https://nation.africa/kenya/news/politics/bbi-fraudulent-and-deceitful-agenda-william-ruto-says--3613726 https://nation.africa/kenya/news/politics/bbi-fraudulent-and-deceitful-agenda-william-ruto-says--3613726> Accessed on 16th November 2022. "BBI was the most fraudulent and deceitful agenda carried out in the name of changing the constitution. You don't need to change the constitution to increase resources to counties," said Dr Ruto.

[10]Ghai, Jill Cottrell (6 January 2020). "Why BBI will not solve Kenya's problems | Democracy in Africa". Accessed on 16th November 2022.

[11]Ibid

[12]Mbugua, Patrick K. (20 November 2020). "PATRICK K. MBUGUA - Why BBI Will Not Promote Peace or Prevent Violence | The Elephant". Accessed on 16th November 2022.

[13]Ibid

[14]Ibid

This position as have been argued by Ben Sihanya argues is crucial for power sharing, inclusion, economic efficiency, accountability and effective constitutional democracy in Kenya and Africa,[15] and this cannot be gainsaid. We laud the BBI Initiative for unsuccessfully trying to legally entrench the position within the constitution.

3.0 Position of the Prime Cabinet Secretary post-2022 elections

Following his win in the recently concluded 2022 presidential elections, President, William Ruto, while putting his house in order and appointing various individuals in different positions reintroduced the position of Prime Cabinet Secretary, thereby appointing Musalia Mudavadi to occupy the said position.

In terms of the role of the Prime Cabinet Secretary, the President through Executive Order No. 1 of 2022 on the Organization of the Government and Republic of Kenya organized and set the Office of the Prime Cabinet Secretary and subsequently listed down his duties and roles. What is striking to note is that the duties are nothing close to the conventional duties and roles of the Prime Cabinet Secretary.[16] According to the organization, the functions include:

1) Assisting the President and the Deputy President in the co-ordination and supervision of Government Ministries and State Departments;
2) In liaison with the Ministry responsible for Interior and National Administration, overseeing the implementation of National Government policies, programmes and projects;
3) Chairing and co-ordinating National Government legislative agenda across all ministries and state departments in consultation with and for transmission to the Party/Coalition Leaders in Parliament;
4) Chairing the Principal Secretaries Committees and supervising the technical monitoring and evaluation of Government policies, programs and projects;
5) Perform any other function as may be assigned by the President.

3.1 The unconstitutionality of the appointment

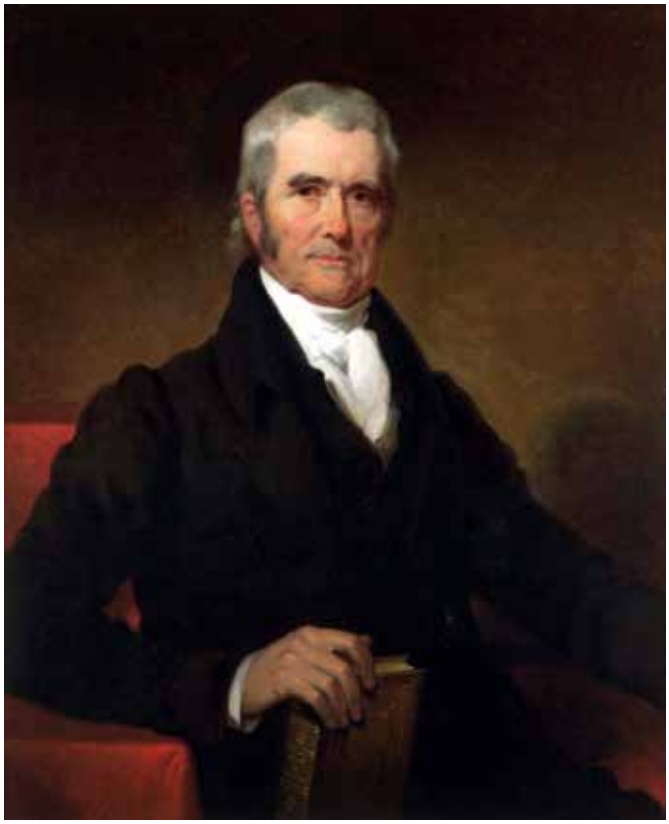
Article 1 of the Constitution[17] places all sovereign power within the hands of the people. It goes further to state that the people may exercise their sovereign power either directly or indirectly through their democratically elected leaders.[18]

Prof. Jill Cotrell Ghai

It is to be noted that this sovereign power is delegated to State organs which according to the Constitution shall perform their functions in accordance with this constitution[19] (*Emphasis ours*). These State organs include: Parliament and the legislative assemblies in the county governments;[20] the national executive and the executive structure in the county governments;[21] and the Judiciary and independent tribunals.[22] This one single line is the sole constitutional basis for the existence of the President's power to issue any form of direct action, let alone executive orders in particular. Indeed, the President being the Executive head of the government can make orders which have the force and effect of law in the country. However, as noted above, this power is fettered in the sense that it can only be exercised within the confines of the Constitution. When then can a governmental decision be declared unconstitutional?

As Waikwa Wanyoike notes, the constitution created (has created) many safeguards to check the President's power. For example, hardly any of the president's appointees (except his personal staff) can take office without parliamentary

[15]Ibid.
[16]See the 1969 Constitution.
[17]The Constitution of Kenya 2010.
[18]Article 2 of the Constitution.
[19]Article 3.
[20]Article 3(a).
[21]Article 3(b).
[22]Article 3(c).



Chief Justice Marshall

vetting. Even when – as has been with the current Parliament – Parliament fails to appreciate the enormity of its power of oversighting the executive and allows mediocre appointees by the president to take office, the courts can constitutionally intervene and can even invalidate the president's appointments.[23]

This therefore means that the interpretation of the correctness of the Executive orders lies with the courts through its inherent power of judicial review. Article 23(1) of the constitution empowers the courts to hear and determine applications for redress of a denial, violation, or infringement of, or threat to, a right or fundamental freedom in the bill of rights. The Courts on previous occasions have heard and determined cases of the unconstitutionality of Executive orders and illegal appointments.[24]

The principle of judicial review originated from the American jurisdiction. The *locus classicus* case was ***Marbury v Madisson*** which established the power of the judiciary to review the constitutionality of executive actions. It specifically stated that where the executive has a legal duty to act or refrain from acting, the federal judiciary can provide a remedy. Chief Justice Marshall gave several arguments on why the courts could be called upon to provide such remedies. First, the court argued that the constitution places limits on government powers and these limits are meaningless without the judiciary's power to enforce them. Next, as the constitution states that it alone, followed by all other types of binding acts, is to be the supreme law of the land, the court saw it as inherent to the judicial role to rule on the constitutionality of the laws it applies since only the laws made in pursuance of the constitution are to be binding. The court also argued that judges take an oath of office to uphold the constitution and they would violate this oath if they were to apply laws that contradict the constitution.

We contend that the President of the Republic of Kenya does not have the power to organize the Government and set out the Office of the Prime Cabinet Secretary and subsequently functions. That doing so would amount to usurping the power of the people to amend the constitution as per the dictates of Article 255. We reiterate the courts holding in ***Coalition for Reform and Democracy (CORD) & Another v the Republic of Kenya & Another*** where the Court stated thus:

> *"…Our constitution having been enacted by way of a referendum, is the direct expression of the people's will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the Constitution… Article 2 of the constitution provides for the binding effect of the constitution on State Organs and proceeds to decree that any law, including customary law that is inconsistent with the constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid…"*

Kenya is currently organized as a presidential system. This is a system of government where an Executive branch exists and governs separately from the legislature, to which it is not accountable and which cannot, in normal circumstances, dismiss. One of the most significant features of a presidential system is that there is theoretically a pure separation of powers. Members of the Executive cannot form part of the Legislature. This should be distinguished from a parliamentary system of government, which is also known as the Cabinet Government, which is based on a close relationship between the Executive and the Legislature. The Executive is accountable to the Legislature and stays in office only as long as it enjoys the confidence of the Legislature. Here, the Head of the state mostly enjoys symbolic and ceremonial powers. Parliamentary systems usually have a clear differentiation between the head of government and the head of state, with the head of government being

[23]Waikwa Wanyoike, "Executive Disorder: Unpacking Illegal Presidential Directives , the Elepghant, Nairobi, July 13th 207 accessed today. < https://www.theelephant.info/features/2017/07/13/executive-disorder-unpacking-illegal-presidential-directives/>

[24]Mwangi Gathanwa, High Court delivers another shocker to Uhuru < https://www.pulselive.co.ke/news/high-court-declares-president-uhuru-kenyattas-executive-order-1-of-2020/ttd1v2m> accessed today pulse live Nairobi.june 10 2021.

the prime minister or premier, and the head of state often being a figurehead, often either a president (elected either popularly or by the parliament) or a hereditary monarch (often in a constitutional monarchy).

The President's appointment of the Prime Cabinet Secretary has the effect of altering Kenya's system of government which is closely linked to the sovereignty of the people. It is only directly through the people that we can alter the kind of system of government operational within the nation. There is no other way to reconcile this save for an amendment to the constitution through referendum as had been proposed by the BBI Amendment Bill, which the President was highly critical of. To avoid any interference with constitutional supremacy, the Constitution is crystal clear on the procedure to be followed. Article 255(1) of the constitution provides that a proposed amendment to the Constitution should be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum if the amendment relates to inter alia such matters as: the supremacy of the Constitution; the sovereignty of the people; the national values and principles of governance referred to in Article 10 (2) (a) to (d); and the Bill of Rights[25] (*Our emphasis*).

It goes without saying that the first consideration for appointment to this position was loyalty, or put differently, by virtue of being allied to the sitting government. Going back to Ruto's criticisms on BBI, he emphatically posited that the President appointing a political ally to a constitutionally empowered Prime Ministerial position would not "[sort out] the winner-takes-all question," pointing out that in Kenya's current Parliament, every powerful office under the BBI system would be held by the incumbent Jubilee Party. Is this not the very phenomenon, or rather idea he is embracing now? The president, just as had been proposed by the BBI, appointed the Prime Cabinet Secretary, who is in fact a political ally. Does it mean that we are yet to solve the 'winner-takes-it-all' dilemma? To top it off, the appointment was from the very Kenya Kwanza Coalition. This is concentrating power in the executive.

This is one act of impunity that has bedeviled the President in his first term in office, less that 100 days into sitting at the highest position of leadership. This is clearly against the provisions of Article 3 (2) by attempting to establish a government otherwise than in compliance with the constitution, which is utterly unlawful.

4.0 Conclusion

Whilst many expected that the Speaker would come out with a Solomonic decision on the legality of the position of Prime Cabinet Secretary, the very people were not caught by surprise when he declared the position constitutional. The

reasons given to justify the same were clearly misconceived and a gross misinterpretation of the constitution. Put differently, justifying the position by opining that in line with Art. 152(1) (d), the President exercised his constitutionally mandated duty under Article 132 (2) (a) to nominate, *among others*, Musalia Mudavadi as the Prime Cabinet Secretary amounts to mutilation of the provisions of the constitution. Violating the constitution just to create such alien positions for political allies ought to be untenable at first instance. Elsewhere, and after making a critical comparison between the position as was proposed by the BBI and the position currently, their distinction is almost invisible. Even after the vehement criticism of that position, the sitting government still went forth to adopt it. What conclusion then are we left with in terms of the character of the incumbent … a hypocritical one? We are actually left with more questions than answers. For instance; should we be apprehensive that the incumbent government is one that takes no notice of the provisions of the constitution?

The authors are both LL. B students at the University of Nairobi. They can be reached via email addresses adamsllayton01@gmail.com and katibaeella@gmail.com respectively.

[25]Kariuki Muigua, 'Constitutional Supremacy over Arbitration in Kenya'

The rise of illiberal legality (democratic decay) in Africa: Quest for an international constitutional court

The elite, like the colonial state, which they inherited, has grown apart from the society. Increasingly the state and the elite who control the state, have become predators of the society.
~Ade-Ajayi, J.F.1992

By Deckstar Adaki

Introduction

Democracy can be defined as a government of the people, by the people, and for the people.[1] Crucial to this study are three different theories of democracies, that is: elite theory which enunciates that masses are incapable of making rational decisions on major national issues; the pluralist theory which states that no single group should dominate politics but instead organized groups should compete with each other to influence policy decisions hence promoting inclusiveness; and participatory theory which emphasizes the broad participation of people in politics in the sense that citizens do have the potential to influence policy decisions, but do not make policy decisions.[2]

Illiberal legality is a system based on popular will where free elections are held frequently, but lacks separation of powers and rights to check majority will. Illiberal regimes often pretend to take over power through democratic means but ignore constitutional limits when they assume power, resulting to centralized authoritarian regimes. The constitutions and legal frameworks in these countries permit liberal democracy, imbibing the attributes of representative democracy with the hope of enhancing and facilitating national progress and development but in practice, these countries are no more than illiberal democracies.[3] Solutions to this problem are hard to find because it is possible for authoritarians to lawfully and constitutionally use the mechanisms of constitutional change to make a state significantly less democratic than it was before.[4] The puzzle now is how to spot and stop democracy decay before it is too late.[5] This article gives insights into how illiberal democracies

have proliferated in Africa and the need for an international constitutional court to preserve our democracies from decaying.

The rise of illiberal legality in Africa

There has been a rise of illiberal regimes across the world particularly in Africa. As of today, Africa is a hotbed of illiberal democracy and has been particularly since post-colonialism. Scholars have argued that African countries have generally not enjoyed complete democracy despite the periodic conduct of elections in many African countries. Elections in Africa are pre-determined in favour of the incumbents and characterized by corruption and intolerance of dissenting laws. Rupert Emerson rightly predicted democracy in Africa would bleed and die "on the altars of national consolidation and social reconstruction". [6]

Most of the local governments in Africa which replaced the European governments after colonization were weak and inept in governing their people effectively. This made many regimes to quickly turn to authoritarian rule as their colonial predecessors.[7] In 1990, when a wave of democratization

[1]President Abraham Lincoln 1963.
2Abiodun O. Africa: *A Content on the Edge, from Skewed Elections to Illiberal Democracies*, International Journal of Social Science Research, ISNN 2327-5510, 2019, Vol. [7], No. 1, Available at http://ijssr.macrothink.org. (Accessed on October 25, 2022).
[3]Ibid.
[4]David Landau, *Abusive Constitutionalism*,47 U.C David L. REV. 189, 200 (2013).
[5]See Kim Lane, *Autocratic Legalism*, 85 U.C. L. REV545 (2018).
[6]Rupert E. From Empire to Nation: *The Rise of Self-Assertion of Asian and African People*, 1960 Cambridge: Harvad University Press.
[7]Charles R. *Is Democracy a Retreat in Africa*? African Program, 2022.

and constitutional reforms swept across much of Africa, hopes were high that Africans would begin to enjoy the freedoms afforded to citizens living in the former colonial powers.[8] However, this did not last. Currently, many Africans live under fully or partially authoritarian states. Many of the democratically elected leaders have established dynasties (some even looking to appoint their sons as their successors) as a process to subvert truly representative government. These leaders do not see themselves as statesmen who are expected to develop a keen awareness of collective responsibility in the long term, but are like colonial administrators, overseers who are in power to ensure that the people adjust to the structure of oppression and exploitation which they manage.[9] They have veneered their eviscerated democracies with regular elections because liberal democracy in these countries is seen as being limiting or threatening to the augmentation and preservation of their power interests. Presidential term limits have been frequently circumvented through constitutional coups in order to keep themselves in indefinite power. Having relatively weak institutions in illiberal states has facilitated the incumbents to manipulate constitutions.[10] A recent example is the allegations by Fafi[11] MP, Salah Yakub, where he revealed that a section of UDA MPs (the governing political party in Kenya) plan to amend the Constitution so as to remove the two-term limit on the presidency in Kenya. UDA has however distanced itself from those remarks. The two-term limit came into effect ahead of the 1993 elections following the repeal of Section 2A of the previous Constitution of Kenya and it was maintained by the 2010 Constitution of Kenya in Article 142. Should such constitutional amendment happen, Kenya could be next in line to becoming an illiberal State.

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During the COVID-19 pandemic, illiberal heads of states could be seen using control methods for stemming the outbreak of the virus as cover to consolidate and extend their control.[12] They used the pandemic as a justification to stop demonstration, muzzle journalists, and stifle dissent.[13] The 2021 report from Freedom House showed that the number of African countries rated "not free" had proliferated from a low of fourteen in 2006 and 2008 to twenty in 2021.[14] Since 1950, International Centre for Investigative Reporting (ICIR) has tracked 494 attempted coups worldwide, with 222 of them taking place in Africa.

Fafi MP Salah Yakub

Of these attempted overthrows, 38% were successful. The coup d'etat in Burkina Faso is a recent example, which took place on 30th September 2022, removing Interim President Paul-Henry Sandaogo Damiba over his inability to deal with the country's Islamic insurgency. Damiba had also come to power via a coup just eight months earlier.[15] The flawed democracy and surfeit of coups that currently characterizes Burkina Faso's governance for the last two years exemplify a widespread pattern of illiberalism and violation of freedoms in many countries in Africa.

Africa, despite having several regional Organisations, only the Economic Community of West African States (ECOWAS) has devoted its energy and resources to defending democracy in West Africa. The Economic Community of Central African States (ECCAS) is stocked with autocrats and East African Community (EAC) has been weak to the point of risking irrelevance.[16] Africa's youthful population and the public across African States have been agitating for constitutional reforms having been inspired by the internet and social media to become politically active.[17] However, their clamors for constitutional reforms have frequently been met with a truculent reaction from their governments. Digital repression has also become commonplace, especially around elections.[18] The failure

[8]Charles M. Fombad, *Democracy, Elections and Constituionalism in Africa: Setting the scene*, 2021. Available at https://doi.org/10.1093/oso/9780192894779.003.0002.
[9]Ibid note 2, See also Joseph K. "Oppressor or Liberator?" African Event. No24 (2000).
[10]John Mukum Mbaku, *Threats to Democracy in Africa*: The rise of Constitutional Coup, 2020.
[11]Fafi Constituency is an electoral constituency in Garrisa, Kenya.
[12]See, Charles R. *Is Democracy in Retreat in Africa?* March 2022, note 7; UN Secretary General earlier las year warned that autocrats were using the pandemic as a pretext to crush dissent, criminalize basic freedoms and curtail the activities of non-governmental organizations.
[13]Ibid.
[14]Sarah R. and Amy S. *Freedom in the World 2021: Democracy Under Siege,* Available at https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege (Accessed on 28th Oct 2022)
[15]Available at https://en.m.wikipedia.org/wiki/September_2022_Burkina_Faso_coup_d%C3%A9tat Accessed on 28th Oct. 2022.
[16]See John Mokum Mbatu, note 10.
[17]Ibid.
[18]Ibid.

to enforce liberal democracy in Africa has had a negative effect on both human and material development. This has been facilitated and enabled by weak institutions of government. The failure of regional organizations and national frameworks to enforce liberal democracy, which is a fundamental of a constitution, calls for the adoption of a different approach, that is, the establishment of an international constitutional court.

The need for an international constitutional court

Constitutional court is a specialized court with jurisdiction over constitutional matters. State heads across the world, particularly in Africa are struggling to preserve their influence, even beyond death, by instituting regimes that are more repressive than those established by their predecessors.[19] One of the potential remedies to this problem is the creation of an international legal framework modelled after the International Court of Justice, and the International Criminal Court whose role is to rule on the legality of elections in any country, that is, the establishment of an International Constitutional Court.[20] This court is needed now more than ever at a time when democracy is decaying precipitously in Africa and so is faith in domestic frameworks and institutions.[21]

The idea for an International Constitutional Court is attributed to an essay by Mohamed Moncef's on Liberation in 1999.[22] Mohamed raised the awareness on what was happening around the world: authoritarian states attacking democracy and the rule of law, violating inalienable rights, holding rigged elections to prove themselves a veneer of legitimacy, and reforming the constitution to consolidate their power and to harm their opponents.[23] He therefore recommended for the establishment of an International Constitutional Court whose role will be to protect democracy across the world. In 2011, Mohamed convened and chaired an Ad Hoc Committee for the Establishment of an International Constitutional Court, which issued an impressive report explaining why and how to create the court.[24] The court is to have two principal functions: giving advice and resolving disputes.[25] In its advisory function, the court would be authorized to give advice on texts or draft texts related to democracy and human rights at the request of governments, political parties, professional groups, NGOs among other groups and institutions.[26] In its dispute-resolution function, the court is to rule on what the report defines as "serious violations of democratic principles and democratic conditions for elections.[27] The court may be petitioned only after the complaint has been evaluated through all available domestic avenues.[28] The judgement from the court will be binding on the State implicated in the dispute.[29] According to the Committee, the impetus for an International Constitutional Court is two-fold: States have an obligation to respect principle and rules relating to democracy, to the rule of law and to hold periodic, competitive and genuine elections and states should be held accountable for how well or poorly they fulfill that obligation; the second impetus derives from the first.[30] However, this idea can be deemed as contravening the UN Charter principle of non-interference in matters which are within the domestic jurisdiction of member states. Therefore, one can argue that states themselves, acting in their own sovereignty, will recognize the powers of the new court, by ratifying the set of international legal rules that regulates the establishment and functions of the new judicial entity thus circumventing the notion of violation of State's sovereignty.

Richard[31] discusses five principles for building this international court:

1. Internationality- the court must be housed in an international organization whose member states are all

[19]Laith K. N., *Towards the Establishment of an International Constitutional Court*, ICL Journal, Vol 10, 2016.
[20]Ibid.
[21]Richard A., *Does the World Need an International Constitutional Court?* 2022. See also Yascha M. and Roberto S., *This is How Democracy Dies*, The Atlantic, 2020.
[22]Moncef Marzouki, *Une Structure Judiciaire Supranationale et Independante pourrait agir enc as de scrutins Truques et Rappeler les Etas au Respect des Libertes: Une Cour Mondiale de la Democratie, Liberation*, Nov 1999. Available at https://www.liberation.fr/tribune/1999/11/08/une-structure-judiciaire-supranationale-et-independante-pourrait-agir-en-cas-de-scrutins-truques-et-290047. (Accessed on 29th Oct. 2022).
[23]See Richard A. note 21.
[24]Ad Hoc Committee for the Establishment of an International Constitutional Court, Project of the Establishment of an International Constitutional Court (2013).
[25]Id.
[26]Id.
[27]Id.
[28]Id.
[29]Id.
[30]Id.
[31]See Richard A. note 21.

the countries of the world;
2. Inclusivity- this must include democracies, autocracies, and others in between. Even if autocracies are unlikely to abide by Court rulings, they must be included within the court's jurisdiction;
3. Representatives- the judges of the Court must represent the rich diversity of the peoples of the world, from regions to legal traditions to systems of governance and beyond;
4. Independence- the Court must be independent and be seen as independent;
5. Advice- the function of the Court is to give non-binding advice through advisory rulings, not to issue binding rules that are likely to be both unenforceable and disregarded.[32]

With the democracy decay on the rise in Africa and the lax of regional organisations and national frameworks to address the problem, the world needs to make Mohamed's vision a reality. Therefore, the idea of an International Constitutional Court should not be rejected without thinking about how and whether it would work.

However, despite the plausible idea of establishing the Court, there are several difficulties and challenges that are likely to stand in the way of implementing the proposal. The most obvious challenge is that turning this idea into a legal reality will require great effort and co-operation between states. This is however, quite difficult to achieve due to the current circumstances regionally and internationally that would undermine any effort for securing such an agreement.[33] Another major challenge that faces the smooth establishment of the court is how to convince states to give up, to a certain extent, their sovereignty in determining and regulating constitutional rights, to an international body established under the United Nations.[34] Realists like Morgenthau and Kenneth Waltz contend that states which subscribe to realism, abide by international law only when it is not inconsistent with their quest for power and national security interests.[35] If these laws are seen to be in conflict with their power interests, they violate them.[36]

Conclusion

Africa is yet to fully realize the potential of democracy and constitutionalism thus there is need to reconstruct Africa's democracy in a manner that can empower its people in realizing their human potential in a significant manner, and the most plausible way is by establishing an International Constitutional Court. However, the implementation of this idea is not anticipated to be a walk in the park.

Effective efforts ought to be made by the public and relevant institutions to convince governmental states of the feasibility of this Court in advancing the rights and freedoms which remain theoretically stated in the constitution.[37] Active participation by the people is desirable to curb the continued widespread of illiberal democracies influenced by elite theory of democracy in Africa. In a South African case, *Doctors for Life International v Speaker of the National Assembly and others*[38], Ngcobo, J who delivered the leading majority judgment spoke to the participation of the public in law making process and importance thereof as follows:

> *The international right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office… The international right to political participation reflects a shared notion that a nation's sovereign authority is one that belongs to its citizens, who themselves should participate in government, though their participation may vary in degree.*[39]

Regional organizations also ought to wake up and become fora for change. Africa desires strong and sustainable democracy. Politicians and citizens must play by the rules.

The author is a final year law student at Jomo Kenyatta University-Karen Campus. His research interests include but are not limited to public international law, administrative law, intellectual property law, company and tax law. He can be reached at adakidexter@gmail.com

[32]Ibid.
[33]See Laith K. N. note 19.
[34]Ibid.
[35]Fako J. L. *Challenges of Constitutionalism in Africa: Focus on Military Interventions in Three Countries in the 1900s*, ROSAS Vol. 5 No. 1 and 2. See also Morgenthau J. *Politics Among Nations: The Struggle for Power and Peace, 4th ed., New York*, 1967.
[36]Ibid.
[37]See Laith K.N., note 19.
[38](CCT12/05) [2006] ZACC 11; 2006 (12) BCRL 1399 (CC); 2006 (6) SA 416 (CC).
[39]Ibid.

The scourge of extrajudicial killings in Kenya: a perfect testament to impunity

By Odhiambo Jerameel Kevins Owuor

By Margaret Kerubo Orare

1) Introduction

Juliani, who is a Kenyan musician, produced a masterpiece in 2017 titled '**Machozi ya Jana**'.[1] Juliani did launch the song in memory of International Justice Mission Lawyer Willie Kimani, his client Josephat Mwenda and taxi driver Joseph Muiruri who were murdered in 2016. The song according to International Justice Mission was aimed to re-ignite and expand public debate on the need to have a radically transformed police service in Kenya. The song as well was meant to inspire a powerful movement that generates police reforms.

Unto an array of folks when the song was released, they noted that once again Juliani had lived up to his reputation with the hit song. For, after all, Juliani as of then had made a name for himself for his punch line songs that did advocate for social justice and good governance.[2] Here is a snippet of the song translated from Kiswahili to English:

First stanza

There is pain on the left side of my chest
Please pass more boxes of handkerchief
Tears turned the soil to mud where you all now rest
This isn't a Whatsapp group, where you can return when you 'left'
They cut your wings, you can't fly again
Clouds are grey, dressed in black, eyes are red
The colors of pain
It takes a long day to know that life is short

The Late Willie Kimani, Advocate of the High Court of Kenya

Life has no remote control, you can't fast-forward or rewind
..to a happier episode
Yesterday's tears won't go sour
We will wipe them with the joy of justice

Refrain

(They took you away
We no longer have you
*Rest… Rest in peace)*2*
We will meet again
Machozi ya jana

Humans have long devoted effort and attention to the making and consuming of art that portrays and conveys

[1]Available at https://icj-kenya.org/news/machozi-ya-jana-stop-extrajudicial-killings-campaign/ Accessed on 23rd November 2022
[2]Sylvia Ambani, *Juliani moves audience at emotional launch of new hit 'Machozi ya Jana'* (17th May 2017) retrieved from https://nairobinews.nation.africa/juliani-machozi-ya-jana/ Accessed on 23rd November 2022

Late Josephat Mwenda (L) and Joseph Muiruri (R)

misery. The ancient Greeks[3] were known for staging tragedies that were widely popular; to this day, films and novels that deal with heartache and despair become bestsellers and garner critical attention[4]. The phenomenon is seen across cultures and art forms. Classical music exhibits the phenomenon abundantly. Sadness in everyday life, however, is hardly pleasant. It is one of the six basic emotions (along with fear, happiness, anger, surprise, and disgust) and it results in feelings that most humans prefer not to experience. As is the case with other negative emotions, the importance of sadness throughout human history and across cultures can be explained through the evolutionary advantage that it confers.[5]

Sadness results from a perceived loss, such as the loss of a valued object, the loss of health, the loss of status or of a relationship, or the loss of a loved one. It is a complex bodily and neural state, resulting in feelings of low energy, social withdrawal, low self-worth, and a sense of limited horizon of the future.[6] Sad music can be defined objectively, based on its acoustical properties, and subjectively, based on a listener's interpretation of the emotion that the composer is assumed to have conveyed. The musical features generally associated with "sadness" include lower overall pitch, narrow pitch range, slower tempo, use of the minor mode, dull and dark timbres, softer and lower sound levels, legato articulation, and less energetic execution.[7] The emotional content of music can also be described in a bi-directional space of valence and arousal. In this view, sad music is defined as music with low valence and low arousal.[8] Others classify music as sad based on either the emotion that is perceived or the emotion that is induced. This is usually determined by directly asking participants which emotion they believe is being expressed by the music or which emotion they feel when listening to the music.[9]

In the past I have argued that art plays a vital place in our society in realizing good governance and agitating for positive change.[10] Art generally reflects the state of the society; in fact one can be right to note that art is a mirror to the society. Art is a reflection of society and culture. It helps us understand what we are as human beings and influences how we relate to each other. Art is an expression of our inner thoughts, feelings, and experiences. It's also an expression of creativity that can be used for self-reflection or social influence. As society expands and grows, art changes to reflect its new developments. Art reflects our history and documents the crucial component of our lives.[11]

Juliani's song though sad reveals something in the society which seems to be bedeviling Kenya. The major focus of the song is on matters of extrajudicial killing and enforced disappearance. The three folks the song alludes to died mysteriously and folks who were arrested for having taken part in their disappearance and murder were convicted this year. After more than five years. It took public interest for the case to be determined. Those convicted of the murder of the three persons were police officers. Thus, the question is, if those we have entrusted to protect us kill us are we safe? In whose hands are we safe? This paper delves into the issue of extrajudicial killings and enforced disappearance with the aim of offering potent and profound recommendations to combat the same.

2) Decoding extrajudicial killings and enforced disappearance in Kenya

Udi Sommer observes that extrajudicial killings are cases where a government kills citizens with no judicial oversight.[12] Every individual is guaranteed certain basic

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[3]Retrieved from https://www.iluli.eu/newblogs/the-science-of-sad-songs Accessed on 23rd November 2022

[4]Dalla Bella, S., Peretz, I., Rousseau, L., & Gosselin, N. (2001). A developmental study of the affective value of tempo and mode in music. Cognition, 80, B1-B10.

[5]Ekman, P. (1992), An argument for basic emotions. Cogn. Emot. 6, 169–200.doi: 10.1080/02699939208411068

[6]Damasio, A., and Carvalho, G. B. (2013), The nature of feelings: evolutionary and neurobiological origins. Nat. Rev. Neurosci. 14, 143–152. doi: 10.1038/nrn3403 See also, Damasio, A. (1999). The Feeling of What Happens: Body and Emotion in the Making of Consciousness. New York: Harvest Books.

[7]Juslin, P. N., and Laukka, P. (2004). Expression, perception and induction of musical emotions: a review and a questionnaire study of everyday listening. J. N. Music Res. 33, 217–238. doi: 10.1080/0929821042000317813

[8]Gabrielsson, A. & Lindström, E. (2010), The role of structure in the musical expression of emotions. In P. N. Juslin & J. A. Sloboda (Eds.), Handbook of music and emotion: Theory, research, applications (pp. 367-400). Oxford: Oxford University Press.

[9]Guhn, M., Hamm, A., and Zentner, M. (2007), Physiological and musico-acoustic correlates of the chill response. Music Percept. 24, 473–483. doi: 10.1525/mp.2007.24.5.473

[10]Jerameel Kevins, The Role of Art in Advocating for Good Governance, Human Rights and Rule of Law (January 2022) Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4226276 Accessed on 23rd November 2022

[11]Rina Factor, Art is a reflection on society and the times, Available at https://panthernow.com/2017/11/17/art-reflection-society-times/ Accessed on 23rd November 2022

[12]Udi Sommer & Victor Asal (2019) Examining extrajudicial killings: discriminant analyses of human rights' violations, Dynamics of Asymmetric Conflict, 12:3, 185-207, DOI: 10.1080/17467586.2019.1622026

human rights and liberties, and at the same time, the individual expects that his/ her rights are being respected. However, sometimes the state government, which is entrusted with the responsibility of protecting and promoting the protection of the human rights itself, violates such rights by committing custodial violence or extra-judicial killings. Extra-judicial killings can be referred to as unlawful killings of an accused by any government authority with no approval or order from the court. There are cases in which these killings take place because of an actual encounter (to prevent the accused from escaping), but there are also numerous cases where fake encounters take place, having different agendas; where the police try to twist the facts of the case so that they cannot be subjected to any questioning if such event occurs.[13]

Extra-judicial killings are those when the accused person is killed or executed illegally by the police officials in charge of the accused person before the judgment of the trial arrives. It can be said that the accused person in such cases is not even given a right to prove himself/ herself innocent before the court of law, which is illegal, as it violates the basic human rights guaranteed to every individual. The physical torture, sexual harassment, or mental torture of the accused by the police or any other officers in charge while the person is in custody also comes under the ambit of extra-judicial killings. The order for such extra-judicial killings always comes from the particular state government. Extra-judicial killings are nowadays seen often. Such killings can also be termed custodial violence.

On the other hand, enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law. It is characterized by three cumulative effects namely: deprivation of liberty against the will of the person; involvement of government officials, at least by acquiescence; refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person.[14]

A disappearance has a doubly paralyzing impact: on the victim, who is removed from the protection of the law,

frequently subjected to torture and in constant fear for their lives; and on their families, ignorant of the fate of their loved ones, their emotions alternating between hope and despair, wondering and waiting, sometimes for years, for news that may never come. Enforced disappearance has frequently been used as a strategy to spread terror within societies. The feeling of insecurity generated by this practice is not limited to the close relatives of the disappeared but also affects their communities and society as a whole.[15]

Victims of enforced disappearance are people who have literally disappeared; from their loved ones and their community[16]. They go missing when state officials (or someone acting with state consent) grab them from the street or from their homes and then deny it or refuse to say where they are. Sometimes disappearances may be committed by armed non-state actors, like armed opposition groups. And it is always a crime under international law. These people are often never released, and their fate remains unknown. Victims are frequently tortured and many are killed, or live in constant fear of being killed. They know their families have no idea where they are and that there is little chance anyone is coming to help them. Even if they escape death and are eventually released, the physical and psychological scars stay with them.[17]

According to Trial International:

> *Enforced disappearance is the act of making someone disappear against their will, often suddenly. It therefore*

[13]Priyal Jain, Extrajudicial Killings (3rd July 2022) Available at https://blog.ipleaders.in/extra-judicial-killings/ Accessed on 23rd November 2022
[14]United Nations Human Rights, Enforced Disappearance, Available at https://www.ohchr.org/en/special-procedures/wg-disappearances/about-enforced-disappearance#:~:text=An%20enforced%20disappearance%20is%20considered,deprivation%20of%20liberty%20or%20by Accessed on 23rd November 2022
[15]United Nations, More than a human rights violation against an individual, Available at https://www.un.org/en/observances/victims-enforced-disappearance Accessed on 23rd November 2022
[16]Dianne Webber, Addressing the Continuing Phenomenon of Enforced Disappearances (18th August 2022) Available at https://www.csis.org/analysis/addressing-continuing-phenomenon-enforced-disappearances Accessed on 23rd November 2022
[17]Available at https://www.amnesty.org/en/what-we-do/enforced-disappearances/ Accessed n 23rd November 2022

Late Zulfiqar Ahmad Khan

> *refers to the arrest, detention or abduction of a person, followed by a refusal to acknowledge the fate of that person. The agents of a repressive State often perpetrate this crime, which, with complete impunity, "gets rid" of people that it considers a "nuisance": no arrest warrant, no charge, no prosecutions. Outside the protection of the law, the victims find themselves in a situation of utter vulnerability and are especially at risk of being tortured or executed with complete impunity. The uncertainty inherent to enforced disappearance makes it a crime that is distinct from confinement or extrajudicial execution: the families' feelings swing between hope and disillusionment, which equates to true psychological torture.*[18]

The phenomenon of enforced disappearances first emerged as a state practice during the Nazi era but became widespread under the military regimes in Latin America during the 1960s. The Commission for Historical Clarification in Guatemala found that from the mid-1960s until the 1996 peace agreement, security forces and "death squads" carried out approximately 45,000 enforced disappearances against anti-government forces and suspected opponents, including members of Mayan communities. The governments of Argentina, Chile, Uruguay, Paraguay, Bolivia, Brazil, Ecuador, and Peru developed a transnational cooperation mechanism called "Operation Condor" to share intelligence about political dissidents for the purposes of carrying out transnational enforced disappearances. The practice of enforced disappearances was soon taken up by governments in other parts of the world, as well. In Sri Lanka, for example, Amnesty International estimates that there have been "at least 60,000 and as many as 100,000 cases of enforced disappearance" since the 1980s.[19]

Kenya has recently recorded several abductions that turned out to be murders when they were investigated to the end. The most recent case was the kidnapping of two Indian nationals – Zulfiqar Ahmad Khan and Mohamed Zaid Sami Kidwai – and their taxi driver Nicodemus Mwania from Mombasa Road. Detectives with the Internal Affairs Unit (IAU) now say the trio was killed and their bodies dumped in the Aberdare forest. The Indians were reported to have arrived in Kenya in April to join William Ruto's ICT campaign team, but they went missing on July 25 after they were abducted outside Ole Sereni hotel. Police say they were grabbed by armed men who were driving an unmarked motor vehicle.

Mr Khan was known to be active on social media. His abrupt silence raised eyebrows and his family began searching for him. He has never been found. Nine officers who served in the now-disbanded Special Service Unit are believed to know what transpired after the three people were abducted and are in custody as investigations continue. President William Ruto recently said the police unit was disbanded because it was linked to extrajudicial killings and forceful disappearances. The arrested officers include Peter Muthee Gachiku, Francis Muendo Ndonye, John Mwangi Kamau and Joseph Kamau Mbugua, who were taken into custody last week. The others are John Mwendwa Mbaya, David Chepcheng Kipsoi, Stephen Luseno Matunda, Paul Njogu Muriithi and Simon Gikonyo, who were arrested on Wednesday, October 26.

Another incident is that of Dr. Solomon Joloimat Lenengwesi. He went missing on July 8 and his case was taken up by Ipoa on August 22. The businessman had just attended a meeting with a friend at a city hotel and was heading to Kileleshwa when he was stopped by a vehicle that blocked his way. Four armed men jumped out of the car that had barred his way, introducing themselves as police officers before they left with him. Mr Lenengwesi was with his friend in his vehicle. The friend had to drive the vehicle to Mr Lenengwesi's home. He informed the family about what had transpired. The family called Mr Lenengwesi's phone number several times but it was not answered, said his sister Salome Lerosion.

The family reported the abduction at the Lang'ata Police Station but were referred to the Kileleshwa Police Station because the incident happened there. "We are asking the

[18]Trial International, What is Enforced Disappearance? Available at https://trialinternational.org/topics-post/enforced-disappearance/ Accessed on 23rd November 2022
[19]Dianne Webber, Addressing the Continuing Phenomenon of Enforced Disappearances (18th August 2022) Available at https://www.csis.org/analysis/addressing-continuing-phenomenon-enforced-disappearances Accessed on 23rd November 2022

Dead bodies retrieved from River Yala

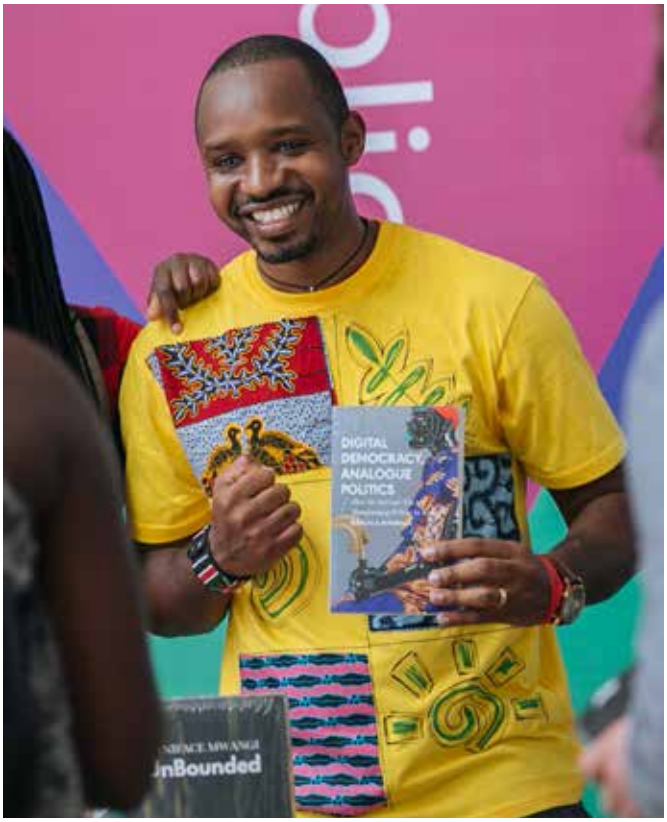
detectives following up on the matter to speed up the investigations so that we can get our brother back," she said. Mr Lenengwesi says in his LinkedIn profile that he was the chief executive at Global Investments Group. He was also the Bingwa Lottery executive chairman when the company partnered with Halifax Limited in a move that allowed Kenyan mobile phone users to buy lottery tickets via short message services, the first end-to-end SMS-based lottery in the country. He did not have any ongoing cases in court.

It is now one year and six months since Mr Mwenda Mbijiwe went missing on Saturday, June 12, 2021. Interestingly, despite the attention the matter was given by former Directorate of Criminal Investigations (DCI) boss George Kinoti, his disappearance was not included on a recent list issued by Ipoa. Mr Mbijiwe was a known security expert and a former Kenya Air Force officer, serving for several years before he left to start his own company. His disappearance also caught the attention of Rigathi Gachagua, who said that once the Kenya Kwanza coalition won the elections, they would get to the bottom of the matter. But this is yet to happen.

For four months, his phone number remained active on WhatsApp groups until Friday, October 14, 2021, when he left several groups, raising the question suggesting that someone else was using his mobile phone. His family says he disappeared en route from Nairobi to Meru County. He was going to see his mother. He went silent at 8 pm and his phone signal was traced to Thika, Kiambu County, detectives said. The car he was last spotted in was traced to Kamiti Corner on Sunday, October 20, 2021, with the doors vandalized, keys missing, and the radiator unplugged. Mr Mbijiwe went missing alongside Mathew Muhatia Namasaka, his longtime driver. Mr Mbijiwe had an ongoing case in court. In June 2019, he was charged with fraudulently acquiring money. He was accused of conning Mr Fadhili Abdi Mohamed of Sh150,000 by pretending that he could get his sister Shamso Abdirahman a job at the United Nations.

Dafton Mwitiki went missing on March 11, 2020, and close family members said he was in a hurry and was heading to seal a deal. His brother Victor said Mr Mwitiki was a shrewd businessman who co-owned a restaurant in Nairobi alongside a Chinese national. But police claimed he had engaged in a series of kidnappings in the city where families had to part with millions of shillings to secure the freedom of their loved ones. In two kidnapping cases that were investigated to the end, the phone numbers were registered to his name, putting him at the centre of the crimes. In the first case, a Chinese national was kidnapped on February 27, 2020, with the criminals demanding Sh100 million.

The plan was foiled by detectives from the National Intelligence Service (NIS) who tracked down the suspects and killed four of them, including an administration police officer. A source privy to the investigations said the communications equipment used in demanding the ransom was a sophisticated one but the line was registered to Mr Mwitiki. In the second case, a university student went missing in January 2020 and his kidnappers demanded a ransom of Sh100 million. The case was reported on January 13, 2020, at the Kilimani Police Station, but investigations were dropped days later after the family withdrew the case and paid the kidnappers Sh4 million after negotiations. The student's phone was switched off in Roysambu on Thika Road at 11.50 pm on the same day he went missing. Mr



Activist Boniface Mwangi

Mwitiki's vehicle was found in a thicket near Juja Oakland Estate after an unidentified person was found driving it. No one has been arrested in relation to the matter.

These are just few cases. Missing Voices, which is a civil society organization in its report, noted that in 2021 alone they documented 219 cases of police killings and enforced disappearances. "Out of these, 187 cases were of police killings, and 32 of enforced disappearances. Of the 32 cases of enforced disappearances, two of the victims were later found alive after campaigns by civil society organizations," Missing Voices said. Originally, there were 36 cases of enforced disappearances; four of these were found dead more than 24 hours after disappearing in police custody, two were returned alive and 30 remain missing. According to the Missing Voices, 219 cases of police killings and enforced disappearances resulted from 161 separate incidents. They singled out the Pangani Police Station of the infamous Pangani six as the station with the highest number of police killings in Kenya.

In, *Of River Yala Dead Bodies: Recrudescing National Coroners Service Act 2017: A Case Study*, I observed that River Yala has been the hub of dumping dead bodies. The locals therein do get dead bodies almost on a daily basis thrown. Overtime it is something that they are used to. Haki Africa Executive Director raised an alarm over the same and it is interesting the former Police Spokesperson was quick to dispute the numbers the Executive Director and Boniface Mwangi gave to the press. These cases thus highlight how enforced disappearance and extrajudicial killings are rife in Kenya.

3) A look at the report by parliament on extra-judicial killings and enforced disappearances in Kenya

Extra-judicial killings and Enforced disappearances have become a legislative concern in Kenya. The right to life and the right to the freedom and security of a person are constitutional guarantees, having been enshrined in Articles 26 and 29 of the constitution. Persons have also been guaranteed fair administration of justice under Articles 47 to 50 of the constitution. The recent spike in incidences of extra-judicial killings and enforced disappearances reflect an affront to the Kenyan constitution and has consequently piqued the interest of parliament. In response, the twelfth parliament Standing Committee on Justice, Legal Affairs and Human Rights conducted a probe into extrajudicial killings and enforced disappearances in Kenya and the report was subsequently adopted.

In identifying the factors that support the continuance of the incidences, the Standing Committee made inquiries from various stakeholders like relevant government agencies, victims' family members, and various civil society and human rights organizations. The committee especially focused on Nairobi, Mombasa and Kwale counties where such practices are rampant. In Kwale County, civil society organizations pointed out that there was a high number of extrajudicial killings and forced disappearances, but the victims' families lacked requisite documentation to prove their statuses and cases and so lacked access to government services. The Human Rights Agenda (HURIA) stated that Muslims were the main victims of this practice and that their religious practice of burying the dead within a day was a major hindrance to autopsy examinations and further investigations.

They further revealed that witnesses and especially village elders and leaders were intimidated and killed to hinder the provision of information to law enforcement agencies. In Mombasa County, numerous organizations including the law society, HURIA, Muslims for Human Rights (MUHURI), Haki Afrika, Maendeleo ya Wanawake, and the Human Development Agenda took part in the inquiry. The key submissions made indicated that rooted marginalization of the coastal communities was a key contributor to forced disappearances as the youth are recruited by terror groups. It was also submitted that the victims' families faced continued torture and harassment by law enforcers, breeding mistrust and fear among Mombasa residents. That investigations and actions against perpetrators were delayed. These organizations gave various recommendations including ratifying the International Convention for Protection of all persons from enforced Disappearance, adopting the recommendations of the Truth, Justice, and Reconciliation Commission (TJRC), providing reparations to victims' families, establishing a judicial inquiry into the extrajudicial killings and forced disappearances in the coastal region, empowering IPOA to prosecute cases that are reported on extrajudicial killings and forced disappearances, publicizing the amnesty policy and supporting the organizations promoting de-radicalization.

In Nairobi County, organizations that made submissions include the Amnesty International, Haki Afrika, the Defenders Coalition, the Independent Medico-Legal Unit, and the International Justice Mission. The key submissions made included the fact that numerous other security agencies besides the National Police Service were responsible for extrajudicial killings and forced disappearances. Such agencies include the Kenya Coastguard Service the Kenya Prison Service, Wildlife Service and the Kenya Forestry Service. It was noted that such other agencies were not under the supervisory ambit of the Independent Policing Oversight Authority (IPOA), hence lack of oversight and accountability. It was also submitted that numerous cases still remained uninvestigated and neither had families been compensated. The Defenders Coalition noted that Human Rights Defenders are not accorded state protection as evidenced by the violence meted on them including life threats and evictions by landlords. It was also noted that the existence if rogue police officers (dubbed "killer cops") in the Nairobi slums was one of the leading contributors to this practice. The social justice centers proposed the devolution of IPOA to all counties, and the operationalization of the National Coroners Services Act and the Prevention of Torture Act.

Various Government Agencies also took part in the inquiry and submitted their reports. IPOA submitted that it had made numerous recommendations regarding the use of force and firearms by police officers but the progress was restrained, hence increasing the incidences. It pointed out that it faced many challenges in the execution of its mandate, such as overlap of functions with the Directorate of Criminal Investigations, abuse of the rule of law, intimidation of witnesses, limited resources, lack of oversight on other security agencies, and incorrect entries of police records. The Office of the Attorney General and Department of Justice noted that while there was a robust institutional and legislative framework to address extrajudicial killings and forced disappearances, three challenges posed a hindrance to the elimination of the practice. These are: lack of seamless cooperation between various investigative agencies, lack of an independent forensic analysis laboratory that can be utilized by IPOA, and non-operalization of the victim protection fund caused by failure to enact the Victim Protection (Trust Fund) Regulations by the Treasury. The Office of the Director of Public Prosecutions submitted that it had adopted a multi-agency approach by working with other agencies like IPOA, the DCI, and the NPS to address extrajudicial killings and forced disappearances. It reported

that it had established a civil rights division to address issues on action or inaction by law enforcers, signed a MOU with IPOA, collaborated with Haki Afrika and the International Justice Mission, collaborated with the office of the High Commission for Human Rights, and established the Witness and Victims of Crime Unit to work with the Witness Protection Agency.

After receiving the submissions, the Standing Committee classified their finds into three categories: legislative frameworks, policy frameworks, and administrative frameworks. Under legislative frameworks, the committee made the following findings: Kenya is yet to ratify the International Covenant for the Protection of All Persons from Enforced Disappearances, the National Coroners Services Act and the Prevention of Torture Act are yet to be Operationalized, the regulations envisaged under the sixth schedule of the NPS Act on the use of force are yet to be enacted by the cabinet secretary concerned, There is an overlap of functions between IPOA and the DCI under Section 24€ and 35 of the NPS Act and Section 6(a) and 25 of the IPOA Act, and that there is no oversight mechanism over other security agencies besides the NPS. The committee made the following findings on policy frameworks: that Kenya is yet to develop a National Security Policy, that some security organs have however developed some sector-specific policies, and that Kenya lacks a national policy on extrajudicial killings and enforced disappearances. The following administrative findings were outlined by the commission: the Witness Protection Agency never protects witnesses during the investigative process of cases hence hampering the progression of investigations, there is lack of cooperation between institutions handing violation of human rights on extrajudicial killings and enforced disappearances, there is no independent forensic analysis laboratory, victims' families cannot access due process and are denied funeral permits to mourn their loved ones, IPOA lacks adequate resources and is understaffed, and that the Victim Protection Fund is yet to be operationalized.

Based on these findings, the Standing Committee made 21 recommendations. Some of these are highlighted below. The legislative recommendations include: ratifying the International Convention for the Protection of all Persons from Enforced Disappearances, amending the IPOA Act and the NPS Act to give IPOA the primary role of investigating crimes committed by police officers, amending the IPOA Act to expand the ambit of IPOA's civilian oversight and investigation of crimes top cover other security agencies, the interior CS and IG to make regulations on the use of force and firearms as required by the NPS Act, and that the treasury CS and the AG to make regulations and bring into operation the Victim protection Trust Fund under the Victim Protection Act. The policy recommendations were that the National Security Council develops a national security policy and the IPOA develops a national policy on policing oversight with the AG. The administrative recommendations included, inter alia, establishing a multi-agency taskforce having members from the ANPS, NCAJ, IPOA, KNCHR, ODPP, and NPSC, operationalizing the National Coroners Services Act and the Prevention of Torture Act, operationalizing an independent forensic analysis laboratory, Review the Witness Protection Act to ensure protection of witnesses during crime investigation, fast-tracking the payment of court awards and reparations to victims of extrajudicial killings, and ensuring the police officers bear tags with their names and service numbers whenever discharging police operations.

4) Recommendations on combating extrajudicial killings and enforced disappearances in Kenya

1. *Adopting and implementing the recommendations made by the Standing Committee on Justice, Legal Affairs and Human Rights*

The committee makes robust findings and recommendations that are instrumental in the elimination of the deep-rooted practice of extrajudicial killings and Enforced Disappearances in Kenya. These include: ratifying the International Convention for the Protection of all Persons from Enforced Disappearances, ratifying the International Convention for the Protection of all Persons from Enforced Disappearances, ensuring the police officers bear tags with their names and service numbers whenever discharging police operations, and developing a national policy on policing oversight.

2. *Fast-track the operationalization of the National Coroners Service Act of 2017*

The National Coroners Service Act will play a huge role in the elimination of extrajudicial killings in Kenya. This can be deduced from its objects as outlined in Section 3, which include providing for the establishment of the National Coroners Service and appointment of coronial officers, providing for the investigation of reportable deaths to determine the identities, time and dates of death of the deceased persons as well as the cause and manner of their deaths, to assist in formulation of policies by offering advise to the government, establishing investigation procedures for reportable deaths, among others.

3. *Increase the budgetary allocation to support the operationalization of the National Coroners Service under the relevant Act*

Section 9 of the National Coroners Service Act establishes the National Coroners Service, which is under the Coroner General. It is an independent body. Pursuant to Section 28, the service is clothed with jurisdiction to investigate a cause of death under various circumstances. The most notable ones include when a deceased person is reported to have died of a violent or unnatural death, when a deceased person is reported to have died from a sudden death and the cause of such death is not known, and when a deceased person is reported to have died when in police or military custody. In this respect, the Service has an important role to play in the investigation of extra-judicial killings in Kenya as it can carry

out independent forensic documentation and reporting. IPOA will not have to rely on the police to analyze a scene of crime, in which case it becomes a hindrance to accessing the police files when the perpetrators are police officers.

4. *IPOA should be given the power to prosecute officers found to be involved in extrajudicial killings*

One of the challenges IPOA faces as seen in their submissions is that their recommendations to prosecute and discipline police officers whom their investigations find culpable are never implemented in time. This makes the Oversight Authority toothless, as their investigations lead to nothing. For more efficacy, they should be given the power to prosecute those officers whom they find guilty.

5. *Establishment of a database to track investigations and prosecutions*

The Inspector General of Police should be required to establish and maintain a database that contains information regarding police killings and forced disappearances in Kenya. Such a database should also give updates on the progression of investigations and prosecutions of police officers who are suspected to be involved in extrajudicial killings and enforced disappearances in Kenya.

6. *Establishment and adoption of a policy aimed at protecting activists and defenders of human rights in Kenya*

Continuance intimidation and killing of human rights defenders reduces their ability to voice their opinions and investigate matters extrajudicial killings and forced disappearances. Consequently, relevant civil society organizations like the KNCHR and the Defenders Coalition should work with concerned government organizations like the National Police Service and the Witness Protection Agency to develop and adopt working policy meant to protect human rights defenders. This will guarantee their safety.

7. *Establishing an independent internal affairs division in the NPS*

The division should be independent an autonomous and should consist of fellow police officers that are tasked with the investigation of complaints lodged against other police officers.

5) Conclusion

All encounter killings must be investigated with the utmost diligence as such killings affect the credibility of the rule of law. Rule of law must be ensured at all costs in every case across the country. It is the duty of the state government to adhere to the rule of law and work in accordance with the rule of law. There is a need to train police officials in such a way that they can handle every unforeseen situation and protect the accused in police custody. As encounter killings are increasing day by day, resulting in human rights violations. Thus, there is a need to instill the importance of human rights in the minds of the police officers executing these unlawful killings as well as the public who engage in these atrocities.

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

Margaret Kerubo Orare is a finalist law student at University of Nairobi, Parklands Campus.

"The freedom of one single human spirit": On the legacy of Chief Justice UU Lalit

By Gautam Bhatia

The final chapter of Ursula K. Le Guin's legendary science fiction novel, The Dispossessed, features a conversation between the protagonist, Shevek, who is being hunted by his pursuers, and a representative of the Terran race, who can save his life. Shevek's discovery of the General Temporal Theory – which would make possible instant communication across space – places him in a strong bargaining position with respect to the Terrans, who desperately want it. Shevek, however, refuses to drive a hard bargain, and the following exchange takes place:

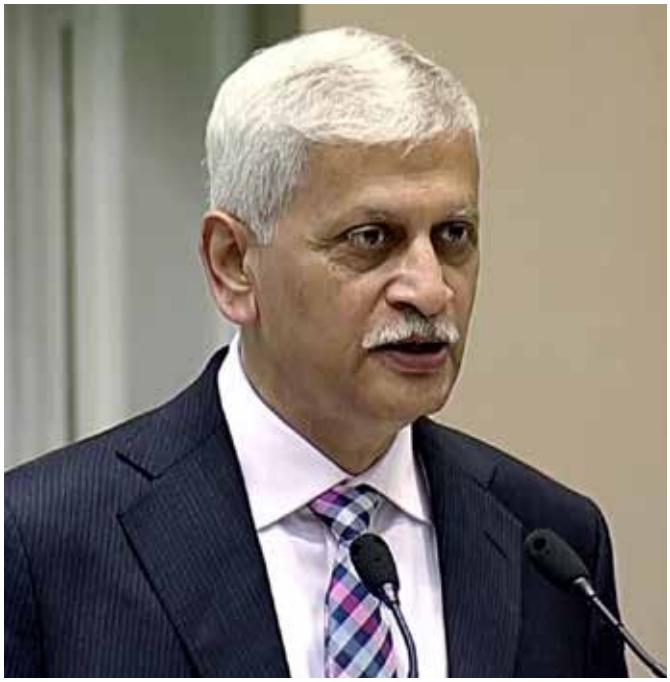
"I only ask your help, for which I have nothing to give in return."

"Nothing? You call your theory nothing"

"Weigh it in the balance with the freedom of one single human spirit," he said, turning to her, "and which will weigh heavier? Can you tell? I cannot."

When we look back at the brief, four-month legacy of Chief Justice UU Lalit, the ending of The Dispossessed is perhaps an appropriate framework to think through what has happened. It is true that four months is but a wrinkle in time. It is also true that these are four months in which a lot has happened. The live-streaming of Supreme Court proceedings, the setting up of Constitution Benches, regular listings and mentionings, and the resurrection of cases long in cold storage are all things that people will point to when assessing the Chief Justice's legacy. Undoubtedly, when it comes to the administration of the Supreme Court, as an institution, the brief, flickering tenure of CJI Lalit has accomplished significantly more than all of his immediate predecessors, put together.

But in my mind, we must begin with the extraordinary events of October 14 and 15, 2022. On October 14, the High Court of Bombay handed down a judgment acquitting G.N. Saibaba and five others in a case under the Unlawful Activities Prevention Act ["UAPA"]. The basis of the High Court's judgment was that a vital procedural safeguard under the UAPA – the requirement of a sanction to prosecute, following an independent review of the evidence by the appropriate authority – had not been adhered to. Consequently, everything that came after – including the trial – was a nullity. In the result, Saibaba and five others



Chief Justice UU Lalit

– who had spent more than five years in jail at the time of writing – were to walk free.

The High Court's judgment, however, carried a significance beyond simply the liberty of six individuals. By now, the weaponisation of the UAPA for political repression has been well-established. Its loose language and onerous bail provisions – facilitated by pro-executive judicial interpretation – have enabled the extended incarceration of individuals (including political opponents) for months and years, as well as the occasional conviction on flimsy grounds (Saibaba himself being an example). In this background context, the Bombay High Court's order sketched out a crucial line in the sand: if the State wanted to prosecute under the UAPA, it would have to go by the book: the statute's procedural safeguards would need to be complied with to the letter. Thus, the High Court's order was, in essence, a judicial pushback against State impunity: Saibaba and his fellow prisoners were to be set free because the State had failed to meet the requirements needed to trigger the draconian, substantive provisions of the UAPA.

That freedom, however, turned out to be an illusion. That same evening, the case was "mentioned" before the still-sitting bench of Chandrachud J. Chandrachud J. correctly observed that there was no tearing hurry to list an appeal against a reasoned judgment of acquittal/discharge, and nor could such a judgment be stayed for the asking. But of course, the State then had the liberty to approach Chief

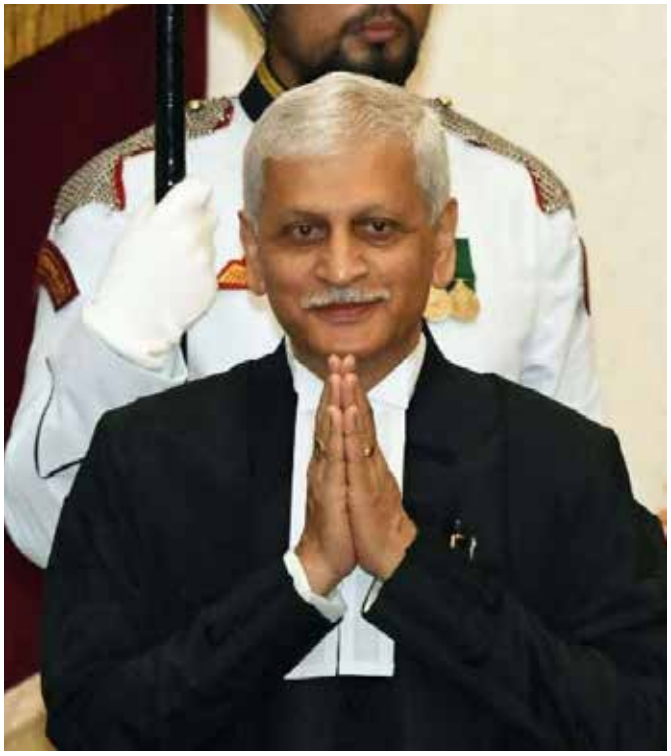
Justice Lalit for an urgent listing, which it did. The Chief Justice complied. The case was listed the next morning, which was a Saturday morning (a non-working day at the Supreme Court), before a "special bench" of Justices MR Shah and Bela Trivedi (what is it with our Chief Justices and these Saturday morning listings?). It is important to note that these two Justices did not normally sit together, and Justice MR Shah did not normally handle the criminal roster.

After a hearing, this bench of the Supreme Court "suspended" the Bombay High Court's order, on the basis that the offences were serious, and that the High Court had not considered the "merits" of the case (instead proceeding on the technicality of sanction). As a result, despite having a hundred-page reasoned order of a constitutional court sanctioning their liberty, the six prisoners (one of whom – GN Saibaba – is 90% disabled) were condemned to stay in jail.

As many, many people have pointed out, the Supreme Court sitting on a Saturday morning to "suspend" an order of discharge/acquittal, and keep people in jail was historically unprecedented. Indeed, there is something profoundly disturbing about the Supreme Court holding special Saturday morning sittings against individual liberty (as a certain senior counsel who often represents the State is fond of saying, "would the heavens have fallen" if the Supreme Court had waited until the next working day?). But even more troubling is the manner in which this "special" bench trashed the vital procedural safeguards under the UAPA as mere technicalities. While the High Court had drawn a line in the sand against State impunity, the Saturday morning "suspension" reads like a paean to State impunity, not only in its reasoning, but also in the outcome: pending consideration by the Supreme Court of the "larger issues" involved, despite having a High Court judgment in their favour, GN Saibaba and others will stay in jail.

Now, the question, of course, is what responsibility does CJI Lalit bear for this? Naturally, the primary responsibility lies with the authors of the order – Shah and Trivedi JJ. However, as I have written previously – in my assessment of the legacy of CJI Ramana – when we consider the record of a Chief Justice, we need to consider their actions as the "master of the roster" – i.e., the position that gives them unlimited and arbitrary power to decide when a case will be heard, and who will hear it. The opacity with which the Office of the Chief Justice operates means that we will not know how, precisely, this decision was made, and what the reasons for it were. However, what we do know is:

The extraordinary decision to list the State's appeal against a reasoned order of acquittal/discharge on a Saturday



morning – before the High Court's order could be implemented – was CJI Lalit's decision, made in the exercise of his powers as master of the roster. I have questioned the urgency above; here, I will add that, for a variety of reasons, Courts generally tend not to send released people back into jail; however, it is significantly easier for a Court to suspend an acquittal/discharge which has not yet been implemented, and when the individuals involved are still in jail. The Saturday morning order accomplished precisely this. The decision to list it before a "special" bench of two judges, who did not normally sit together, one of whom was not normally on the criminal roster and who – indeed – was previously on record making statements that have raised serious concerns about the separation between the judiciary and the executive, was likewise a decision made by CJI Lalit. It is true that the roster is not always followed to the letter, and is subject to the orders of the Chief Justice, but that only amplifies the point I am making here.

As I have written previously, in a poly-vocal Supreme Court with more than twenty-five members, there will be some judges who will be reflexively pro-State in matters of individual liberty, and there will be other judges who will be reflexively pro-individual. While there is nothing untoward about this – judicial ideology is inevitable, and is distributed across the Court – it is here that the powers of the Chief Justice as master of the roster – the power to assign cases – turns into a power to significantly influence the outcomes of cases. This is specifically borne out by the fact that on Friday evening, Chandrachud J expressed severe reservations about the Supreme Court "suspending" a reasoned High Court order of acquittal/discharge, but the next morning, two other Justices saw no compunctions in doing so. When you add to this the extraordinary Saturday morning listing and the composition of a "special" bench for just this case, the upshot of all this is that CJI Lalit's actions as the master of the roster on the 14th of October 2022 had a significant and non-trivial impact on the extraordinary judicial denial of liberty to GN Saibaba and five others. For that reason, notwithstanding the fact that he did not personally sit on the bench, the circumstances in which this order came about must play a significant role in the assessment of his legacy, as he leaves the Court.

For it is an order that characterises the executive Court at its worst: a Court that speaks the language of the executive, and that has – for all practical purposes – become indistinguishable from the executive. So if you were to ask yourself that basic question: did CJI Lalit leave the Court better than he found it, the events of October 14 and 15 must have their say: and what they say is that when it comes to the crunch, when the stakes are high, the Supreme Court is still an executive Court, and indeed, perhaps even more of an executive Court than it was before: because now not even reasoned High Court judgments setting people free from jail are safe from being "suspended" in under twenty-four hours.

But then you may ask: what of the balance sheet? What of the other things that CJI Lalit did as Chief Justice, which I flagged at the beginning of this post, and which will no doubt feature heavily in the encomiums that accompany a judicial retirement? He granted bail to Teesta Setalvad and Siddique Kappan, two of the more egregious cases of State impunity in recent times. He listed many cases (although, like his predecessors, he steered clear of listing the Article 370 challenge, and – regrettably – downgraded the electoral bonds challenge to a two-judge bench). He set up many Constitution Benches (one of which even resulted in a judgment on the day of his retirement, albeit in favour of the State). He kick-started the live-streaming of court proceedings.

These are all good things, no doubt. But does organisational competence make up for the deprivation of freedom, as if the two things form part of the same currency, to be traded against one another? Or is freedom itself a tradable commodity, where bail to one individual justifies keeping six others in jail? Is not a live-streamed executive Court, which sits on a Saturday morning to suspend an order of acquittal/discharge, still an executive Court? And so then, at the end of the day, when considering the "good" that Lalit CJI did, we are left to ask ourselves the question that Shevek asked the Terran ambassador:

Weigh it in the balance with the freedom of one single human spirit, and which will weigh heavier? Can you tell? I cannot.

This article was first published in the Indian and Constitutional Law Philosophy Blog: https://indconlawphil.wordpress.com/2022/11/07/the-freedom-of-one-single-human-spirit-on-the-legacy-of-chief-justice-uu-lalit/

Ride or die?

By Florence Mithamo

Introduction

As the economic climate worsens, it is conceivable that an increasing number of Kenyans would choose cycling as a mode of transportation. Similarly, companies like Uber Eats and Glovo choose to use cyclists to transport short-distance deliveries to reduce operational expenses. Given this, it is logical to conclude that, yes, there may be an increase in the number of cyclists using the roads. The question is, are we prepared for this? This essay aims to shed light on the current cyclists' enigma on Kenyan roads as well as possible solutions.

Background of the issue

It is now a normal occurrence that cyclists are perceived as less "worthy" road users compared to motorists. To defend this position, one may term it as a manifestation of social classes on the roads. With the less economically empowered- the cyclists, against the motorists with a stronger financial muscle. The aforementioned position gradually solidified as the number of motorists increased with the authorization of car importation by the government as well as the booming cab business within Nairobi and its outskirts. Therefore, the number of cyclists on the roads as compared to motorists is a drop in the ocean.

Cycling is viewed as a sport and a leisure activity in the more affluent areas of the city, like Kilimani and Upper Hill. Contrarily, cycling is frequently used as a form of transportation in the city's lower socioeconomic areas to save money on daily bus fares (this is typically done by people who work in the city and must commute back and forth); unfortunately, most of these cyclists hardly ever wear protective gear on the roads because it is prohibitively expensive as it must meet Kenya Bureau of Standards requirements.

Steps taken thus far

To accommodate bicyclists and pedestrians, who are regarded to be the most vulnerable category of road users, various legislative changes have been enacted. One is that new policy modifications mandate the construction of roads with cycling lanes. This policy has been implemented in some areas of the city, however on roads like the Ngong Road and Thika Superhighway, the lanes have poor intersection designs for cyclists and do not meet the recommended width of a bike lane, which is 1.5 metres (or 5 feet) from the face of a curb or guardrail to the bike lane stripe, and if the [longitudinal] joint is not smooth, 1.2 metres (or 4 feet) of the ridable surface.[1] The majority of these lanes inevitably come to an end, forcing the cyclists to ride back on the main road, which is unsafe because the majority of Kenyan roads are not wide enough to safely fit both automobiles and bicycles.

Another noteworthy development is the Nairobi City County Government's (NCCG) pledge to devote at least 20% of its current and future transport budget to non-motorised transportation (NMT), in this instance bicycles. This entails building and maintaining transportation amenities. The NCCG additionally committed itself to collaborate with the private sector to raise money for NMT and to ensure that any estate included the necessary provisions for NMT modes to link to existing or future networks, such as street lighting, bicycle parking and tree shading.[2] The Nairobi Metropolitan Services (NMS) executed NCCG's pledge by allocating 1.5 billion to build sidewalks and bike lanes throughout the city. However, this progress seems to have stalled this year even after the announcement of the allocation of 1.5 billion to build sidewalks and bike lanes in city estates.

[1]National Association of City Transportation Officials, Urban Bikeway design guide < https://nacto.org/publication/urban-bikeway-design-guide/bike-lanes/conventional-bike-lanes/ > accessed 2 November 2022.

[2]The Kenya Alliance of Resident Associations, 'Non Motorized Transport (NMT) Policy for Nairobi The popular version' < http://www.kara.or.ke/Nairobi%20NMT%20Policy%20Popular%20Version.pdf > accessed 2 November 2022.

Legal framework

The Traffic Act only goes as far as defining the term "bicycle"; which it describes as *"any bicycle or tricycle that is not self-propelled"*. Relative to other road users, it does not explicitly address cyclists as road users. Likewise, the rest of the Act makes no mention of the rights of bicyclists in relation to those of other road users; this depicts that cyclists are among the lowest rungs of road users. Consequently, this stance is to a large extent unconstitutional as *"Every person is equal before the law and has the right to equal protection and equal benefit of the law.*[3]" Sadly, there are not nearly as many laws and highway regulations protecting cyclists as road users as there are for other road users, thus they do not get the recognition they deserve.

The Highway Code provides for road guidelines that cyclists should follow on the road for their personal road safety. In as much as this is the case, most of these guidelines are there to make cyclists less of a nuisance to other road users, especially the motorists. One such guideline is *"A light-coloured or fluorescent clothing which helps other road users to see you in daylight and poor light."* One may agree that indeed a cyclist has to ensure their visibility on the road ultimately for their safety but if you look at it from a fair view one may state that the wearing of light- coloured clothing is to enable visibility of the nuisance so that motorists may know what to avoid.

There are no adequate highway regulations ensuring the safety of cyclists as users of the road. Examples of some of the fundamental provisions lacking are the lack of a legally suggested safe cycling space and a recommended speed for automobiles while approaching cyclists. The present situation is a blatant indicator of how lowly regarded cyclists are.

A noteworthy element is the harassment cyclists' face on the roads, and in most instances this harassment comes from motorists. One major reason for this is the narrow roads where both motorists and cyclists end up using to get by and reasonably speaking vehicles being bigger in space and mass will occupy a larger space consequently pushing the cyclist off the road.[4] Such conduct illustrates the absence of the responsibility to exercise care for other road users (in this case cyclists). This, in a wider sense, endangers the cyclist's right to life. Some drivers take it a step further by being verbally abusive to cyclists on the road. Such conduct undermines the cyclist's right to human dignity, which ought to be acknowledged and safeguarded. Human dignity cannot be conferred by the state because it is inherent to every individual in their capacity as humans;

rather, it can only be safeguarded and promoted by the state. Human dignity is founded on the idea that people should be treated with respect and consideration simply because they are human. Sadly, such unbecoming behavior is not unfamiliar to cyclists on the road or other users of the road. The duty of care is disregarded and cyclists are seen as being less deserving of basic road safety. The demeaning treatment they face on the roads threatens their right to dignity as held in *Republic v Kenya National Examinations Council & Another ex-parte Audrey Mbugua Ithibu where the court held that "human dignity can be violated through humiliation, degradation or dehumanization"*.[5] Merriam Webster dictionary defines humiliate as *"to reduce (someone) to a lower position in one's own eyes or others' eyes"*.[6] This is what transpires on the roads as motorists hurl insults onto the cyclists or when motorists try to intimidate the cyclists by veering them off the roads. Such treatment is humiliating since the cyclist's status is degraded to one that is viewed as less deserving. Additionally in *Ahmed Issack Hassan vs. Auditor General*, the Court held that:

> *"… the right to human dignity is the foundation of all other rights and together with the right to life, forms the basis for the enjoyment of all other rights… put differently thereof, if a person enjoys the other rights in the Bill of rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated".* [7]

This case law suggests that the rights to life and dignity are both fundamental freedoms that form the basis for all other rights. Far more emphasis should be placed on protecting these rights since they subsequently influence a person's overall quality of life. Likewise, if the right to life is in jeopardy, the right to dignity is likewise in jeopardy.

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[3]Article 27 (1) Constitution of Kenya, 2010.

[4]Kizzi Asala, *The COVID-19 Pandemic sees a growing cycling trend in Nairobi* (19 February 2021) < https://www.africanews.com/2021/02/19/the-covid-19-pandemic-sees-a-growing-cycling-trend-in-nairobi/ > accessed 2 November 2022.

[5](2014) e KLR.

[6]Merriam Webster, *Humiliate* < https://www.merriam-webster.com/dictionary/humiliate > accessed 2 November 2022.

[7] [2015].

Regrettably, for some, this does not always work out well; some cyclists pass away, and some suffer from long-term injuries that make it difficult for them to maintain themselves and their dependents.

Progress in other parts of the world

In contrast to other countries, Colombia boasts the Bogota Bike Path Network, a system of about 300 kilometers of secure riding lanes. Such is an indication of how well cycling is taken by the locals and how proper policies are put in place to set aside funds for cycle track construction and maintenance that run for a large number of kilometres. In addition to this, there are proper highway codes that provide for cyclists' safety from other road users.

One that is well known is the recommended 1.5 metres distance between the cyclist and the motorist on the road and insurance policies that cater to the needs of cyclists.[8] Moreover, countries such Netherlands have The Rotterdam route, which is 46 kilometers long and is accessible from various parts of the city. Such proper consideration of cyclists is lacking within our borders. Taking the example of Germany which has set plans in motion to invest about $ 1.38 billion in cycling considering that this new investment comes on top of other existing funding investments such as €170 million for cycle highways, and €46 million for the national cycle tourism network. This new $ 1.38 billion investment project is geared towards the construction which includes setting up cycle tracks, bike boxes, and lighting lanes among other things as an effort to deal with climate change which is now a hot topic globally.[9] Well one cannot expect a third-world country like Kenya to pump in so much money into cyclists funds' investments but one can expect progress in the right direction which in this case means setting aside some part of taxpayers' money into the construction of the bare minimum, which are the cycle tracks and lighting lanes. Such development is necessary not only in Nairobi City but also in other urban regions like Mombasa and Kisumu, which are both booming urban areas.

What can be done?

Despite all these new regulations, a growing number of people are still discouraged from using bicycles for transportation. One reason is that the recommended 1.5 metres between a bicycle and a car is rarely considered by the majority of drivers. And most Nairobi drivers have the "barabara ni ya magari," mentality which translates to "the road is for automobiles". This gives the impression that most cyclists are a waste of space. Therefore, even when fully equipped with safety gear, a cyclist's safety cannot be entirely assured. Although complete safety cannot be guaranteed, there are steps that can be taken to reduce the risks.

One measure is the building of wider roadways so that even when the bike paths end, the vehicle may still give the cyclist some room to move around. The second is raising public awareness; driving schools may have a segment teaching budding drivers about the ideal spacing between cyclists and motorists and about common road courtesy. The implementation of urban design that allows for cycling tracks with significant lengths of kilometres is another step worth mentioning. Most cycle tracks are a few kilometres long, which forces cyclists back onto the main road, which can be dangerous. The creation of comprehensive, thorough, and express legislation that provides protection for the rights and safety of bicyclists on the roads is the other core that should be taken into account. Such laws will, among other things, seek to provide a remedy to this vulnerable minority.

Conclusion

Given the aforementioned difficulties, it is reasonable to conclude that we are not prepared for the increase in cyclists using the roads. However, there is still hope, as additional funding may be set aside for the creation and upkeep of cycling lanes, public awareness campaigns, as well as the formation of comprehensive laws to protect cyclists' rights as road users. In the end, society needs to adopt a different perspective on cyclists.

The author is a final-year law student at the University of Nairobi.

[8] Charlie Allenby, *How Bogota became a world beating cycling haven* (4 November 2021) < https://www.timeout.com/news/how-bogota-became-a-world-beating-cycling-haven-110421 > accessed 2 November 2022.

[9] Phil Latz, *German climate package earmarks $ 1.38 billion for cycling* (11 March 2021) <https://micromobilityreport.com.au/infrastructure/policy-and-funding/german-climate-package-earmarks-1-38-billion-for-cycling/ > accessed 25 October 2022.

COP27 key outcomes: progress on compensation for developing countries, but more needed on climate justice and equity

PHOTO BY MOHAMED ABDEL HAMID/ANADOLU AGENCY VIA GETTY IMAGES

Climate activists held demonstrations in front of International Convention Center to protest the negative effects of climate change.

By Imraan Valodia

By Julia Yaylor

There were high expectations for COP27, the 27th Conference of the Parties to the UN Framework Convention on Climate Change.

COP conferences broadly provide a platform for the negotiation of international climate change agreements. This was to be the first COP held in Africa since 2016. It was also framed as the implementation COP, which would lead to action.

COP27 was expected to make progress on "loss and damage". This is financing to compensate developing countries for the harm to the climate that has been caused primarily by the developed world.

The outcome – the establishment of a new fund for loss and damage – is a relief for climate activists and developing countries.

Below we unpack this, and other key outcomes from this crucial climate change conference.

Urgency, justice and equity missing in negotiations

Outside the formal negotiations, there were clear and consistent messages about the urgency of climate action from scientists, NGOs and climate activists. They gathered at the event and in small, peaceful protests. The same urgency wasn't seen among party negotiators.

Inside the formal negotiations, mostly wealthy country parties pushed back on immediate action in these areas:

- support for people displaced by extreme events caused by climate change
- strong and transparent governance of carbon markets
- the phasing out of all fossil fuels.

This disconnect was striking and has led to significant delays and setbacks in agreements relevant to climate justice.

Further, the decision-making process raises questions about the equity of different voices at COP, and whose reality counts. All decisions within COP are made by consensus, not a vote. Decisions can be overruled by one dissenting party. There's also inequality in representation of countries and the prevalence of lobby groups at COP27. Certain countries can support large teams of party delegates and technical support. Poorer countries can't.

New fund for loss and damage

A significant achievement of COP27 was an agreement to establish a new fund for loss and damage finance.

This negotiation was very contentious, with some parties threatening to walk out at various points. The central tension was between developed and developing countries. Developed countries did all they could to avoid a new financing entity for loss and damage.

Developing countries are largely represented by the G77 and China. This is a negotiating group of 134 developing countries initially founded by 77 countries in 1964. Rich nations tried to divide the G77 and China negotiating group by arguing that China, India, and other less vulnerable countries should also have to pay for loss and damage.

It's true that China and India are currently large emitters of greenhouse gases, but this approach shows a refusal to acknowledge the historical cumulative emissions mostly attributed to the early industrialisers.

The responsibility for cumulative emissions does vary based on which emissions are counted, how they are counted, and whether it is analysed on a per capita basis. However, North American and European regions stand out as the largest emitters.

While the agreement on a fund for loss and damage is a significant step forward, a lot of work needs to be done before it is set up. The parties agreed to set up a transitional

committee to make recommendations for adoption at COP28, in November 2023.

Technical assistance to address loss and damage
An additional positive move was made with the agreement on the institutional arrangements to operationalise the Santiago Network, which was established at COP25 to help developing countries identify their technical needs and connect with providers of assistance to address them. For example, in the case of flooding, improved systems to prepare and implement early warning systems and evacuation processes.

The next step will be to identify the host for the Santiago Network Secretariat.

No decision on the governance of the Warsaw International Mechanism
The Warsaw International Mechanism (WIM) was established in 2013 to provide coordination and encourage dialogue on loss and damage. Unfortunately, discussions on the governance of the WIM went nowhere.
Parties could not agree on whether it should be under the governance of COP or the Paris Agreement.

Developed countries want the mechanism to be governed under the Paris Agreement alone. Developing countries want a dual governance system.

Governance under COP would hold developed countries to account, whereas the Paris Agreement has a paragraph which excludes liability and compensation.

Carbon market governance
There were similar tensions in the discussions around the governance framework for carbon markets.

Carbon markets allow countries or entities that can reduce or absorb emissions to sell them as carbon credits to high emitters. The markets can therefore reduce emissions and increase flows of climate finance if held to high standards of integrity and transparency.

However, new language in the decision text allows for confidentiality around the details of carbon credits. This could jeopardise transparency and accounting processes and reduce the likelihood of carbon markets contributing to mitigation.

New climate finance goal
This COP was supposed to develop a new collective quantified goal on climate finance, to replace the US$100 billion annual target which has not been met. It was also supposed to develop an action plan to double adaptation finance, which has not materialised.

The new finance goal has been delayed to next year, along with a status report on the commitment to double adaptation finance by 2025. Various parties pointed out that climate finance should not worsen the indebtedness of developing countries. For the first time, the decision document acknowledged this issue. It also encouraged reform of the way multilateral development banks support climate finance.

Phasing out fossil fuels
This COP failed to get a commitment from all parties to phase out all fossil fuels.

Instead of committing to this obvious solution to reduce emissions, parties insisted on using the wording "accelerating efforts towards the phase-down of unabated coal power and phase-out of inefficient fossil fuel subsidies."

"Unabated coal power" insinuates that coal (with carbon capture technology) could be continued. Specifying "inefficient fossil fuel subsidies" may allow for loopholes due to the definition of "inefficient."

Moving forward
While COP27 has delivered significant progress on finance for loss and damage, it remains to be seen whether this will translate into action. The lack of progress on mitigation and adaptation is a worry. In failing to deal with the central challenge of reducing fossil fuel use and reaching agreement on further reducing carbon emissions, COP27 has not addressed the key challenges of climate change.

The UN multilateral processes that govern climate change need developed countries to seriously commit to loss and damage. And treaties must be given greater enforcement capabilities. The parties will also need to find a mechanism to place common interests at the top of the agenda, above that of party interests.

It may also be time to assess the equity of representation and power in these processes. It has taken 30 years to make progress on loss and damage finance. Existing treaties are inadequate to hold parties to account on mitigation and adaptation targets.

Imraan Valodia Pro Vice-Chancellor: Climate, Sustainability and Inequality and Director Southern Centre for Inequality Studies, University of the Witwatersrand, University of the Witwatersrand.

Julia Yaylor Researcher: Climate and Inequality, University of the Witwatersrand.
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Black Panther in the classroom: how Afrofuturism in a film helped trainee teachers in South Africa

By Zayd Waghid

Back in 2018, I joined the millions of people who flocked to cinemas worldwide to watch Ryan Coogler's Black Panther. The story of an ultra-modern African society not shaped by colonialism was celebrated by critics and audiences alike as "revolutionary". It won three Oscars. Now its sequel, Black Panther: Wakanda Forever, is dominating box office returns and delighting critics.

While I enjoyed and was entertained by the first film, I was also struck by its potential as a teaching tool. Its Afrofuturistic approach – using the past to imagine futures that differ from existing historical narratives – could, I thought, be a catalyst for dispelling myths about African history, culture and tradition. It might be a way to help my students – trainee teachers at a South African institution – overcome cognitive injustice. This is the idea that some forms of knowledge are more significant than others.

Eurocentrism, which is based on a biased view of western or European knowledge at the expense of knowledge from the global south, leads to cognitive injustice. As I've explored in my research, students at a university in the global south might experience cognitive injustice when the curriculum is dominated by western thought and knowledge.

Overcoming their own sense of cognitive injustice is a powerful way for educators to enable their students to question and transform society's unbalanced power relations. This is especially urgent in a South African society troubled by gender-based violence, xenophobia, racism and social inequality.

So, I conducted a study in which I examined whether seeing Black Panther influenced future teachers to think differently about their identities and relationships with others. I used the film to introduce them to the concept of Afrofuturism. I found that Black Panther made a significant contribution to the students' awareness by reinforcing the idea that people should be proud of how they look, and that beauty is not tied to a grand, western or global standard, but is, rather,

fluid and different for each person. By understanding the importance of identity and using teaching methods that are sensitive to different cultures, these teachers will be better able to promote diversity in their future classrooms.

Varying messages

Fifty-two trainee teachers were involved in the study. They were asked to see the film in cinemas and we then discussed what they learned from it.

The students identified with several aspects of Black Panther, often depending on their own place in society.

For instance, some of the female students found the film's message of gender equality to be the most interesting aspect. These students perceived a connection between the many roles portrayed by the black actresses in the film and their capacity for both physical and emotional expression. They further seemed to have had the insight that a society's power dynamics may be shaken up when women are given equal status within that society.

Most of the female students held the belief that the way women are treated in their communities or society renders them helpless. However, several of them felt inspired by the film to take a stand against the many forms of discrimination that, in today's culture, make it difficult for roles to be shared equitably.

Several students felt the systems and structures of many modern African communities demonstrated that the continent was still subject to the policies of globalisation rather than developing its own policies, tailored to its requirements.

Challenging norms

A few other students expressed their views on the importance of challenging political norms, as well as resisting orthodox ways of thinking. They were firmly on the side of decolonisation – pulling entirely away from global north influence, theories and knowledge systems.

Others, though, insisted that it was essential to collaborate with others from across the globe rather than to operate in isolation. They argued that western and European knowledge had value, but that African knowledge and policies ought to be at the centre of learning and teaching on the continent.

In my opinion, schools in South Africa are lacking a social justice curriculum that would teach students about the concept of cognitive injustice. Students should constantly be immersed in a welcoming learning environment that acknowledges and appreciates their individuality, while also fostering a feeling of community among their peers. Black Panther's Afrofuturistic perspective, in my opinion, encourages students to reflect on what makes them unique and to be receptive to discussions on the impact of gender stereotypes and racism on their experiences in the classroom and beyond.

Using Black Panther as a way into exploring Afrofuturism led to decolonial ideas. That, in turn, could alter the students' future classrooms if they take up these ideas in teaching and learning. Those classrooms would be fairer and more inclusive, giving pupils a chance to speak up and challenge society's norms, values and attitudes.

Zayd Waghid is an Associate Professor, Cape Peninsula University of Technology

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Statement on the appointment of the Attorney General as Acting Chief Justice in Kiribati

Commonwealth Magistrates' and Judges' Association (CMJA)

Commonwealth Legal Education Association (CLEA)

Commonwealth Lawyers Association (CLA)

Further to our previous statements on the situation of the judiciary in Kiribati, the CMJA, CLA and CLEA are seriously concerned about the most recent developments, namely the appointment of the Attorney General as Acting Chief Justice.

This appointment raises some fundamental concerns. It is a conflict of interest to have the Attorney General, appointed in the present circumstances, as Acting Chief Justice. Having signed indictments, it would not be appropriate to then have the same person act as Judge in such cases or in any matter in relation to which she gave advice as a Law Officer to the government. This does not comply with the Basic Principles on the Independence of the Judiciary. The effect of this would be that the people of Kiribati would not enjoy the right to a fair trial heard by an impartial and independent tribunal, an inalienable right under the Universal Declaration of Human Rights

Furthermore, the present situation is a blatant breach of Commonwealth fundamental values including the Commonwealth (Latimer House) Principles on the Accountability and Relationship between the Three Branches of Government as embodied in the Commonwealth Charter.

There are good reasons why acting appointments should not be made and why Judges should have security of tenure. Acting appointments (particularly at a senior level) can create the risk of government influence on judges and interference with independent judicial decision-making, especially when judicial office-bearers do not have security of tenure.

The present situation arises from the position of Judge David Lambourne whose tenure has been suspended and from the suspension of Chief Justice William Hastings. We urge the government and parliament of Kiribati to comply with the judgment of the Court of Appeal of 19 August 2022.

We note the requirements set out by the UN Special Rapporteur on the Independence of Judges and Lawyers in his communication of 17 August 2022 which called for the re instatement of Judge Lambourne under the terms of his initial appointment as well as to reinstate the Chief Justice.

Kiribati has committed to the shared fundamental values and principles of the Commonwealth. At the core of these values is a shared belief in, and adherence to, democratic principles including an independent and impartial judiciary. We acknowledge that issues will arise which create challenges, and we respect the independence of Commonwealth members to make decisions, but these should be in accordance with the shared values and international standards.

We call upon the Government of Kiribati to respect the orders of the court in the litigation involving Judge Lambourne, to reconsider the appointment of the Attorney General as Acting Chief Justice and to demonstrate respect for and uphold the independence of the judiciary, Commonwealth Principles, and other relevant international standards of due process.

3 November 2022

The Commonwealth Magistrates' and Judges' Association is a not-for-profit organisation, registered in the UK, whose aims are to promote judicial independence, advance education in the law, the administration of justice the treatment of offenders and the prevention of crime in the Commonwealth. It brings together judicial officers of all ranks from all parts of Commonwealth and provides a forum for the promotion of the highest judicial standards at all levels. www.cmja.org

The Commonwealth Legal Education Association is an international non-profit organisation which fosters and promotes high standards of legal education in the Commonwealth. Founded in 1971, it is a Commonwealth-wide body with regional Chapters and Committees in South Asia, Southern Africa, West Africa, the Caribbean and the UK. www.clea-web.com

The Commonwealth Lawyers Association is an international non-profit organisation which exists to promote and maintain the rule of law throughout the Commonwealth by ensuring that an independent and efficient legal profession, with the highest standards of ethics and integrity, serves the people of the Commonwealth.
www.commonwealthlawyers.com

The deployment of Kenyan troops to DRC: is it worth it?

By Musonye Collins Tieni

Barely three months into what he promised to be a transformative tenure as the commander in chief, President William Ruto, elected to send Kenyan troops into the regions of the eastern Democratic Republic of Congo on a peacekeeping mission to thwart the rebels that have plagued the region for several years now. Most people are familiar with the conflict that has been the routine in DRC ever since their Belgian colonial masters decided to grant them their independence back in 1960. The unending conflict has consistently ravaged the DRC, claiming the lives of more than five million people, driving millions more into starvation and exposing them to diseases, and has resulted in a violation of human rights, where millions of women and girls have been raped. The conflict has claimed the nation's political and economic stability to the benefit of international conglomerates that have interests in the country's natural wealth.

The country has continued to experience conflicts and instability despite consistent efforts at the national, regional, and international levels to negotiate the end of wars and consolidate peace. Key peace deals have been signed, including the six-country ceasefire signed in July 1999 in Lusaka; the July 2002 peace deal between the DRC and Rwanda for the pull out of Rwandan troops and disarmament of Rwandan Hutu militias in Eastern DRC; and the January 2008 accord between the DRC government and rebel groups. The failure of the various ceasefires and peace deals to consolidate peace is indicative of unresolved deep problems that perpetuate inter-group antagonisms, distrust of the people and communities vis-à-vis the state, and troubled relations between the DRC and its neighbors. Most of these problems have a long history dating as far back as the colonial era.

The conflicts in the DRC have been a major cause of concern at the national, regional and international levels, especially due to the heavy death toll and the massive abuses of human rights orchestrated by warring factions against innocent civilian populations. The wars have disrupted

PHOTO | TONY KARUMBA | AFP

Kenya's President William Ruto (left) on November 2, 2022 inspects some of vehicles to be used by Kenya Defence Forces soldiers deploying to the DRC as part of the East Africa Community Regional Force.

economic activity in key sectors such as agriculture and industry due to insecurity, population displacement and deterioration of physical infrastructure. They have also undermined the capacity of State institutions and governance, hence preventing the country from taking full advantage of the massive growth potential associated with its vast natural resource endowment and its strategic position in the region. When President Ruto decided that it would be worth it to risk the lives of the Kenyan soldiers on a war that has absolutely nothing to do with Kenya, many people had their doubts whether this was indeed the right cause of action to take. The question that comes to mind is, is it actually worth it and is it true that the conflict has absolutely nothing to do with Kenya?

It is important to appreciate that Kenyan soldiers have fought in peacekeeping missions before, most notably against the notorious Al- Shabaab in Somalia. Kenyan troops were deployed in 2011 to Somalia where they managed to liberate many towns including Kismayo albeit suffering immense casualties especially in El- Adde and Kulbiyow within the Geda region. In addition, increased attacks along the Kenya- Somalia border. Other than this, Kenyan troops have participated in peacekeeping missions in Angola, Namibia, Liberia and Sierra Leone. This time, there will be deployment of about 900 soldiers (1 battalion) to DRC for the peacekeeping mission. It is unclear exactly how long this operation is going to take as this is war and it is not simple to project how long it will take. This operation is going to cost the Kenyan taxpayers Ksh. 4.4 billion in the initial six months but would rise to Ksh.7.2 billion if the troops stay for a year. Drawing from the past experiences of the Linda Nchi Operation in Somalia, it is more probable than not that this mission is likely to extend for more than the planned six months. It is not unreasonable to draw the conclusion that Kenya does not need to be involved in this conflict bearing in mind the immense financial costs and the loss of life that is inevitable in the face of such an altercation. Futhermore, the timing of this is also not the best. Kenya is struggling with the effects of the worst drought in 40 years. The ongoing drought, the worst in 40 years, has affected 23 counties; out of which 10 are under the alarm drought phase.[1] With millions of Kenyan`s in dire need of food, shouldn`t the priority of the government be towards protecting its citizens instead of diverting resources towards another country?

[1] https://www.citizen.digital/news/ten-counties-on-red-alert-as-kenya-faces-worst-drought-in-40-years-n306031

DR Congo applied for membership in 2019, hoping to improve trade and political ties with its East African neighbours. In April 2022 after the signing of the Treaty of the Accession of the DRC into the EAC in Nairobi, this was realized. This meant a lot for the trading bloc because the DRC was bringing a lot more than just internal disputes to the table. Problem child or not, DRC has an impressive and unmatched resource portfolio including mineral wealth such as cobalt, gold, diamond, aluminum, and copper, among others, 96,027,187 people[2], numerous water bodies, vast farmland, rich biodiversity, and the world's second-largest rain forest.

`The DRC is the world's leading producer of cobalt, used in the manufacture of batteries. It is also the world's fourth-largest producer of copper, used in the assembly of electric cars and the infrastructure of most renewable energy sources. Lithium deposits, estimated at over 130 million tonnes, are also present in the southeast. Congo has most of the mineral ores that produce key components in making computer chips and electric vehicles, technologies that are powering the drive to the future. In a typical computer, copper and gold are key components used in making the monitor, printed circuit boards and chips. DRC is rich in these minerals, producing 68 percent of the world's cobalt — the largest globally — and over 1.8 million tonnes of copper annually. In 2020, these minerals accounted for $17.8 billion, about 91 percent of DRC's total exports, and 36 percent of the country's GDP that year.'[3]

Like Tanzania, DRC is a Southern Africa Development Community (SADC) member state. DRC's entry into EAC will strengthen the EAC-SADC bridge that Tanzania already established when she joined SADC. It will also improve ongoing bilateral negotiations for a Grand Free Trade Area between EAC and the 16-member SADC, and among EAC, SADC, and the Common Market for Eastern and Southern Africa (COMESA).[4] Furthermore, the addition of DRC's populace to EAC will swell EAC's current population to 303,370,369 individuals, and expand the EAC-SADC one to about 613,588,439 people. DRC, sub-Sahara's largest country, will become EAC's largest country.[5] The new EAC now offers a combined market-driven economy of 266 million people and a GDP of $243 billion.[6] According to the East African Business Council, EAC's exports to the DRC have averaged 13.5 percent in the last seven years to 2020. In 2018, the value of imported goods into the DRC stood at $7.4 billion against exports of $855.4 million.[7]
To leverage the additional resources that DRC brings to the EAC table for the accelerated socio-economic development that the bloc absolutely needs to sustain its peace and security, EAC member states are best advised to embrace DRC wholeheartedly.[8] Attacks by armed groups and recurring inter-communal violence continue to threaten populations in the eastern provinces of the Democratic Republic of the Congo (DRC), where more than 120 militias and other armed groups actively operate.[9] At least 5.6 million Congolese are internally displaced while at least 1 million have fled to neighboring countries, making this the largest displacement crisis in Africa.[10] It is important to note that should there be peace in DRC, all the countries of the trading bloc stand to gain from this. This is why it is a joint effort among all the states; Burundi (2 battalions), Rwanda(2 battalions), South Sudan(2 battalions), Uganda(2 battalions) while Tanzania has given commitment to join the peace efforts at a later date.

International relations are based on long time customs and honor between countries. The peacekeeping mission is a mission to protect humanity. It is no longer possible to sit idly by and conclude that the conflict has absolutely nothing to do with the Kenyan people. Albeit it would be the easier choice and it will not cost us any lives and any financial loss, one would argue that it would cost us our humanity. War has plagued DRC for years and many have lost their lives and many more displaced. The country has failed to develop economically, politically and socially. The conflict is being right on the border of the East African Community, how long before it encroaches past the borders to the member states? For a mundane Kenyan citizen who has never seen such atrocities, it is easy to condemn DRC and conclude that it is not worth it to help. If not us, the neighbours, then who? The economic opportunities that are coupled with the success of the peacekeeping mission should not be the only motivation towards the efforts in the first place.

In conclusion, it is worth it to risk the lives of the Kenyan troops, because of the many innocent lives that will be saved by the end of the mission to protect humanity.

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[2]https://www.worldometers.info/world-population/democratic-republic-of-the- congo-population/#:~:text=The%20current%20population%20of%20the,the%20latest%20United%20Nations%20data.
[3]https://www.privacyshield.gov/article?id=Congo-Democratic-Republic-Mining-and-Minerals
[4]https://horninstitute.org/the-pros-and-cons-of-democratic-republic- of-congos-entry-into-the-east-african-community/
[5]ibid
[6]https://www.theeastafrican.co.ke/tea/news/east-africa/-opportunities-and-burdens-dr-congo-brings- to-eac-table-3769482
[7]ibid
[8]https://horninstitute.org/the-pros-and-cons-of-democratic-republic-of-congos-entry-into-the-east-african-community/
[9]https://www.globalr2p.org/countries/democratic-republic-of-the-congo/
[10]ibid

M23: Four things you should know about the rebel group's campaign in Rwanda-DRC conflict

A Congolese army tank heads towards the front line against M23 in the area surrounding the North Kivu city of Goma in May 2022.

By Delphin R. Ntanyoma

Fighting between the Democratic Republic of Congo's national army and the rebel group M23 has displaced thousands of people in the eastern border city of Goma. Formed 10 years ago, the Rwanda-backed Mouvement du 23 Mars (M23) soon made its first mark when it briefly occupied Goma, a city of 1 million today. An African-led effort resulted in a ceasefire and M23's demobilisation – until the resumption of hostilities in 2021. Delphin Ntanyoma sets out the four things you should know about the rebel insurgency, which threatens regional stability.

1. What is the background to M23's insurgency in eastern DRC?

The current force is what's left of the original M23 Movement formed in April 2012. M23 was an offspring of the National Congress for the Defence of the People, better known by its French acronym CNDP, a rebel group which fought the DRC government between 2006 and 2009. Both groups draw on a claim that the Congolese Tutsi and other ethnic communities in the north and south Kivu are discriminated against. They are considered of Rwandan descent and are commonly referred to as "Rwandophones". One of the consequences of this discrimination is the presence of tens thousands of refugees in the Africa Great Lakes region.

M23 occupied the city of Goma in eastern DRC for 10 days in 2012. The rapid rise and its links to Rwanda caused alarm and triggered international efforts for a ceasefire. After talks brokered by the Southern African Development Community, M23 ended its rebellion in 2013.

The latest fighting in eastern DRC has forced tens of thousands to flee their homes.

Infighting soon erupted within M23 between two groups. One wing made up of roughly 1,700 soldiers fled to Uganda. The other smaller wing of 700 fighters fled to Rwanda. Many of those fighters thereafter demobilised voluntarily or negotiated their way into the DRC's national army.

Early in 2017, a few hundred remnants of the Uganda wing left Uganda for the DRC, where they sometimes clashed with the DRC's national army. But there was no sign of intense recruitment until 2021 when the rebel group resumed attacks.

It is extremely hard to estimate how large the M23 group is currently. Still, this is a region that has been volatile for decades and where countless unresolved grievances simmer under the surface. There are hundreds if not thousands of young men who constitute a ready reservoir for recruitment and mobilisation.

Nonetheless, the M23's ability to occupy and control several localities in North Kivu with its limited military force has led many experts to believe that the rebel group has received military support from Rwanda and to a lesser extent Uganda. DRC government has strongly opposed any form of peace talks with M23.

2. What territory do they seek to capture and why?

The majority of M23 rebel combatants originate from North Kivu province and specifically from Masisi and Rutshuru. These territories are close to the border of Rwanda where fighting takes place. They are extremely familiar with this terrain and might enjoy local support from inhabitants. The city of Goma is also within this vicinity.

The area of Rutshuru territory alone is approximately 5,300km^2, equivalent to a fifth of Rwandan territory. The region occupied by M23 borders Rwanda, Uganda, and DRC and has a huge traffic of commercial trucks carrying goods from the Kenyan port of Mombasa through Uganda to Goma and Bukavu in the DRC. Controlling the border town of Bunagana – as M23 curently does – provides an opportunity to raise additional funds through informal taxation. The region is also rich in terms of natural (forest and mineral) resources. In the past, access and control of these resources have also motivated several actors to support rebel groups.

While moving closer to the City of Goma and based on the 2012 experience, M23 may not seek to easily capture

the city. The city harbours a million inhabitants, including hundreds of thousands of internally displaced. Fighting near Goma exerts pressure on the Congolese government to open dialogue. But attacking the city would increase more international pressure against rebels and Rwanda.

3. What's behind their battlefield success against the national army?

Mathias Gillmann, spokesperson for the UN stabilisation mission in the DRC, hinted at their strength as recently as July 2022. He noted the M23 was militarily stronger than in the past.

The M23 operates more and more like a conventional army, relying on equipment that is much more sophisticated than in the past.

Though it has not yet been independently verified, M23 is among the groups thought capable of shooting down a UN mission helicopter that crashed within their stronghold in March 2022. DRC military helicopters were also targeted in this area in 2017.

Military sources have hinted that M23 is currently able to operate around the clock, thanks to night vision devices and equipment. It also has longer-range weapons, such as mortars and machine guns. It's likely these would have been supplied by a well organised army, which is why Rwanda security services are suspected of supporting M23.

Besides equipment, M23 is fighting a well-organised conventional war in which it has intimidated the national army. It advanced quickly from Sarabwe forest reserve to Bunagana. More recently rebels were in action within 20km of Goma City.

However, it's also important to understand that the DRC's national army is extremely dysfunctional, corrupt, ill-equipped and low on morale. It is well known that soldiers' rations disappear into the hands of the generals. In many cases, soldiers can spend days without logistical support simply because senior officers and military generals are more concerned with accumulating resources even at the expense of their rank and file soldiers.

4. What happens next?

Let's start with the context. The political agreement that ended M23's occupation of Goma 10 years ago was never fully implemented. Its combatants should have been integrated into the Congolese national army but were not. And the M23 political wing was to become a recognised political party but was not.

The DRC government, first under President Joseph Kabila and now President Felix Tshisekedi, opted to politically engage its main sponsor, Rwanda formally or informally. Rwanda's involvement in the DRC dates back to 1996 when it backed the rebellion that toppled long-time ruler Mobutu Sese Seko. Its subsequent involvement through proxies such as M23 has both security and economic motivations.

Relations between Kinshasa and Kigali soured recently after Tshisekedi and Uganda's President Yoweri Museveni agreed joint military operations along their border coupled with roads construction. Neighbouring Burundi was also allowed by DRC to pursue rebels across the common border. Burundian rebels operating in DRC have received military and logistical support from Rwanda security services.

This left Rwanda looking isolated in the volatile region. By reactivating M23, President Paul Kagame's aim was to stir the regional political landscape in which he was feeling increasingly isolated.

For its role, Rwanda has come under intense diplomatic pressure from the international community. This includes key western allies such as the US, the UK and France. Kagame has little choice but to withdraw his military, logistical and political support and get M23 to leave the large area the rebels have occupied. This has happened before. In 2009, CNDP – the precursor to M23 – was dismantled when Kigali secured a deal with Kinshasa that was advantageous to Rwanda but detrimental to the rebel group. In 2013, Kigali again was obliged to withdraw his support to M23 under international pressure.

This time around, Kagame could seek guarantees that the East African Community's regional force won't constitute a threat to Rwanda's security in the same way that a joint operation of Uganda and DRC's army in North Kivu could have been.

The cost of this to Kagame would be loss of credibility among his shrinking supporters within his Rwandan inner circle . It would also hit his support base, mainly among the Congolese Tutsi in the DRC who count on his support amid violence targeting them in North Kivu.

Rwanda will still remain somewhat isolated in the region. This is because Kenya, Tanzania, Uganda, Burundi and South Sudan are all allowed the East African Community and DRC specifically to send in their forces to stabilise the Eastern DRC while Rwanda is not.

Rather than back a rebel group and operate through a proxy, Rwanda could still directly intervene across the border with DRC if its security is threatened. But this option requires its security services to show tangible evidence of these threats within the country's borders.

Delphin Nyanyoma is a PhD Visiting Researcher, International Institute of Social Studies

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Statement by the Commonwealth Lawyers Association (CLA) regarding the conviction of Richard Naidu by the High Court of Fiji

The CLA has been observing the contempt proceedings against Mr. Richard Naidu over a post on his Facebook. The post was a comment on a spelling error in a judgment. Mr. Naidu was convicted by the High Court of Fiji on 22 November 2022 for scandalizing the court and he is to be sentenced on 6 January 2023.

The CLA is concerned over the invoking of criminal contempt for scandalizing the court, which has been repealed in many parts of the Commonwealth. In this regard, it has been accepted that prosecution for this contempt will deter comments on judicial errors or misconduct and will have a chilling effect on the freedom of speech and expression.

The CLA notes that in jurisdictions where prosecution for this contempt is still available, it has only been instituted in exceptional cases where there is a real risk of undermining public confidence in the administration of justice. Its application has also been narrowed by the overriding right to comment in good faith on matters of public concern and importance.

The CLA, while respectful of the court, considers that Mr Naidu's comment could not satisfy the stringent threshold for the offence alleged. The court's decision amounts to an unreasonable and disproportionate restriction on freedom of speech and expression.

The CLA notes the international response to Mr. Naidu's conviction and supports the statements issued by LAWASIA and the Bar association of India on 24 November 2022 and the statement of the Law Council of Australia issued on 25th November.

The CLA also notes that the Commonwealth Law Ministers, in their meeting in Mauritius on 24 November 2022, unanimously endorsed the Commonwealth Principles on Freedom of Expression and the Role of the Media in Good Governance, which among others, provides that "The criminal law and contempt proceedings should not be used to restrict legitimate discussion on matters concerning the judiciary and the courts"

Richard Naidu

The CLA:

- Urges the government of Fiji to respect the freedom of speech and expression.
- Urges the Attorney General of Fiji to withdraw the charge of contempt against Mr. Naidu and to move to quash the conviction

25th November 2022

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