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THE PLATFORM

FOR LAW, JUSTICE & SOCIETY

KATIBA INSTITUTE

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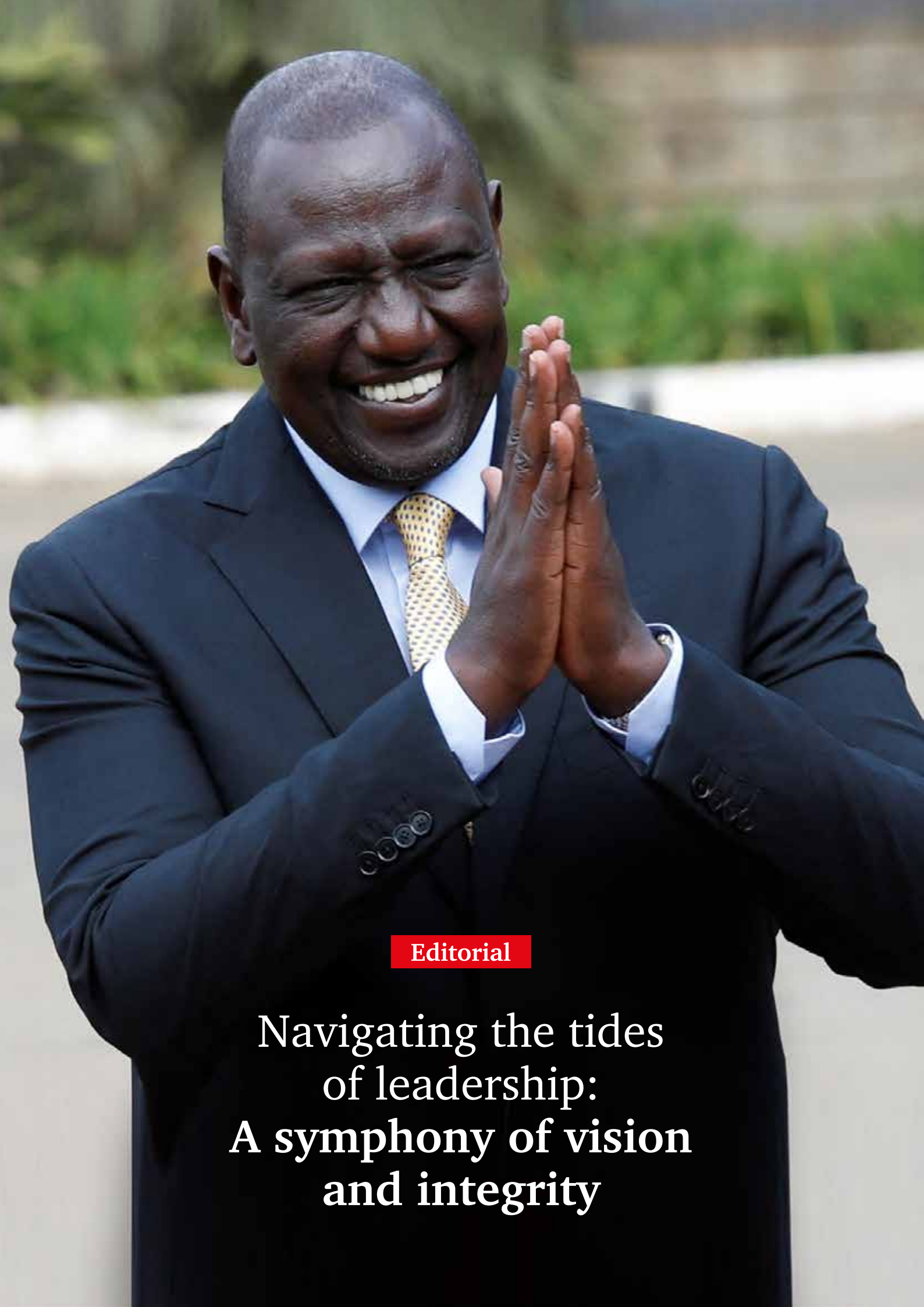

Editorial

Navigating the tides of leadership: **A symphony of vision and integrity**

Mr. President, it has been a difficult year for Kenyans in general. The year 2023 painted a bleak picture for Kenya. A crippled economy, vanishing jobs, soaring taxes, and a political morass – the nation floundered, yearning for a guiding hand at the helm. Yet, in this tempestuous sea, the captain's chair remained tragically vacant.

Leadership, in its truest form, is a composition of grand aspirations and grounded ethics, a resonant melody that uplifts and unites. It demands a clear vision, a North Star illuminating the path ahead, articulated with unwavering conviction. But a static vision is a hollow echo; great leaders dance with change, their foresight anticipating shifting currents, their courage embracing the ebb and flow.

This symphony, however, requires more than a lone violinist. True leaders understand that strength lies in the collective, weaving a tapestry of diverse talents into a harmonious ensemble. Empathy becomes the conductor's baton, drawing out the best in each member, and fostering an environment where trust and collaboration replace discord.

Yet, what of the soul of this symphony? Integrity, the unwavering commitment to ethical conduct, rings like a clarion call in our age of moral murkiness. Leaders who walk with transparency and accountability, their actions synchronized with their words, build a foundation of trust that weathers even the fiercest storms.

The curtain drawn on 2023 reveals a Kenyan landscape shadowed by profound disappointment. The nation, yearning for steady hands at the helm, witnessed not only economic turmoil but a disconcerting erosion of its standing on the world stage. On the diplomatic front, a series of missteps, attributed to your agents, Mr. President, cast a long, embarrassing shadow over the nation, jeopardizing its interests and international standing. Effective leadership necessitates not just economic acumen, but astute navigation of the intricate tapestry of global relations. Kenya's recent diplomatic stumbles raise a chorus of disquiet, leaving one to ponder the strategic rationale behind actions that undermined carefully cultivated relationships and tarnished the nation's image. The consequences of such missteps resonate far beyond fleeting moments of diplomatic awkwardness; they represent a potential weakening of Kenya's influence, a diminished voice on the global stage.

Examples of actions that were diplomatically off-colour were the careless statements emanating from your agents concerning foreign policy and foreign relations as well as the unilateral action of the signing of the European Union-Kenya Economic Partnership Agreement, which has raised concerns among regional partners.

The delicate dance of diplomacy demands calculated moves, not impetuous jigs. It necessitates a deep understanding of cultural nuances, a respect for established protocols, and an unwavering commitment to upholding Kenya's best interests. The year gone by, however, painted a picture of disregard for these fundamental principles, leaving allies bewildered and adversaries emboldened. This is not a call for blind allegiance but for a return to the hallmarks of prudent statecraft. Kenya's diplomatic corps, once renowned for its acumen and grace, now finds itself treading treacherous waters, its effectiveness hampered by the fallout from ill-conceived actions.

To reclaim its rightful place on the world stage, Kenya must embark on a course correction, one that prioritizes strategic diplomacy, rebuilds trust with allies, and reasserts its commitment to international norms. The road ahead demands introspection, a thorough re-evaluation of diplomatic strategies, and unwavering dedication to restoring Kenya's standing as a respected and valued member of the global community.

Back to the most concerning issue for Kenyans; the Kenyan economy, which is in shambles. Jobs are scarce, businesses are failing, and families are struggling to put food on the table. The cost of living has skyrocketed, fueled by inflation and mismanagement. The education system is in disarray, and healthcare is inaccessible to many. The very fabric of Kenyan society is fraying at the edges.

The political landscape is ever so fraught with tension. Corruption runs rampant, eroding public trust in the government. Ethnic and political divisions have deepened, leading to violence and unrest. The democratic institutions that Kenyans fought so hard for are under threat.

Mr. President, you are the captain of this ship. The Kenyan people have entrusted you with their hopes and dreams. You cannot fail them. This is not a time for empty promises or political maneuvering. This is a time for decisive action, for bold leadership that will pull Kenya back from the edge of the abyss.

What then is the blueprint for Kenya's salvation? Here are some

concrete steps you can take, Mr. President, to save the nation: First, tackle corruption head-on. Bring those who have stolen from the Kenyan people to justice, no matter how powerful they may be. Secondly, revive the economy. Implement policies that will create jobs, boost businesses, and attract investment. Thirdly, promote unity and reconciliation. Heal the divisions that have torn Kenya apart and build a nation where everyone feels included and valued. Fourthly, strengthen democratic institutions. Uphold the rule of law, protect the freedom of the press, and ensure that all Kenyans have a say in their government.

The time for action is now

Mr. President, the Kenyan people are watching. They are waiting for you to lead them out of this darkness and into a brighter future. Do not let them down. Seize this moment, rise to the challenge, and be the leader that Kenya needs. Save the nation, Mr. President. The time for action is now.

This editorial is not just a call to the President but to all Kenyans. We must come together as one people, united in our love for our country. We must hold our leaders accountable and demand the change that is so desperately needed. Together, we can build a better Kenya, a Kenya that is prosperous, just, and peaceful.

The journey will be arduous, but the stakes are too high to remain adrift. It is time to chart a new course, one guided by prudence, respect, and a clear vision for Kenya's place in the world.

For leadership is not merely a position of power, but a sacred responsibility. It demands resilience, a steely resolve in the face of adversity. When the waves crash and the ship lurches, the captain must stand firm, transforming setbacks into stepping stones, inspiring hope when hope seems lost.

Kenya yearns for the symphony alluded to in the beginning. We crave the vision that ignites our spirit, the empathy that binds us together, the integrity that guides us through ethical mazes, and the resilience that carries us through the darkest nights. Let us, then, demand this symphony from our leaders. Let us hold them accountable for the notes they neglect and celebrate the harmonies they create. For it is in the music of true leadership that our nation will find its rhythm, its unity, and its path toward a brighter dawn. Let us rise to the challenge, Mr. President. Let us save the nation, together.

THE PLATFORM FOR LAW, JUSTICE & SOCIETY

Strathmore University Law School

11th CB Madan Awards & Memorial Lecture

INCORPORATING THE STRATHMORE LAW SCHOOL OUTSTANDING STUDENTS AWARDS 2023 & THE C.B. MADAN MEMORIAL LECTURE

Friday, 15th December 2023
Strathmore Law School

The awards commemorate the distinguished public service career of
CHIEF JUSTICE OF KENYA, THE HON. MR JUSTICE CB MADAN

Citation for the C.B Madan Prize 2023 Winner, Katiba Institute

By the 2023 C.B Madan Prize Award Committee

It is our distinct pleasure to present the CB Madan Prize 2023 award to Katiba Institute, in this 11th Awards Ceremony.

The CB Madan Prize is conferred upon individuals and organizations that have shown unwavering commitment to safeguarding the principles of the rule of law and constitutionalism.

Katiba Institute has demonstrated a firm commitment to making a positive difference in the communities it serves. Through tireless efforts and innovative initiatives, the organization has become a beacon of inspiration, embodying the true spirit of the rule of law and constitutionalism.
As the name suggests, Katiba Institute personifies the calling of Article 3 of the Constitution. It has become synonymous with a beacon of justice, quality, and public-spiritedness. Katiba Institute is now a voice for the voiceless, a helper to the afflicted, and a hope to the hopeless. From representing the residents of Lamu against the LAPSSET Project's erosion of traditional fishing rights – to challenging biometric Huduma cards, the impact of Katiba Institute cannot be gainsaid. Katiba Institute has left an indelible mark on our constitutional order. What makes Katiba Institute even more outstanding is its entry into new constitutional frontiers such as data protection and climate change.

Established in 2011, Katiba Institute was created with the primary goal of advancing knowledge and comprehension of Kenya's Constitution and constitutional principles. The story of Katiba Institute is the story of our Constitution and it is the story

Katiba Institute staff with Director Waikwa Wanyoike seated (right) with former Chief Justice Honourable David Kenani Maraga. seated (middle).

of optimism in establishing a transformative constitutional society using the tools of the Constitution. Through its wide range of constitutional thematic areas, Katiba Institute has become a frontline constitutional defense institute in areas such as leadership and integrity, human rights, devolution, gender, electoral matters, environmental concerns, land misappropriation, evictions of indigenous people, and protection against illegality and police harassment.

Utilizing a combination of methods such as litigation, research and publication, civic education, and activism, Katiba Institute actively works towards the promotion and safeguarding of constitutional ideals.

Notably, Katiba Institute extends its impact beyond Kenya's borders by striving to nurture the spirit of constitutionalism in the East African region. This involves encouraging academic discourse on constitutional matters and collaborating with like-minded organizations. Through these initiatives, Katiba Institute aims to contribute to the advancement of greater freedoms and the reinforcement of constitutional values across the broader within the East African Region.

Beyond the demonstrable outcomes, it is the ethos of Katiba Institute that sets it apart. The commitment to ethical practices, inclusivity, and a dogged determination to protect the Constitution serve as a model for other organizations. Katiba Institute's leadership has consistently gone above and beyond to ensure that its organizational values align with the greater good.

Katiba Institute's declared mission is to entrench constitutionalism

Katiba Institute Director Waikwa Wanyoike

through research, public interest litigation, and promoting public participation. This formidable organization has lived true to its mission and calling. Just to mention a few, when the government moved to introduce the Huduma Card, Katiba challenged in court the infamous National Integrated Identity Management System (NIMS). Katiba also moved to court to challenge the marginalization and discrimination of women and the failure of political parties to implement the two-third gender rule. Katiba has also challenged the Standard Gauge Railway (SGR) project for being undertaken with controversy and secrecy contrary to constitutional principles. The organization also challenged parliament's removal of the campaign spending and contribution limits. On the research front, Katiba assisted the court in the Muruatetu case on the death penalty. The organization also supported the court as *amicus curiae* in a case seeking a finding that female genital mutilation (FGM) performed with consent was lawful. Katiba's work runs into an unending litany that would take a day to recite.

To the committee of judges, it was not an uphill task to arrive at Katiba Institute. It is both an organization that embodies the spirit of C.B Madan and a homegrown organization that exemplifies the ideals of constitutional defense. To Katiba Institute, no amount of award can acknowledge the work that you do. But this award demonstrates that the world sees your work, recognizes it, and more importantly your work makes the world a better place.

Continue with the good work of building a just, better, and more compassionate Kenya. May this award serve as a testament to the organization's commitment to transforming society through the defense of the Constitution and a challenge to all of us that through the defense of the Constitution, we can make Kenya a better place.

Congratulations to Katiba Institute on this well-deserved honour!

THE PLATFORM FOR LAW, JUSTICE & SOCIETY

Strathmore University Law School

MASTERS OF CEREMONY:
Evans Ogada - The Platform
Allan Mukuki - Strathmore Law School

2:00pm : Welcoming Remarks
Dr. Jane Wathuta - Dean, Strathmore Law School
Hon. Gitobu Imanyara - The Platform

2:10pm: Opening Remarks
Prof. Izael da Silva – DVC, Research & Innovation - Strathmore University

2:20pm : Remarks by Chief Justice Emeritus & Katiba Institute Board Chair
Hon. Dr. Willy Mutunga, D.Jur, SC, EGH

2:40pm : Remarks by SLS Partners & SLS Student Awards 2023

3:00pm : Musical interlude

3:20pm : Remarks by SLS Partners & SLS Student Awards 2023

3:45pm : Introduction to the CB Madan Awards

3:50pm: The CB Madan Student Awards 2023

4:00pm : 11TH CB Madan Memorial Lecture
Waikwa Wanyoike, Founding CEO – Katiba Institute

4:30pm: Presentation of the 11TH CB Madan Prize
Recipient: Katiba Institute

4:35pm : Remarks by CB Madan Prize Recipient CEO
Christine Nkonge

4:45pm: Remarks by Chief Justice & President of the Supreme Court of Kenya
Hon. CJ Martha K. Koome, EGH

5:00pm: Closing Remarks & Vote of Thanks
The Platform

'Join us for refreshments after the ceremony'

THE PLATFORM FOR LAW, JUSTICE & SOCIETY

Strathmore University Law School

The Katiba Institute
2023 CB Madan Prize Laureate

MEET THE KATIBA INSTITUTE TEAM

Christine Nkonge	Executive Director
Christine Njeru-Kuria	Institutional Development Manager
Chris Kerkering	Litigation Manager
Patriciah Joseph	Programme Manager
Emily Kinama	Research and Litigation Counsel
Ochiel J. Dudley	Litigation Associate
Eileen Imbosa	Litigation Counsel
Lempaa Suyianka	Litigation Counsel
Purity Kirema	Senior Finance Officer
Jackson Kiberenge	Finance Officer
Lulu Kavoi	Executive Assistant
Kevin Mabonga	Communications & Public Liaison Officer
Alvin Walubengo	Monitoring & Evaluation Officer
Ray Odanga	Legal Researcher
Michael Kioko Munguti	Legal Assistant
Lillian Nguli	Programme Officer: Research & Capacity Building
Joshua Malidzo Nyawa	Litigation Counsel: Governance & Rule of Law
Moses Makomere	Finance Assistant
Douglas Koech	Office Assistant
Felix Ogutu	Office Assistant
Elisha Ouma	Office Assistant

THE PLATFORM FOR LAW, JUSTICE & SOCIETY

Strathmore University Law School

KATIBA Institute

Constitution as an Instrument of Change

About

Katiba Institute (KI) is a research, policy, and public-interest litigation organization mainly focused on constitutional issues. It was established in 2011 to help with the implementation of Kenya's 2010 Constitution and to assist in developing a culture of constitutionalism in Kenya. Katiba Institute's principal objective is to achieve social transformation through the implementation of the Constitution.

We work with communities and organizations dedicated to fostering principles of constitutionalism, particularly about demanding leadership and integrity, protecting human rights and fundamental freedoms, promoting principles devolution, and protecting the environment.

KI engages in public interest litigation, research and publication, education, and capacity enhancement, advocacy, legislative review, and technical support to individuals, organizations and government institutions, awareness creation on constitutional provisions, as well as promoting the use of access to information and participation of Kenyans in public affairs. KI partners with organizations specializing in different aspects of the Constitution, or aspects of life affected by the Constitution.

Philosophy

Katiba's philosophy is hinged on the full implementation of the Constitution and establishing a culture of constitutionalism in Kenya's society. Katiba Institute believes that proper implementation of the Constitution can greatly contribute to solving many of Kenya's challenges such as corruption, tribalism, state-sponsored violence, and the rich-poor disparity, leading to greater rule of law and respect for human rights, more transparent and accountable leadership, good governance and eventually, a more just society.

Vision: A just and equitable society founded on constitutionalism.

Mission: To entrench constitutionalism through research, public interest litigation and promoting public participation.

Slogan: ***Constitution as an instrument for socio economic transformation***

Strategic Pillars:

- Good governance, rule of law, integrity and accountability
- Devolution
- Rights and fundamental freedoms
- Environmental justice, natural resource governance and climate change
- Organizational excellence

THE PLATFORM
FOR LAW, JUSTICE & SOCIETY

Strathmore University
Law School

THE C.B. MADAN MEMORIAL LECTURE

TOPIC: Strategic Litigation as a guardrail to protect and sustain Kenya's Transformative 2010 Constitution.

BY
WAIKWA WANYOIKE
Founding CEO of Katiba Institute of Kenya

Waikwa Wanyoike is the Director of Strategic Litigation at the Open Society Justice Initiative. Justice Initiative is a legal centre of the Open Society Foundations that undertakes strategic litigation in international, regional and national judicial and quasi-judicial forums around the world. Before joining the Justice Initiative, Waikwa served as the founding executive director of Katiba Institute – a public interest litigation non-governmental organization primarily litigating constitutional matters in Kenya.

Waikwa is a barrister and solicitor in Ontario, Canada, an advocate of the High Court of Kenya and is admitted by Gray's Inn as barrister in England and Wales. He has previously taught law at Osgoode Hall Law School, Canada. Waikwa has led and participated in strategic litigation on issues ranging from refugee and citizenship rights, fair trial rights, transnational crimes, civil and political rights, socioeconomic rights, corporate accountability, electoral justice, climate justice and environmental rights.

THE PLATFORM FOR LAW, JUSTICE & SOCIETY

Strathmore University Law School

THE C.B. MADAN AWARDS COMMITTEE
Proudly presents the winners of the
C.B. MADAN STUDENT AWARDS 2023

Dempster Nicole Ingado
Catholic University of East Africa, School of Law

In the 2023 July Edition of the Platform Magazine, Dempster Nicole wrote a commentary titled 'Constitutional Silences and their Role in Shaping Legal Doctrine in Kenya'. This nuanced and theoretically rich paper discussed how the existence of silences in constitutional texts do not necessarily result in a lack of constitutional meaning. It proceeds to interrogate how Kenyan superior courts have approached constitutional silences and how attempts to fill textual gaps through purposive and creative interpretation have shaped emerging transformative jurisprudence. For this commentary, The Platform Magazine awards Dempster Nicole Ingado the 2023 C. B. Madan Student award.

Elvis Mogesa Ongiri
Kabarak University, School of Law

In the 2023 April Edition of the Platform Magazine, Elvis Mogesa Ongiri wrote a commentary titled 'The Presidential Veto Dilemma and its Implications on Article 115 of the Constitution of Kenya, 2010'. This critical commentary demonstrates that the Speaker of the National Assembly and the Courts have interpreted the presidential veto in a manner that transforms the President to the law-maker in chief thereby impinging on the separation of powers and the constitutional aspiration for democratic governance. For this provocative commentary, The Platform Magazine awards Elvis Mogesa Ongiri the 2023 C. B. Madan Student Award.

Ndong Evance
University of Nairobi, School of Law

In the 2023 October Edition of the Platform Magazine, Ndong Evance wrote on 'The Battle of Principles: Clarifying the Jurisdiction of Kadhis' Court in Children Matters'. This paper joins the raging jurisprudential debate as to whether the Kadhis' courts have jurisdiction to determine children matters. It contends that Kadhis' court and the Children's court have concurrent jurisdiction in children's matters with a distinction being the circumstances of a particular case with Kadhis' Court jurisdiction confined to children's matters that are incidental to the dispute on the personal status of a Muslim. For this commentary, The Platform Magazine awards Ndong Evance the 2023 C. B. Madan Student Award.

Strathmore University
Law School

STRATHMORE LAW SCHOOL STUDENT AWARDS 2023

IRADUKUNDA, UMWALI MARIE VICTOIRE
Coulson Harney Best Overall Finalist

RAGU, SANJANA
Anjarwalla & Khanna Best Overall all-round female student in the graduating class

NGILE, TREVOR MUOKI
Anjarwalla & Khanna Best Overall all-round male student in the graduating class

IRADUKUNDA, UMWALI MARIE VICTOIRE
IKM Best Female Finalist (Highest aggregate scores)

NGILE, TREVOR MUOKI
IKM Best Male Finalist
(Highest aggregate scores)

KANG'ETHE, MITCHELLE WANJIKU
Muma & Kanjama Runner-up
Best Overall Finalist (2nd best overall student finalist)

IRADUKUNDA, UMWALI MARIE VICTOIRE
KN Law LLP Commercial Prize Winner
(graduate with the highest aggregate score in commercial law subjects)

MUNGAI, MICHAEL KINYANJUI
ENSAfrica Financial Services Law Prize

IRADUKUNDA, UMWALI MARIE VICTOIRE
DENTONS HH&M Taxation Law Prize
(highest aggregate score in taxation law courses)

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STRATHMORE LAW SCHOOL STUDENT AWARDS 2023

CHEGE, GRACE KIBUI
DENTONS HH&M Intellectual Property and Information Technology Law Prize
(highest aggregate score in IP and IT law courses)

OCAN, ABIGAIL CHURCH
Nyiha Mukoma Legal Business Ethics Prize
(highest aggregate score in Legal Business Ethics courses)

IRADUKUNDA, UMWALI MARIE VICTOIRE
Anjarwalla & Khanna Commercial Law Prize
(highest aggregate score in a selection of commercial law units)

IRADUKUNDA, UMWALI MARIE VICTOIRE
Muma & Kanjama "Jurist of the Year" Award
(highest cumulative marks in the following courses: Ethics, Jurisprudence and Legal Systems and Methods)

OKELLO, ELVIRA AKECH
TripleOKLaw Mooting Award

WACHIRA, TESSY WANGU
Anjarwalla & Khanna Law Clinics Prize:
Most outstanding student in law clinics, given to the student who has made the greatest social impact through his/her work in the Strathmore Law Clinics.

KANG'ETHE, MITCHELLE WANJIKU
TripleOKLaw Dissertation Award
(student with the highest dissertation mark in the 2022 graduating class)

IRADUKUNDA, UMWALI MARIE VICTOIRE
Muma & Kanjama Criminal Law Prize
(highest marks in criminal law courses, Criminal Law and Criminal Procedure)

KIMANI, ALLAN
WithersWorld Law International Commercial Arbitration Prize
(Student with highest mark in ICA from the graduating class)

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STRATHMORE LAW SCHOOL STUDENT AWARDS 2023

ADIPO, ASHLEY KHAYO
Gamma Wezesha Award
(Scholarship Student demonstrating overall and academic excellence)

NYAKIEKA, RUSSEL OCHIENG'
Musyimi & Company Advocates'
Best Male First Year Award

ESSAJEE, RUQAIYA ABBASALI
Musyimi & Company Advocates'
Best Female First Year Award

AKELLO, ELVIRA AKECH
Strathmore Law Review -
Yash & Jill Cottrell Ghai Prize

STRATHMORE LAW REVIEW

THE EDITOR & STAFF OF THE STRATHMORE LAW REVIEW
The Platform for Law, Justice & Society Magazine

Strathmore University
Law School

THE SLS STUDENT AWARDS 2023 WINNERS

Iradukunda, Umwali Marie Victoire

Marie Victoire is an SLS graduate. She is currently a Graduate Assistant at the Strathmore Law School and a Research Fellow at the ILINA Program. She is interested in pursuing a career in academia, and in particular, conducting research in and teaching refugee and migration studies.

Ngile, Trevor Muoki

Trevor Ngile is a lawyer and recent graduate from Strathmore Law School now specialising in corporate, commercial and conveyancing law and passionately blending this with a commitment to Effective Altruism. With great critical and analytical skills he intends to dedicate his ever growing experience and legal knowledge to make a difference in society and to force a mark in this country and the world.

Kang'ethe Mitchelle Wanjiku

Mitchelle Kang'ethe is an ILINA Program Research Fellow and a Student Intern at the International Association of Law Schools. She holds a first-class honours degree in law from Strathmore University and has now published two articles with the Strathmore Law Review. Her interests include research, editing, academia, and policy work, and she is passionate about technology, human rights, and intellectual property.

Ragu, Sanjana

Ragu Sanjana is an LLB graduate with a strong passion for research, advocacy, policy-oriented work, and litigation. In particular, her areas of internest are human rights law, public international law and international commercial arbitration. Currently, I'm set to begin my traineeship at Anjarwalla & Khanna LLP. On a personal level, she enjoys gymming and reading novels in my free time.

Chege, Grace Kibui

Grace Chege graduated from Strathmore Law School, earlier this year, with a First Class Honours. She is currently a graduate assistant at the law school, where she is pursuing her interest in academia, research and advocacy work. Her specific areas of interest include intellectual property law, sustainability law as well as children and the law.

Ocan, Abigail Church

Ocan Abigail is a Ugandan who came to Strathmore University searching for a career path in law. She is a hard worker, social, reliable, friendly, a good listener, a best friend, a good chef, a sibling, daughter and currently a lawyer. She is passionate about cooking, swimming, singing, travelling and many others. She is a dreamer and go-getter who never backs down from a challenge.

Elvira Akech

Akech Elvira is a law graduate from Strathmore University, and she currently works as a Graduate Assistant at the same institution. She is also a certified mediator under the Chartered Institute of Arbitrators, Kenya. She is passionate about academia as a means of cultivating legal talent and professionalism. Specializing in property law, Akech brings a nuanced understanding to her role. Her commitment extends beyond the classroom, contributing to legal discourse through impactful research.

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THE SLS STUDENT AWARDS 2023 WINNERS

Mungai, Michael Kinyanjui

Michael is a recent graduate of Strathmore University having graduated in July as part of the Class of 2023. Michael is a young lawyer with interests in tax law, international trade, and investment law as well alternative dispute resolution. Michael is also keen on legal research and writing having fostered his interest while working at the Strathmore Law Clinic Criminal Justice Wing. Michael currently works at I&M Bank as a legal trainee.

Kimani Allani

Allan Kimani, a graduate student at Strathmore Law School, embodies resilience and unwavering determination. Throughout his academic journey, Allan triumphed over numerous challenges, exemplified by facing ten exams and defending his dissertation in the final semester to graduate. These experiences fostered a robust can-do mentality and a deep connection with faith. While he engaged in co-curricular activities like MUN, Allan's true passions lie in philosophy and writing, with his current read being St. Augustine's Confessions, reflecting his profound love for learning and introspection.

Wachira, Tessy Wangu

Tessy is a charismatic, warm and bubbly character. Her engaging personality and strong communication skills make her adept at connecting with others. Tessy led the Law Clinic with vigor and worked tirelessly to promote access to justice to the vulnerable and indigent in society. A natural problem solver, she approaches challenges with creativity and determination. She is passion driven, and often uses the knowledge and resources at her disposal to better the community around her.

Adipo, Ashley Khayo

Ashley holds a Bachelor of Laws (LL. B) from Strathmore University. She is an associate member of the Chartered Institute of Arbitrators (CIArb). She is also a researcher, having served in the Strathmore Law Review (SLR), and the Strathmore Tax Research Centre (STRC). She is currently an associate at PricewaterhouseCoopers (PwC) Kenya. Ashley is passionate about legal research and corporate law and governance.

Russel Ochieng' Nyayieka

Russel Nyakieka is currently a second-year law student at Strathmore Law School. He is an ambitious, creative and hard-working individual, who loves to learn new things. He enjoys establishing goals for himself and working towards achieving the set goals. Outside of the classroom, his hobbies include listening to music, reading fiction and occasionally poetry as well as engaging in physical outdoor activities. He enjoys exploring

Essajee Ruqaiya Abbasali

Ruqaiya is a second-year student at Strathmore Law School, who approaches her studies with a practical mindset. She values continuous learning and aims for steady personal growth. As an introverted individual, she finds solace in the world of books, thus fostering a deep love for reading. This passion not only enriches her personal life but also complements her academic journey, providing a unique perspective and a quiet source of inspiration.

THE PLATFORM FOR LAW, JUSTICE & SOCIETY

Strathmore University
Law School

11th CB Madan Awards & Memorial Lecture

Strategic Litigation as a guardrail to protect and sustain Kenya's transformative 2010 Constitution

By Waikwa Wanyoike

Overview

In this paper, I try to do three things. First, I attempt to explain what Strategic Litigation (SL) is by comparing and contrasting it with Public Interest Litigation (PIL) and providing its defining elements. Secondly, I discuss the concept of transformative constitutionalism including the constitutional ideological underpinnings of transformative constitutionalism. Finally, I explain how SL and which of its factors are critical in promoting transformative constitutionalism.

Introduction

Transformative Constitutions emerge from and respond to people's history and their historical frustrations; determine the ideal values and aspirations that should guide a nation to its future; and provide effective tools for the people to use to vindicate those values and aspirations.

In many ways, the Kenyan 2010 Constitution is transformative. The evidence of this is in the process used to make it; the ubiquitous and progressive values it prescribes; its emphasis on social justice and social transformation; and, the nature of authority given to some of the tools it has provided to the people to help them vindicate those values and its aspirations. The judiciary is one such constitutional tool. Another is the formal recognition by the Constitution of PIL or SL.

What is it: Public Interest Litigation or Strategic Litigation

Let me start by problematizing the nomenclature. In Kenya, we tend to use the term PIL more than we do SL. For this paper, I have intentionally chosen the use of the term SL over PIL for reasons that – I hope - will soon be apparent. I should note from the outset that often PIL and SL are terms used interchangeably in both scholarly work and in practice. This happens to some extent, in this paper.

Public Interest Litigation versus Strategic Litigation

PIL – or legal practice that advances social justice or other causes for the public good[1] is litigation whose impact goes beyond the litigant who has filed the case. Impact and public interest, as a value, become the defining features of the litigation.

However, in a strict sense, SL is value-neutral. Strategic in SL therefore connotes two aspects. First, the aim, objective, or impact intended to be achieved by litigation. Second, the intentional way the litigation is undertaken – that is - tactics of conducting litigation to make it strategically impactful.

[1]Bryan Garner and Henry Black, Black's Law Dictionary (11th edition, Thomson Reuters 2019).

Jurisdictional issues are crucial in legal systems as they determine which court or authority has the power to hear and decide a particular case. Clarity on jurisdiction helps ensure fairness, efficiency, and the proper application of laws.

Impact

My organization, the Open Society Justice Initiative (OSJI), notes that impact in SL is intended to be broadly synonymous with the terms "effect," "result," and "outcome"[2] Understood this way, some of the typologies of impact in SL are material impacts[3] - that is direct quantifiable changes achieved through litigation, such as monetary damages, compensation for harm and specific performance in land claims. These could also include the barring of a person from contesting public office or orders to disclose specific information sought through litigation.

The second type of impact is "instrumental impacts" described as quantifiable yet indirect result of SL.[4] Examples here are changes in policy, law, jurisprudence, or even some qualitative institutional changes that occur as a result of litigation. Because, unlike material impacts, these changes tend to occur or be palpable years after the litigation is concluded, they are less readily associated with the litigation that catalysed them.

Finally, there are "non-material impacts" – these are SL impacts that are indirect and impossible to quantify.[5] However, these are the impacts that denote the most enduring outcome of SL since they result in a change of behaviour and attitudes of policymakers or public officials; empower communities to be more assertive in the future on issues that affect them, among other systemic impacts. In a sense, these changes are the real measures of how much the outcomes associated with SL help establish a culture of constitutionalism.

Tactics

While in a few instances, SL may be reactive, most often it is proactive, intentionally thought out, with each aspect tactfully planned and executed. These intentional steps or actions in the conduct of litigation are what SL practitioners refer to as tactics.

Tactics are often jurisdictionally contextualized as they tend to engage the practical realities of the jurisdiction of the litigation – such as standing rights, the nature of the law and the options it offers in the conduct of litigation including availability of, scope and the features of judicial review. Some of the tactics used in conceptualization and conduct of SL includes the choice of litigants and forum; the manner of conducting litigation including whether to use experts, conduct site visits; and, whether advocacy and communication should be used to amplify the litigation or issues being pursued through litigation and, even then, how and to what extent.

Instructively, most of the litigation characterised as PIL may not, at least initially, be inspired by public interest considerations or conceptualized and executed with much intentionality or in a manner that maximizes on amplifying public interest. Public interest character of such matters only arises or is apparent following the outcome, or based on the interest generated following the

[2]Open Society Justice Initiative, 'Strategic Litigation Impacts: Insights from Global Experience' (OSF 2018) at p. 26
[3]Ibid
[4]Ibid
[5]Ibid

launch, of the litigation.

This then explains why, for this paper, I have chosen the term SL over PIL – to emphasize the point that, if the mission of the litigation is to protect and promote constitutionalism and engender social transformation, then litigation must be conceptualized and conducted with a high sense of intentionality to maximize or achieve the intended impact.

Public Interest in PIL/SL

If PIL has to be presumptively normative on account of public interest, then what is public interest? Though commonplace in judgments and rulings, Kenyan courts have rarely defined or delineated elements of what constitutes public interest.

Public Interest Litigation has become a significant legal tool in many jurisdictions to address systemic issues, promote good governance, and protect the rights and interests of the public.

One unsatisfactory attempt at this is by the Supreme Court of **Kenya in Kenya Revenue Authority v Export Trading Company Limited** where the court adopted the Black's Law Dictionary of what constitutes public interest – that is, "the general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes…".[6] That definition characterizes the public as "all members of the community; relating to or concerning people as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies."

I say it is an unsatisfactory attempt because by adopting a dictionary definition of the term with little more, the court failed to infuse the necessary Kenyan context in order to provide for the autochthonous character of what public interest means - an approach that is demanded of the court by Section 3 of the Supreme Court Act. That provision instructs the Supreme Court to "develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth". [7]

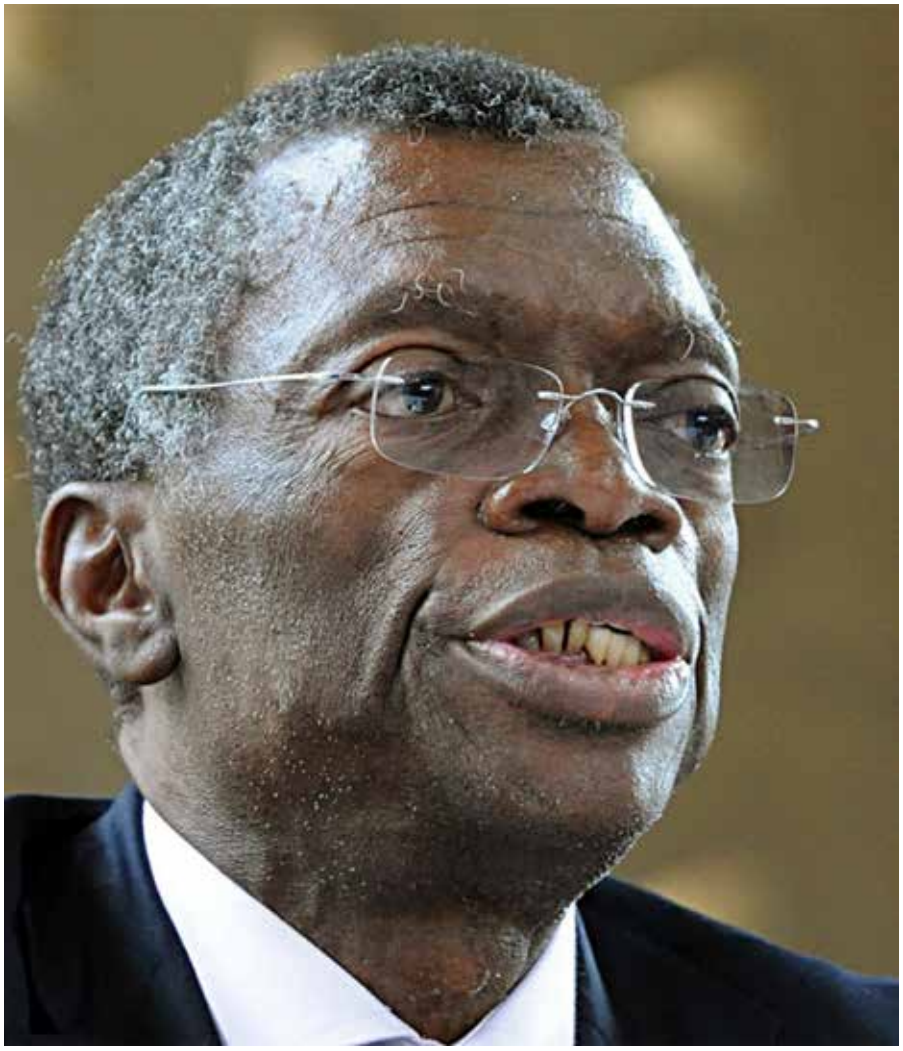
In my view, the starting point of giving an autochthonous character to the term public interest is requiring, as a threshold issue, that what constitutes public interest must align with the values of the Constitution given the obvious understanding that the Constitution reflects Kenya's shared history, values and aspirations. Consequently, any constitutional litigation whose impact is intended to protect, promote or vindicate the Constitution and its values – engages public interests.

The content of Kenya's transformative constitutionalism

Transformative constitutionalism has been aptly described as the exercise of "conceptualizing the Constitution as a comprehensive order for a more equal and just society and a tool to prompt the state to that purpose as much as to restrain it".[8]

The transformative aspects of a Constitution are country specific. Gautam Bhatia in his book *The*

[6]Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020) [2022] KESC 31 (KLR) (Civ) (17 June 2022) at para 65
[7]See, Section 3 of Supreme Court Act, No. 7 of 2011
[8]Hailbronner, Michaela. "Transformative Constitutionalism: Not Only in the Global South." *The American Journal of Comparative Law* 65, no. 3 (2017): 527–65.



The late Pius Langa, former Chief Justice Emeritus of South Africa

Transformative Constitution: A Radical Biography in Nine Acts[9] notes that what India's Constitution set out to transform in the 1950s was political as well as social transformation. Instructively, because of the prevalence of incidents and highly steeped socio-cultural and economic drivers of inequality in India, a significant part of social transformation that India's Constitution focuses on seeks to promote equality.

Similarly, Karl E Klare notes that the purpose of transformative constitutionalism is to radically change a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.[10] In South Africa, all these aspirations are relevant – but perhaps most critical is the effort to engineer "egalitarian social transformation".[11]

Relevantly, Pius Langa, the former Chief Justice of South Africa posits what – at core - transformative constitutionalism is about:

> *For me, this is the core idea of transformative constitutionalism: that we must change. But how must we change? How does the society on the other side of the bridge differ from where we stand today?*[12]

Objectives of the Kenya's transformative constitutionalism

It is hard to pin down a precise provision or statement of the Constitution that stipulates its overall transformative objective. Still, the Constitution's preambular statement on "recognising the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law" provides an instructive starting point.

In **Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others**,[13] Kenya's Supreme Court noted that the transformative nature of the Constitution is intended to address both social transformation and political change. Earlier, the court in the **Matter of the Speaker of the Senate & another**, stated that

> Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional 'liberal' Constitutions of the earlier decades which essentially sought

[9]Bhatia, Gautam The Transformative Constitution: A Radical Biography in Nine Acts, Uttar Pradesh : HarperCollins Publishers India, 2019
[10]Karl E Klare, Legal Culture and Transformative Constitutionalism, South African Journal on Human Rights Volume 14, 1998 - Issue 1 at 146
[11]Ibid
[12]Pius Langa, *Transformative Constitutionalism*, 17 Stellenbosch L. Rev. 351 (2006)
[13]Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR

> the control and legitimisation of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy* ...[14]

I suggest that an analysis of the Constitution underlines the following objectives for transformation. Fostering constitutionalism, democracy and rule of law; and social transformation.

Constitutional law is foundation to the functioning of a legal system and the protection of individual rights. It serves as a framework for governance, ensuring government actions align with principles of justice, democracy, and the rule of law.

Kenya's ideology and tools for transformative constitutionalism

Kenya's transformative constitutionalism derives its ideological anchor on at least four aspects. First, and I believe the most consequential anchor, is Article 1 which provides that "sovereign power belongs to the people of Kenya" and they may exercise it "either directly or through their democratically elected representatives." This is a radical constitutional statement for a number of reasons.

One, it is the anchor of the constitutional legitimacy of any and all people's activities to vindicate the Constitution, including those taken in parallel of what may be considered formal government policy.

Two, it is the foundational basis of the Constitution's overinsistence on public participation as a *sine qua non* to the legality and legitimacy of any state policy or action.

Three, it provides the underlying legitimacy of the people's efforts to constantly audit government's actions and to require that every policy or action be justified and justifiable under the Constitution. This way, the Constitution's reconfirms and re-enforces its architectural agency design – requiring that those with delegated power undertakes only constitutionally firm and justifiable actions.

Four, it is a clear statement of the intention to liberate our legal philosophy from the jurisprudential hostage-taking English colonial legal system and culture. This is by shifting the state sovereignty from parliament (or at times, the executive) to the people. Additionally, it is a de-emphasis or caution on (over)reliance on English common law - which is mostly built from a scaffolding of monarchical and class-based inspired private law.

The second ideological anchor is its overemphasis on values collectively encapsulated in Article 10. In fact, the ubiquitous values the Constitution enumerates are the most informative of what an ideal outcome of the constitutional transformational project would look like.

The third anchor is spelt out in Article 19(1). It is the statement that the "Bill of Rights is an integral part of Kenya's democratic state and *is the framework for social, economic and cultural policies*." This not only underlines the emphasis that constitutions ordinarily give to rights, but adds the requirement that all aspects of state policy be steeped in and guided by rights' consideration.

The fourth anchor is the horizontal application of the Constitution. Horizontal application of the Constitution has gained significant currency in post-cold war liberal constitutions. Still, worthwhile to underline the emphasis of the Principle in Kenya's constitution because a significant part of the effectiveness of the constitution would be lost if its application was

[14]In the Matter of the Speaker of the Senate & another [2013] eKLR at para 51

The judiciary in Kenya plays a crucial role in upholding the rule of law, interpreting the constitution, and ensuring justice for individuals and entities. The judiciary is an independent arm of government, and its functions are outlined in the Kenyan constitution.

limited only to regulating vertical constitutional relationships.

The foregoing provides the objectives and constitutional ideological underpinning for Kenya's transformative constitutionalism. These must inform and act as guide in any SL relating to the constitution.

SL as an effective tool for safeguarding transformative constitutionalism

Ultimately, what makes SL such a potent tool for safeguarding and promoting the objectives of Kenya's transformative Constitution? I identify three.

1. The constitutional legitimation of people's participation and action

For most jurisdictions, the starting point on whether one can bring a legal challenge hinge on and is strictly regulated by very technical rules of standing. In Kenya, the foundational basis of bringing litigation to foster constitutionalism is the constitutional legitimation of people's direct exercise of power (Article 1); the obligation to defend the Constitution (Article 3); and the centrality of and insistence on public participation. Still, the constitutional rules of standing – in Article 22 (litigation on rights), 258 (general constitutional litigation) and Article 70 (enforcement of environmental rights) - are highly permissive.

2. Constitutional character and role of the judiciary

Kenya's judiciary is a constitutionally powerful and consequential institution. The Constitution assigns the judiciary the unique role of being its ultimate protector. As the ultimate protector, the judiciary has (at least potentially) the last word on what is constitutionally permissible in all affairs of the state and the public. Moreover, Article 159(2)(e) emphatically assigns the judiciary the explicit role of ensuring that "the purpose and principles of this Constitution shall be protected and promoted". In other words, Article 159(2)(e) obligates the judiciary to play a leading role in helping deliver the promise of transformative constitutionalism.

Though it is at times slow at acting; though at times it seems to second-guess itself – and, even - the Constitution; though at times

it moderates the transformative reach of the Constitution, I still hold the view that Kenya's judiciary is consequential and progressive. This is because of its near unfettered scope and power of judicial review and, comparatively, the unmatched institutional and individual commitment at catalysing change.

3. Reach and expansiveness of constitutional power for judicial review

For the most part, SL is about finding ways to package socio-economic and political problems into justiciable legal issues to give the judiciary the authority to adjudicate on them. In fact, the effectiveness of SL as a tool for the promotion of social transformation is this ability to formally democratize the search for policy solutions by allowing individuals and communities to either formally – through courts - question the government's policy options, or to participate in developing policy and legal solutions on critical issues affecting them. This approach – which scholars, including Prof. Oloka-Onyango have referred to as the judicialization of politics[15] - deviates from the traditional approach to litigation, which insists that litigation must be limited to strictly legal disputes ostensibly to prevent abuse of the justiciability rule.

The Constitution underscores the use of litigation to defend and promote it and minimizes or perhaps entirely eliminates the technical and substantive reach of the justiciability rule. It is instructive, for example, that Article 165, which establishes the judicial review authority of the court, uses expansive and

Prof. Joe Oloka-Onyango

generous language on what is amenable to judicial review including "anything said to be done under the authority of this Constitution or any law is inconsistent with, or in contravention of, this Constitution".

The power of litigation as a tool for social change is the formality it brings to the issues. Legal processes and success in court can secure material benefits, shift policy, grant legitimacy to long-silenced claims, and narrow the range of available justifications for defenders of oppression. In a country like Kenya where power is overly mystified, SL is a strong and very empowering tool to demystify power – even by individuals or communities considered most marginalized or inconsequential. Litigation facilitates a formal space – and at least some notional equality - where individuals and communities can negotiate with those in power and allow their views and grievances to shape the solutions to address the relevant socio-political, cultural, or economic issue under contestation.

Challenges facing SL in Kenya

Despite its seemingly limitless potential, the growth and conduct of SL face myriad challenges in Kenya. I identify two categories of critical challenges - implementation of court decisions; and SL resources.

Implementation of Court Decisions

SL is grounded on the basic understanding that litigants and impacted groups will recognize and abide by the formal power of the court by complying with and implementing decisions and directives. However, Kenya still suffers from acute democratic and

[15]See, J. Oloka-Onyango, When Courts Do Politics: Public Interest Law and Litigation in East Africa Cambridge Scholars Publishing (2017)


Chief Justice Emeritus David Maraga

constitutionalism deficit.[16] This lack of culture that respects the law, especially by formal actors regularly manifests itself through failure or refusal to implement court decisions. In most cases, there is outright defiance or contumacious violation of Court orders. Retired Chief Justice David Maraga reflected on the enormity of this problem:[17]

> **[127]** ... It is trite that until they are set aside, court decisions have to be obeyed by all and sundry; court orders are part of the law of this country and must be obeyed by all.
> **[128]** As such, the Government as well as State organs and State officers should be at the forefront in obeying and complying with court decisions. As a country, we cannot and should not allow the Government to demand obedience by its citizenry to the law of the land which it is itself disregarding with abandon. No State organ or State officer should be allowed to do that as that will be courting anarchy.

I recommend two ways to try and redress the problem of implementation of court decisions. One, more proactive engagement by the courts on implementation of its decision; two, a more collaborative approach in conducting SL, especially on litigation that engages complex socio-economic and cultural issues.

A pro-active judiciary: The Constitution allows for courts to craft structural remedies, which may include aspects of the implementation of their decisions. To their credit, courts have made some attempts to issue structural remedies[18] – including monitoring of enforcement of the decision - where they perceive the violations are systemic. Supreme Court has recently given constitutional imprimatur to structural remedies. However, our judicial practice in this regard is incoherent and lacklustre, even at the level of the Supreme Court – the best example being the failure to follow through on the implementation of its decision on legislative reform in the Muruatetu case.[19] Similarly, in spite of initial concerted effort by the High Court in following up on implementation of its structural orders in **Satrose Ayuma v Registered Trustees of the Kenya Railways Staff Retirement**

[16]On what may entail constitutional and democratic deficit, see; Blokker, Paul, The Constitutional Deficit, Constituent Activism and the (Conference on the) Future of Europe (December 18, 2021). Paul Blokker, 2021, ed., Imagining Europe. Transnational contestation and civic populism, series European Political Sociology, Palgrave., Available at SSRN: https://ssrn.com/abstract=3988878 or http://dx.doi.org/10.2139/ssrn.3988878
[17]Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae) [2020] eKLR
[18]*See*, Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR
[19]Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR); Francis Karioko Muruatetu & another v Republic [2017] eKLR

Benefits Scheme & 2 others;[20] the court ultimately seems to have succumbed to fatigue.[21] Still, the structural remedies had the salutary effect of legislative reform to introduce specific provisions of the law relating to evictions.[22] Many other structural remedies by Kenyan courts remain unimplemented with little judicial follow-up.

Regardless of whether state organs have the goodwill to implement court decisions, because of the complexity of what constitutes effective remedies in litigation with a significant impact on social transformation, there is a need for courts to develop coherence and a sustainable approach to require and monitor the implementation of their decisions.

Collaborative lawyering is based on the premise that parties are better able to control the outcome of their dispute and preserve relationships when they actively engage in a cooperative process.

Collaborative approach to litigating and adjudication: This brings me to the second suggestion – that is, pursuing a more proactive and collaborative approach in SL. Litigation whose impact is intended to result in social transformation is complex since it requires sensitive, sensible and judicious assessment of policy options available to bring about the desired change. Often courts and lawyers do not have the expertise to unilaterally make the judgment call of what are the prudent policy options. Because of the long-term effect the outcome of such litigation will likely have on society, a mechanistic approach to lawyering and adjudication is counter-productive. Certainly, an approach to adjudication on PIL matters that fully relies on the traditional common law approach of adversarial conduct of litigation is imprudent.

My view is that where a court believes that the outcome or conduct of litigation is likely to result in significant public interest impact, the court ought to take a more proactive posture and demand from the parties a more collaborative approach. This heightens the possibility of amicable, fair and informed resolution of the matter. Elements of a proactive posture may include the court adopting a more inquisitorial adjudication approach and a hands-on case management process, including inviting its experts, engaging in site visits, and even, where possible, demanding evidence-based modelling of policy or remedial options available in the litigation.

Collaborative lawyering acknowledges the complexity of and potential salutary or detrimental impacts that may result from litigation. It recognises that the constitutional permission to engage in litigation that impacts public interest is an onerous obligation – that calls for a significant sense of prudence. Litigating to win, which is the traditional instinct of a lawyer, is, often the wrong approach to SL. Instead, litigating for impact is a more appropriate and prudent approach. At the core of anticipating litigation impact is the ability to weigh the pros and cons of the outcome and make the necessary but responsible call –

[20]Ayuma & 11 others (Suing on their own Behalf and on Behalf of Muthurwa Residents) v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others; Kothari (Interested Party) (Petition 65 of 2010) [2013] KEHC 6003 (KLR) (Constitutional and Human Rights) (30 August 2013) (Judgment)
[21]Satrose Ayuma & 11 others v Registered trustees of the Kenya Railways Staff retirement benefits scheme& 3 others [2015] eKLR
[22]*See*, Section 152A-I of Land Act, No. 6 of 2012

Litigating organizations play a vital role in shaping legal precedent, influencing public policy, and advancing social justice. They contribute to the development of the law and provide legal representation for those who may otherwise lack access to the legal system.

guided by public interest – on the best cause, including oftentimes, not undertaking the litigation at all no matter how intellectually or politically stimulating the issues are. I reckon that taking a collaborative approach is less socialized in most of us lawyers – and perhaps even more so among government actors.

Litigation resources

In his appraisal of the development of SL in South Africa, Jason Brickhill identifies three resource challenges SL faces, which, in my view, equally apply to Kenya: suitable litigants and litigating organizations; funding of SL; and shortage of publicly spirited SL lawyers.[23] There are certainly more challenges afflicting SL in Kenya.

Litigants and litigating organizations: The growth and conduct of PIL in Kenya have been mostly ad hoc. Except for a handful of individuals, most of the litigants are one-time litigants who have a direct interest in the outcome of the case, though the impact may have public interest dimensions. It is unlikely that such litigants will be concerned with the strategic aspects of litigation hence minimizing the possible impact of the litigation.

The situation is not that different when it comes to litigating organizations. Since the promulgation of the Constitution, very few organizations have been formed with SL as their mainstay mandate. On this, Katiba Institute, and a handful of other organizations are the exception. For most organizations, including human rights organizations, that often bring or participate in PIL, litigation is a peripheral activity. As such, I believe it is difficult for these organizations to develop the critical, nuanced approach that SL calls for. Additionally, because most of these organizations engage in diverse issues of constitutional litigation, it is nearly impossible for them to develop issue-specific expertise or the knowledge base that at times is needed to sharpen SL issues and impact.

Funding: There is no established and predictable funding available in Kenya to support SL. Even

[23]Brickhill, Jason: Strategic litigation in South Africa : understanding and evaluating impact. PhD Thesis (2021). Available at http://ora.ox.ac.uk/objects/uuid:e7be10e6-c511-40b1-8126-df3b3b229b5b https://ethos.bl.uk/OrderDetails.do?uin=uk.bl.ethos.864702 (Accessed December 2, 2023)

Effective lawyers possess a strong foundation of legal knowledge in their practice areas. They continually update their understanding of relevant laws, regulations, and legal precedents.

though the Legal Aid Act[24] identifies PIL as one area that should be legally funded, Legal Aid Board has struggled to meet even basic operational costs let alone find money to fund PIL. Hence most PIL in Kenya is self-funded, with the exception of a few organizations that can mobilize litigation funding from (mostly, western) donors. Often, that funding comes with significant restrictions.

Yet, good and effective SL is expensive. And it should be, because if we accept the foundational premise that SL is litigation for the public good, whose impact is far-reaching including changing policy, laws and ultimately engineering social transformation, then we must accept that SL is a critical, involving, and an expensive affair. Effective SL calls for significant comparative research, top-level expert evidence and analysis and often elaborate site visits. All these come with significant funding costs.

Lawyers: Effective SL lawyers must possess certain attributes. Brickhill highlights two: a good understanding of political context and the ability to listen.[25] Listening and adaptability skills are especially a critical attribute of an SL lawyer because of the level of heightened engagement SL calls for with individual litigants and communities, including in the development of litigation strategy and remedies.

Kenya has a weak base of legal aid or movement lawyering, which often is the incubation space for later - to be effective - SL lawyers. Worse, because of the generalist tendency of Kenya's litigation culture, at times even exceptional lawyers may lack the facilities, knowledge base, and nuanced approach that specific but complex issues SL engages calls for.

But perhaps the greatest challenge is the personal attributes inherent in effective lawyers. SL requires an ideological commitment to issues. It calls for lawyers who believe in an egalitarian, gracious, and collaborative approach to all the critical relationships i.e. litigants, opposing parties, and the court. It also calls for resilience, since, because of the consequential impact they carry, hardly are SL matters resolved with a single stroke.

Conclusion

The Constitution provides clarity on what the outcome of implementing transformative constitutionalism should be. It also provides the tools and demarcates pathways for people to use to achieve those outcomes. Certainly, SL coupled with the constitutional authority of the judiciary is one of the consequential tools to do so. To a large extent, we owe the judiciary and SL whatever we have achieved in engendering some elements of constitutionalism. Still, there is a lot more to be done – including recruiting more publicly-spirited lawyers and insisting on continued decisional and institutional independence of the judiciary to fully tap on the latent potential that SL holds to help fully entrench constitutionalism and engineer social transformation. Thank you!

Waikwa Wanyoike is an Advocate of the High Court of Kenya and the founding CEO of Katiba Institute.

[24]LEGAL AID ACT (No. 6 of 2016)
[25]Brickhill op cit, footnote 23

11th C.B Madan Awards Ceremony

Vote of thanks on behalf of The Platform

By Muthoni Nkonge

What a warm afternoon ladies and gentlemen, and as we wind up this wonderful session. On behalf of The Platform, I would like to thank you all for your presence, patience, participation and phenomenal turnout for our gala; the 11th Annual C.B Madan Awards and Memorial Lecture.

The Platform feels a deep sense of gratitude towards all of you especially;

Our host, Strathmore University for your loyal and generous support in our partnership that has now marked a decade. Special thank you to the Strathmore University School of Law.

We equally extend our gratitude to Strathmore University's Deputy Vice-Chancellor in charge of Research and Innovation, Prof. Izael da Silva. We also thank the former Deans of Strathmore University School: Prof. Luis Franceschi, Dr. Peter Kwenjera, and Prof. Borja Lopez, for building a great learning institution to which we are currently hosted by the current Dean, Dr. Jane Wathuta.

We humbly note the presence of the Chief Justice of the Republic and President of the Supreme Court of Kenya, Her Ladyship, Hon. Martha Koome together with Chief Justice Emeritus, Prof. Willy Mutunga.

We extend our gratitude to all law firms and individual sponsors for honouring us with their presence and contributions which have been integral in making this day come to fruition. We thank Mr. Aaron Tanui, Mr. Walter Ochieng, Commissioner Kamotho Waiganjo, Dr. Sam Gakunga, Mr. Elisha Ongoya and Kioko Kilukumi, SC. Others include Mr. Brian Migowe, Ms. Lumallas Eunice, Mr. Morris Kaburu, Mr. Walter Amoko, Mr. Waikwa Wanyoike, Canon Francis Omondi, the kind young professor, Paul Muite, SC, Mr. Ian Mathenge, Ms. Mary Mukoma, Mr. Emmanuel Tioko, Mr. Evans Ogada and Sir John Maina. The emcees who fluidly took us through the whole ceremony.

The awardees of the afternoon. Thank you for standing out among many. The grand prize winners of today are a family that says it as it is. A team that has shown unwavering commitment to safeguarding the principle of the rule of law and constitutionalism. A team that has not only carried great minds but also been a home for great people including our speaker of the day.

Ladies and gentlemen, our recognition to the 11th CB Madan Memorial Lecturer, an Advocate of the High Court of Kenya, a Barrister and Solicitor in Ontario, Canada, Founding CEO of Katiba Institute, the Director of Strategic Litigation at the Open Society Justice Initiative, *inter alia*. Mr. Waikwa Wanyoike is a man in touch with making changes one step at a time through Strategic Litigation. Thank you.

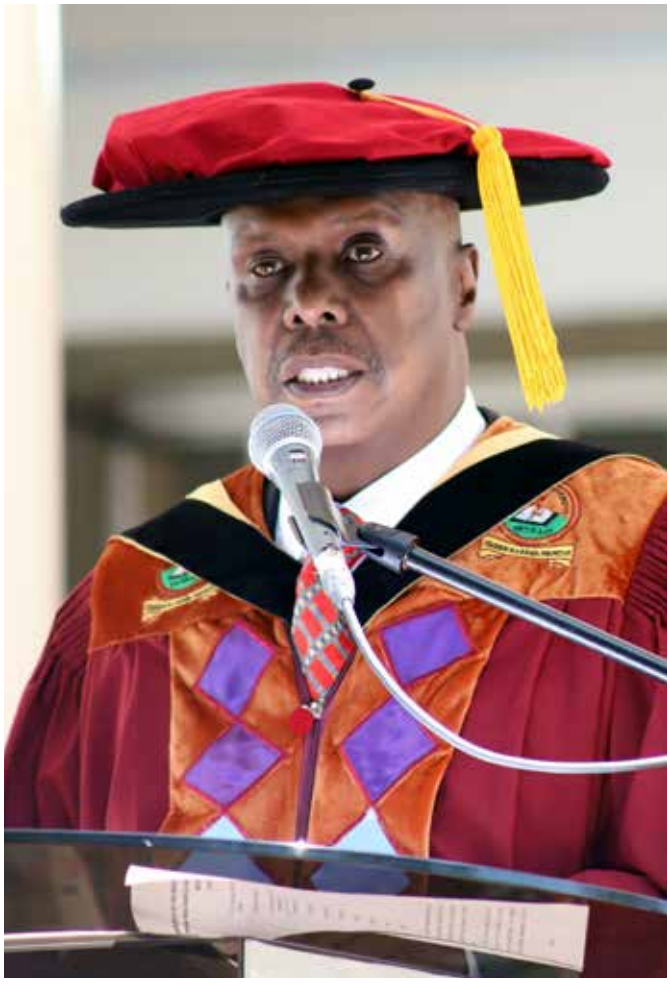
To the staff members, the Board of Associate Editors and others who delight in the perfection that is Platform including the Executive Assistant to the Editor-in-chief, Mr. Marangu Imanyara, and the editorial researcher, Mr. Nyaga Dominic. To our Editor-in-chief, Hon. Gitobu Imanyara, we appreciate your efforts as the founder and publisher of this outstanding, insightful and highly respected legal magazine.

Once again, ladies and gentlemen, it is time to give a round of applause to everyone who has participated in today's event. The Platform wishes each one of us a prosperous 2024.

19th Kabarak University Graduation Ceremony Speech

Introductory remarks by Honourable Dr. Gideon Kipsielei Moi, Chancellor, Kabarak University

It is my pleasure to introduce our graduation speaker for the 19th congregation of Kabarak University. Professor Luis Gabriel Franceschi is a holder of a Bachelor of laws, Master of laws and Doctor of laws degrees. Currently, he is the Assistant Secretary General of the Commonwealth of Nations, an intergovernmental organization of 56 countries, 2.5 billion people constituting one-third of the world. In this capacity, Professor Franceschi coordinates the political, democracy, electoral, public sector, governance, rule of law, judicial transformation, human rights and countering violence and extremism work in the 56 member countries of the Commonwealth. He is also the Commonwealth Heads of Government Meeting (CHOGM) Conference Secretary, and together with the heads of the host country task force, oversees the organization and negotiations throughout the meeting. Professor Franceschi is the founding Dean of Strathmore University Law School in Nairobi. As a thinker, educator and writer, he loves positive and disruptive innovations. Professor Franceschi was appointed as Al-Shabali by the President of Gabon with the Order of Merit, (National du Merite) for his outstanding achievements. He is also the recipient of the 2019 Legal Excellence C.B. Madan Award and the 2018 Utumishi Bora National Award. In 2019, Professor Franceschi was a visiting scholar at the University of Oxford and UC Berkeley Law School in California. His area of expertise focuses on innovation in legal education, judicial transformation and comparative constitutional law.



Dr. Gideon Kipsielei Moi, Chancellor, Kabarak University

Dr. Gideon Kipsielei Moi with Professor Luis G. Franceschi.

Professor Franceschi has written widely on the convergence between constitutional law and public international law— the constitutional regulation of foreign affairs power. He has been a legal advisor to several national and international government agencies, commissions and programs including the international regional courts, the United Nations and the World Bank. Professor Franceschi sits on several boards, and he has conducted executive leadership courses for CEOs in several countries. He has been a governing council delegate and the legal advisor to the President of the Governing Council of the United Nations Environmental Program (UNEP) where he co-drafted the United Nations Declaration.

Professor Franceschi has published widely on constitutional law and political international issues. He was also a weekly columnist with the Daily Nation newspaper for almost 10 years. Apart from academic and professional engagements, Professor Franceschi also finds time to indulge in self-care and leisure activities. He likes cycling, running and mountain climbing and has reached point Lenana, Mount Kenya, which is 5,000 meters above sea level, five times. Uhuru Peak on Kilimanjaro, 5800 meters above sea level and the Ruwenzori mountains circuit, Uganda-Congo.

He is a Kenyan citizen and currently resides in London where the Commonwealth Secretariat has its headquarters. On a personal note, where my wife Sarah and I are very proud, is that he is also the godfather of our second-born son. Ladies and gentlemen, you will agree with me that Professor Franceschi is best suited to deliver the graduation message of the 19th congregation of Kabarak University. **Welcome Professor.**

19th Kabarak University Graduation Ceremony Speech

By Prof. Luis G. Franceschi

Honourable Dr. Gideon Kipsielei Moi, Chancellor, Kabarak University,

Distinguished Chair and members of the Board of Trustees present,

Distinguished Chair and members of the University Council,

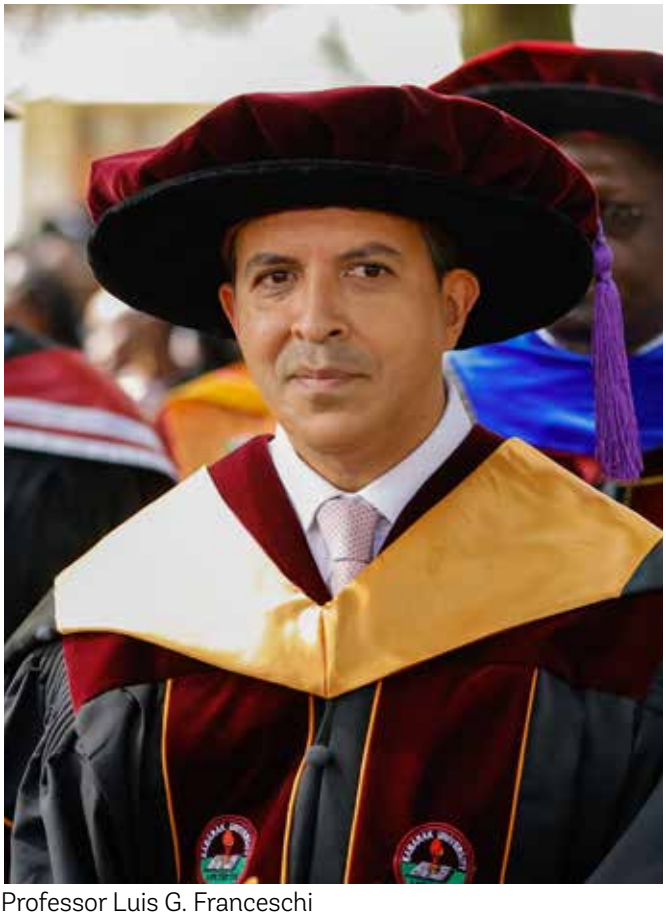
Professor Henry Kiplangat, Vice Chancellor, Kabarak University,

Honourable David Kenani Maraga, Chief Justice Emeritus of the Republic of Kenya and awardee of the Degree of Doctor of Law honoris causa,

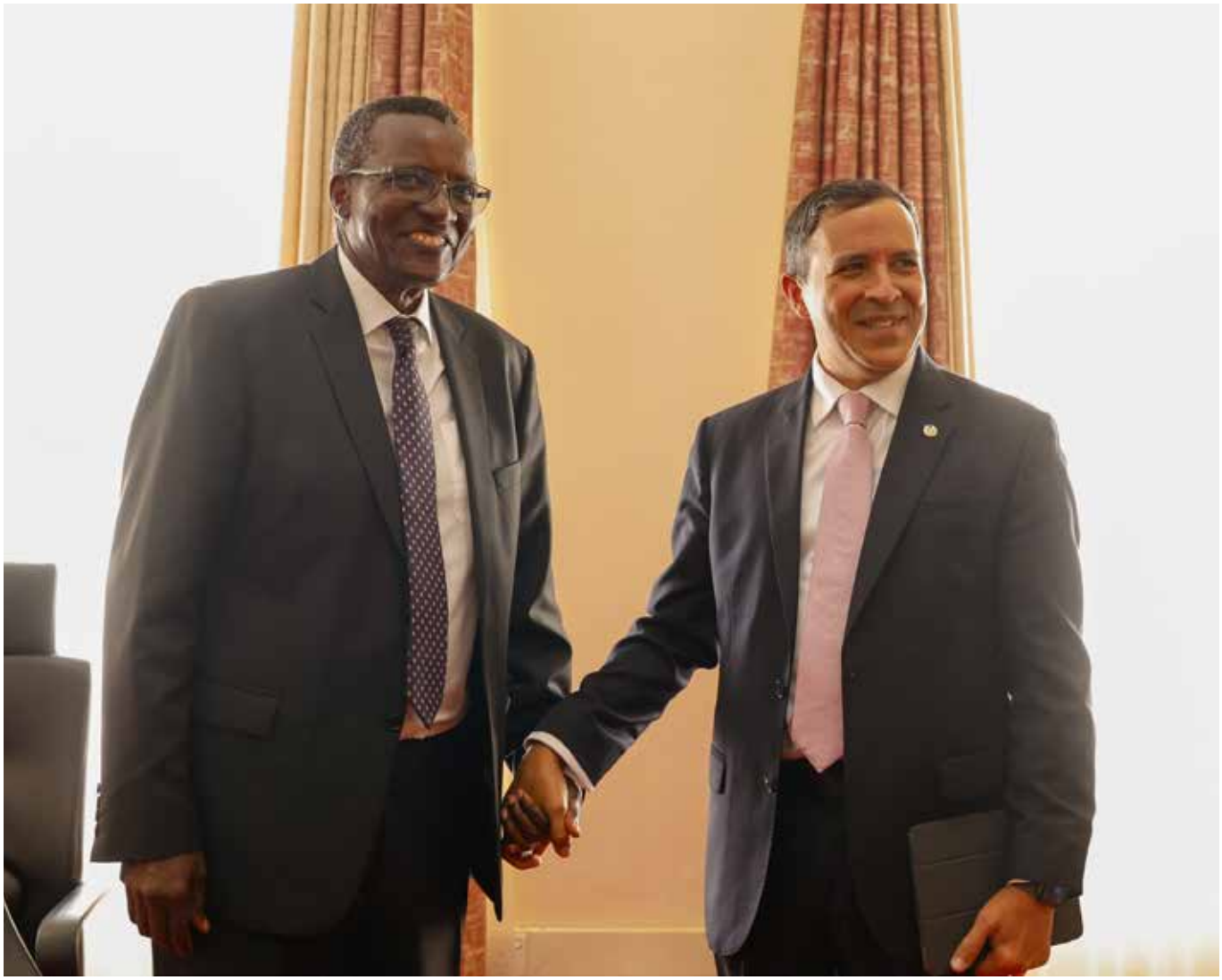
Authorities, Deans, Directors, members of faculty, Our dear graduands,

Parents, guardians and family members, Ladies and gentlemen.

If these buildings that surround us were not here and our vision was unlimited to the North-East behind me, we could see Somalia, to the North is Ethiopia and further North-West is South Sudan. If we could see even



Professor Luis G. Franceschi



Professor Luis G. Franceschi with the Chief Justice Emeritus Honourable David Kenani Maraga.

further, we would see Palestine, Israel and even further Ukraine. To the West is Congo, Cameroon, and closer to us without straining our eyes so much we could see poverty-stricken neighbouring counties. This reality is shocking, the world is in turmoil, and it is not the fault of democracy, nor of the political parties, nor of the International Monetary Fund. It is the fault of those who have been sitting on those chairs that you are occupying today since 1963. For sixty years, and I include myself in this group, it is the fault of those who graduated before you and you do not want to be accomplices, you want to do better for the country, for Africa, and the world.

Many years ago, I sat like you today in one of those chairs. Today, I am the Assistant Secretary General of the Commonwealth. How did it happen? So to say, I am not a genius, there are cleverer minds sitting here today on those chairs, and even behind me, those who taught you and those who sponsored you to come to the university.

But truth be told, my story is a little bit unique, like the story told to us just before the graduation. Each of us has a unique story, and I wanted to tell you a little bit about mine so that you discover that your own story will be unique and great because you have what it takes to make it great.

I am French by descent, Venezuelan by birth and Kenyan by choice. My father was a prestigious general, he had French and African blood running through his veins. My mother was a director of a banking institution; he had the power and she had the money. We are ten children, I am the eighth born and I was the last born for fifteen years. They are all holding PhDs, successful degrees, the eldest was nominated to have a Nobel prize: he is a scientist.

There are three of them who are priests. It is amazing and we get along very well, we are a very united family.

Professor Luis G. Franceschi with Dr. Gideon Kipsielei Moi and Professor Henry Kiplangat, Vice Chancellor, Kabarak University,

What was the trick? This is a trick you may have to consider for yourself and the parents sitting behind you today, who supported you, may also have to think if they could do this with their grandchildren.

One was time, then money, then piety. There was no free time at home, we had no free time, there was always something to do, a wall to clean, furniture to move, boys and girls did it all, washed dishes, anything. Money; there was no money, they kept us short of money, we had to decide between the soda and the sandwich, but we could not afford both.
And then piety, sober, sincere, we saw them pray. There was nothing strange but my father despite having thousands of men at his command, he had no shame and was not apologetic about kneeling before God to pray. Well, he found his strength in faith and it is that beautiful faith that you are taught or encouraged to live here in this university. They taught me, they taught us to do ordinary things extraordinarily well. Fast forward a few years, I am here in Kenya, more than thirty years ago before you all were born, and of course a different environment.

I was introduced to the international arena perhaps by error, when the President of the UNEP's Governing Council asked for legal help and I was sent to him, and he may have wondered, what is this young man doing here? But he took me along and we ended up drafting that declaration that modified or somehow reformed the UNEP system. Years later, I found myself again by error, being invited to the Office of the President of Kenya to write the values of Kenya in 2007-2008. We met for a whole year, week after week at the Office of the President of Kenya and conceptualized and later legislated the values of Kenya, though they are yet to be taught. A few years later, the burden of starting a new law school was placed upon me, perhaps again by error and we started the Strathmore University Law School. We put in place a beautiful collaboration with Kabarak University which lasts until today. When I finished my second term as the Dean of the law school, I was

selected for the sabbatical the Chancellor mentioned at Oxford University and in Berkeley. Perhaps again by error, I was called for an interview at the Commonwealth and after following a very difficult process of several interviews, I was appointed Assistant Secretary General of the Commonwealth, a truly amazing organization. How did these errors come together? Well, I would say what Africa, what Kenya has taught me, and I call it the six absurdities of Africa:

i. The absurdity of hospitality;
ii. The absurdity of generosity;
iii. The absurdity of patience;
iv. The absurdity of resilience;
v. The absurdity of joy;
vi. The absurdity of faith.

When John Paul II travelled to Africa, he was shocked that he was always asked, "what else can we do to you? What else can we give you?". And when he traveled around Europe, he was always asked, "how much are these trips costing? Is it worthwhile?" And he said, well, there is incredible hospitality in Africa and it is true, we find hospitality always and everywhere.

ii. The absurdity of generosity

Africa was never driven by profit maximisation. It took a village to raise a child; just imagine that investment in just one child. No matter how poor and destitute a family is you will always find something to eat and chai to drink made with love and simplicity. Meanness has no place in the African culture. This generosity is not naivete, but rather the challenge to profit maximisation, which is a concept that was forced down our cultures by a process of colonisation focused on the extraction and a process of both colonisation focused on exploitation.

iii. The absurdity of patience

Today if somebody left Nairobi this morning to attend this graduation, they will probably make it to next year's graduation because the traffic is unbelievable. I usually say that in London, trains leave at 3:07 and here we

Professor Luis G. Franceschi with Professor Henry Kiplangat, Vice Chancellor, Kabarak University,

From Left: Zahra Moi, Dr. Gideon Kipsielei Moi, Professor Henry Kiplangat, Vice Chancellor Kabarak University and Professor Luis G. Franceschi

leave between 3 and 7. We queue, we wait, we are promised and perhaps abused but we are not down yet, we wait.

iv. The absurdity of resilience

Well, we keep going, like those old Peugeot 504 which we saw on the roads forever, they lasted forever. Well, we have seen poverty, misery, war, conflict, disease, and abandonment but we keep going. Our polluted world will not be sanitized by solutions with electric cars, good filters and tree planting—all those are essential but what about the means of extraction, exploration, exploitation, and manufacturing so that resilience is constantly improved.

v. The absurdity of faith

It is very interesting, in Kenya and Africa we believe, and it is so interesting that even the Secretary of the atheist association in Kenya left the organization because he found Jesus, which happened two years ago. We believe in God and we are not apologetic about this.

vi. The absurdity of joy

Finally, because I already mentioned the absurdity of faith, the absurdity of joy; a sense of humour; our laughter; our bright eyes—they look like sponges sucking all the possible knowledge, friendship is amazing. The absurdity of Africa is the hope of humanity. Africa today reminds the world about nature, culture, generosity and simplicity. Why do I call them absurdities? Because they are absurd in a world driven by profit, fame, power, greed and material welfare. A world where the spirit finds no space and where God has been forgotten.

I usually say that my life has been a combination of these six beautiful absurdities and errors majestically weaved by God's providence in the company of a brilliant team, back then, here in Kenya and now, at the Commonwealth. I have been blessed to be surrounded by outstanding professional colleagues, and this is something that also taught me a lesson. You never reach alone, you always go with the village that educated you, with the friends that surrounded you, and with those who are graduating today, you will grow better and better together.

However, we have to be always fully aware that those honours bestowed on us are not ours, the position I occupy there in the Commonwealth does not belong to me, and even though today I may have honours and life

is made easy for you when you visit a place, these will not happen tomorrow. So, we are in positions of power to serve. Kenya and Africa expect greatness from this generation. You will be the ones to change the course of history, a history my generation mistreated and mishandled. Hospitality, generosity, patience, resilience, joy and faith combined will make, well, truly each of you reach greater heights. Courage; keep trying. A saint is not the one who doesn't fall, a saint is the one who stands up and keeps trying.

I want to share with you two stories.[1]

I. Easy Eddie

In the 1920s, Al Capone virtually owned Chicago. In his empire of illicit trade—illegal liquor, liquor, prostitution and murder, Al Capone had a lawyer nicknamed 'Easy Eddie'. Easy Eddie emerged as Capone's legal maestro, the man who kept the untouchable mob boss out of jail with his legal acumen.

Capone rewarded Eddie handsomely. Money cascaded like a waterfall, affording Eddie and his family a life of opulence and grandeur. A colossal mansion, sprawling across a Chicago city block, stood as a testament to Capone's appreciation. Yet, amidst the riches and lavishness, Eddie held a soft spot, a precious place in his heart reserved for his beloved family. His son, the apple of his eye, was bestowed with luxuries beyond measure—fine clothes, sleek cars, and the best education money could buy.

Despite his involvement with organised crime, Eddie even tried to teach him right from wrong. Eddie wanted his son to be a better man than he was.
Yet with all his wealth and influence, there were two things he could not give his son—a good name and a good example.

One day, Easy Eddie reached a difficult decision—he wanted to rectify the wrongs he had done. He decided he would go to the authorities and tell the truth about Al Capone. He decided he would clean up his own tarnished name and offer his son some integrity. To do this he would have to testify against Al Capone.

Not long after he testified, Al Capone went to jail and Easy Eddie was murdered in a lonely street in Chicago.

Professor Luis G. Franceschi

[1]The two stories were originally authored by Bob Day AO and published in October 2021 by *The Daily Declaration*: https://dailydeclaration.org.au/2021/10/26/easy-eddie-and-butch-ohare-two-stories-one-lesson/

It is said that in his pockets were a rosary, a cross, a religious medallion, and a poem clipped from a magazine which read;

"The clock of life is wound but once and no man has the power,

To tell just when the hands will stop, at late or early hour.

Now is the only time you own so live and love and toil with will,

And place no faith in time, for the clock may soon be still."

II. Butch O'hare

The Second World War produced many heroes. One such man was Lieutenant Commander Butch O'Hare, a fighter pilot assigned to the aircraft carrier Lexington in the South Pacific. On 24 Feb 1942, his entire squadron was sent on a mission. After he was airborne, he looked at his fuel gauge and he did not have enough fuel to complete his mission and get back to his ship. His squadron leader told him to return to the carrier, so he reluctantly dropped out of formation and headed back to the fleet. As he was returning to the mother ship he saw something that turned his blood cold — a squadron of nine Japanese aircraft was speeding its way toward the American fleet. His colleagues were away, and the US's Lexington was defenseless. Laying aside all thoughts of personal safety, Butch dived into the formation of Japanese planes, attacking one surprised enemy plane after another. Finally, the exasperated Japanese squadron took off in another direction. He had destroyed five enemy aircraft and scattered the other four.

For that action, Butch became the first naval aviator to win the Medal of Honour. A year later Butch was killed in aerial combat at the age of twenty-nine. Chicago, his hometown would not allow the memory of their hero to fade, and today O'Hare Airport in Chicago is named in tribute to his courage. Today, Butch's memorial statue and his Medal of Honour are exhibited at O'Hare International Airport. So, what do these two stories have to do with each other? Butch O'Hare was Easy Eddie's son.

There are many O'Hares here today. True heroes, who I can see with my eyes, and I see it in their eyes. They are your parents, dear graduands, who changed the course of their lives and fortunes to give you the best they could afford, the best education. True heroes and heroines who passed on the faith to you in a world where faith is looked down upon as weakness, humility as silliness, simplicity as lack of depth, and hospitality as softness.

There are many O'Hares here today.

Finally, I want to read to you a very short write-up by Dr. Bob Moorehead who wrote a beautiful piece titled, '***The Paradox of Our Age***':

"The paradox of our time in history is that;
we have taller buildings but shorter tempers;
wider freeways but narrower viewpoints;
we spend more but have less;
we buy more, but enjoy it less.
We have bigger houses and smaller families;
more conveniences, but less time;
we have more degrees, but less sense;
more knowledge, but less judgement;
more experts, but more problems;
more medicine, but less wellness;
we drink too much, smoke too much;
spend too recklessly, laugh too little;
drive too fast, get angry too quickly;
stay up too late, get up too tired;
watch too many movies , and pray too seldom.
We have multiplied our possessions, but reduced our values.
We talk too much, and hate too often;
we have learned how to make a living, but not a life;
we have added years to life, but not life to years;
we have conquered outer space, but not inner space;
we have done larger things, but not better things.
We have learned to rush, but not to wait;
we have higher incomes, but lower morals;
we have become long on quantity, but short on quality.
These are the times of fast foods and slow digestion;
tall men and short characters,
steep profits and shallow relationships.
These are the days of two incomes, but more divorce,
of fancier houses, but broken homes."
The future belongs to you and you graduands belong to the future. Cicero used to say that the wise are instructed by reason, ordinary minds by experience, the stupid by necessity, and the brute by instincts.

You have to decide who will instruct you or what will you be instructed by. Never forget the reason for the hope that you have in this university and do so with gentleness and respect as your university coat of arms reminds you.

You cannot guarantee success, but you guarantee failure by giving up. **Thank you very much!**

Challenges and opportunities in constitutional evolution

By Nicole Dempster

By Deckstar Adaki

Jean-Jacques Rousseau. Rousseau's ideas on democracy, the social contract, and the general will influenced subsequent political thinkers and movements, including the French Revolution.

Introduction

Democracy is often applauded as a government of the people where power belongs to the people who may exercise it directly or elect representatives to represent and protect their interests.[1] In the turbulent landscape of Rousseau's time, where oppressive monarchies held sway, the concept of true democracy was but a distant dream.[2] His solution to achieve human freedom and legitimate government was to shift sovereignty to the people. Fast-forwarding to the 21st century, the fervent desire for democracy and the rule of law echoes universally, compelling individuals to risk everything for its realization. Yet, Kenya, since its birth in 1963, has grappled with an elusive functioning democracy, a void that underpins many of its challenges.[3] Beyond the surface, the essence of democracy, the fusion of 'people's rule', has been forgotten in Kenya.[4] Instead, a ruling faction, often autocratic and plutocratic, operates with a tribal-feudal mindset,[5] donning a democratic façade while advancing personal interests. The democratic principles, where power should emanate from and belong to the people,[6] have been overshadowed by a government that wields authority for its gains, stripping the populace of their rights and privileges. Despite the 2010 Constitutional efforts[7] and subsequent legislations, the rule of

[1]Kanyinga, Karuti, "Kenya : democracy and political participation", A review by AfriMAP, Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS), University of Nairobi, 2014. From https://lccn.loc.gov/2013441869 on 16
[2]Rousseau on Democracy. Available at https://www.thephilosophyproject.in/post/rousseau-on-democracy on 16 December 2023.
[3]Wafula S. Democracy in Kenya: An Analysis Of its Limitations And Challenges, Soko Directory, 2023. From https://sokodirectory.com/2023/03/democracy-in-kenya-an-analysis-of-its-limitations-and-challenges/ on 16 December 2023.
[4]*Ibid*.
[5]Kisaka O, Nyadera N, *Ethnicity and politics in Kenya's turbulent path to democracy and development*, Sosyal Siyaset Konferansları Derg, 2019, 76:159–180
[6]Constitution of Kenya 2010, Article 1(1).
[7]Barkan D, Mutua M "Turning the corner in Kenya", 2010. Foreign Affairs; Akech M "Institutional reform in the new constitution of Kenya", In: International center for transitional justice, 2010, pp 15–32.

Abraham Lincoln is remembered for his eloquence, moral leadership, and dedication to the principles of freedom and equality.

law in Kenya struggles to challenge the dominance of the ruling elites due to institutional weaknesses. The democratic experience in Kenya has thus become a paradox where power intended for the people is wielded by political officeholders, perpetuating a system that contradicts the very ideals it claims to uphold.

The intricate tapestry of Kenyan political history reveals a governance landscape shaped by diverse influences.[8] From the early years of independence to the complexities of the present day, the delegation of decision-making authority has been the hallmark of the nation's governance framework.[9] Yet, as the socio-political fabric undergoes dynamic shifts, so too does the relationship between the governed and the governing. Delegation, a once-reliable mechanism for policy implementation, has spurred a growing sentiment among Kenyan citizens—a yearning for more direct involvement in the decisions that shape their lives. The evolution of Kenyan society, coupled with global demands for transparency and citizen participation, propels the nation into promising territories.[10] This phenomenon transcends local boundaries, echoing the global conversation about redefining democratic governance.[11] Many Kenyans have lost trust in elected representatives, doubting their ability to represent diverse interests. Human rights violations by those in power intensify concerns, while the debt crisis raises questions about fiscal discipline. As the erosion of public trust in institutions becomes increasingly pronounced, this paper seeks to critically assess the impact of these challenges on the democratic fabric. One plausible scenario is that lack of trust in the representative system may contribute to the preference for direct exercise of sovereign power. After all, the choice of whether to exercise sovereign power directly or indirectly is ultimately up to the people, which can vary depending on the specific circumstances and contexts.

In echoing President Lincoln's timeless words in the Gettysburg Address — a call for a *"government of the people, by the people, [and] for the*

[8]Bates H, "Modernization, ethnic competition, and the rationality of politics in contemporary Africa", 1983, In: State versus ethnic claims: African policy dilemmas, vol 152. Westview Press, Boulder, p 171.
[9]Muli K, *The Struggle for Democracy in Kenya through the Electoral Process*, The Regional Stakeholders Round-Table on Elections and Democracy, 2007; Gichuki N (2016) Kenya's constitutional journey: taking stock of achievements and challenges. Recht Afr 18(1):130–138.
[10]Katiba Institute, 'How political parties are failing Kenya yet again', 2016. From https://katibainstitute.org/how-political-parties-are-failing-kenya-yet-again/ on 18 December 2023.
[11]European Partnership for Democracy, 'Exploring Worldwide Democratic Innovations', Sep 2021 – Aug 2024. From https://epd.eu/what-we-do/programmes/exploring-worldwide-democratic-innovations/ on 16 December 2023.

President Mwai Kibaki lifts Kenya's constitution after it was promulgated at Uhuru Park in Nairobi on August 27, 2010.

people" — the question arises: Is this an achievable template for Kenyan democracy? Could direct democracy find resonance in the governance of Kenya? This paper contends that indeed it could. Direct democracy possesses the potential to diminish the influence of legislative and executive bodies, enabling citizens to engage beyond periodic elections of representatives.[12] Let us ground this intuition in political and constitutional theory. There is one question that is essential to this discussion: Just how direct ought our sovereign power be in a constitutional democracy that seeks to protect vested individual rights? We contend that there ought to be a meaningful direct democracy. In the original design of the Constitution, Kenya adopted a system devoid of a singular directional pull. Enshrined in the Constitution of Kenya 2010 is the proclamation that sovereign power is vested in the people and should be wielded in strict accordance with it.[13] The avenues for this exercise are twofold: direct action by the citizens themselves or through the conduit of democratically elected representatives.[14] Often, attention is skewed towards the latter – citizens participating through representatives – neglecting the potent option of citizens directly wielding their sovereign power. The Constitution grants people the flexibility to choose how they exercise their sovereignty, allowing them to bypass representatives if they opt for direct action. Despite this provision, the practical manifestation in Kenya leans heavily towards citizens predominantly channeling their power through elected representatives. But why so? Several factors contribute to this trend:

1. The roots of representative democracy run deep in Kenya's political soil, where the conventional and widely accepted approach involves citizens electing representatives to decide on their behalf.
2. Limited awareness of rights and available avenues for direct

[12]Altman, David, "Direct Democracy Worldwide", Cambridge: Cambridge University Press, 2011.
[13]Constitution of Kenya 2010, Article 1(1).
[14]Constitution of Kenya 2010, Article 1(2).

participation may hinder some Kenyans. Barriers to information access and participation further curtail their ability to exercise sovereign power.

3. Cultural values and social norms weave into the political fabric, potentially fostering a preference for representative decision-making over direct involvement in Kenya's context.

However, direct democracy has experienced a remarkable renaissance over the past few decades.[15] Its rising popularity is fuelled by the belief that direct voter control may not only improve the legitimacy of political decisions, but could also slow down or even reverse the rapid growth in government spending and debt observed over the past decades.[16] This means that citizens would need to participate more actively in the decision-making processes and governance of the country. This direct exercise of sovereign power by the people would require a significant level of organization, coordination, and unity among the citizens to effectively challenge and reshape the existing power structures.

This paper therefore unfurls a tapestry of compelling questions, captivating not only to legal scholars but to all who delve into the legal and philosophical bedrock of our 2010 Constitution. Can a significant direct democracy serve as the antidote to the pervasive personalization plaguing Kenyan party politics? If representative democracy poses challenges, does direct democracy offer a solution? And, crucially, has the Constitution erected a resilient framework for the exercise of direct sovereign power? In unraveling these inquiries, this paper accentuates the imperative of reclaiming power for the people, positioning the law as a balancing force and a check against breaches of constitutionally prescribed political power structures. Navigating this terrain exposes layers of historical legacies, cultural underpinnings, and the intricate dance between tradition and modernity. The resounding call from citizens for increased involvement in decision-making for their collective gain resonates not only within Kenya's chambers but harmonizes with the global symphony of democratic aspirations. This paper aims to comprehensively dissect the odyssey, scrutinizing motivations, challenges, and transformative potential encapsulated in the shift 'from delegation to direct decisions' in Kenya. It also offers a narrative of how direct democracy came into being in Switzerland and how the same can be replicated/ implemented in Kenya. The goal is to present actionable recommendations that can reignite citizens' right to wield sovereign power, fostering a more robust and responsive democratic system.

The realm of direct democracy

The historical journey of democracy is intricate, marked by conflicting and confusing conceptions, an ongoing narrative shaped by the complexity of the issues at hand.[17] Unlike ideologies rooted in Marxism, democracy lacks a singular doctrinal source, yet it finds its justification and defense in the pursuit of fundamental values such as equality, liberty, moral self-development, the common interest, and social utility.

[15]Funk, Patricia; Gathmann, Christina, "Direct Democracy as a Disciplinary Device on Excessive Public Spendin", DICE Report; Munich Vol. 12, Iss. 1, (Spring 2014): 18-23.
[16]*Ibid*.
[17]Beetham D, *Key principles and indices for a democratic audit: In Defining and Measuring Democracy*, Sage modern politics series, vol 36. London, Sage, 1994, pp 25

Democracy encourages political pluralism, allowing for multiple political parties and a diversity of opinions. This ensures that a range of perspectives is considered in the decision-making process.

This ever-evolving system adapts to the dynamic currents of societal development, with direct democracy emerging as a recent addition, shrouded in mystery regarding its real-world impact on predominantly representative systems.[18] Shaun Bowler observed that "direct democracy" sparks heated discussions not only among political scientists but also among politicians, often raising blood pressure levels.[19]

The theoretical landscape around direct democracy is dichotomous, with two fundamental views: one considers it a variation on the democratic regime, distinct from representative democracy, while the other sees it as the fundamental essence of democracy itself.[20] If democracy is understood as popular rule, direct democracy embodies a system where people actively and govern themselves.[21]

It's described as a system of "self-government by citizens rather than representative government in the name of citizens," emphasizing the extension of democratic rights beyond political decision-making to crucial societal institutions.[22] In practical terms, direct democracy holds the potential to diminish the influence of legislative and executive bodies, empowering citizens beyond the periodic election of representatives.[23] While all forms of democracy involve some level of participation, direct democracy, according to its proponents, goes beyond extensive and active citizen engagement in the self-governing process. Many studies posit that the more a system embraces direct democracy, the more frequently citizens see their desires realized. Hence, in the words of Budge, "direct democracy, where people directly vote on the questions parliaments typically decide on, holds a compelling allure as the most evident institutionalization of democracy itself".[24] However, the notion that "bad" representation, indicating a substantial deviation between the electorate and the political elite, calls for direct democracy, is a source of fervent debate within political science.

Despite the enduring debates surrounding direct democracy, as old as the instrument itself, research

[18]Pateman, Carol, Participation and Democratic Theory, Cambridge, UK: Cambridge University Press, 1970. From http://books.google.com/books?id=7ZNiOo89Er4C on 18 December 2023.
[19]Bowler, Shaun, "Review. Reviewed work: The Battle over Citizen Lawmaking: A Collection of Essays by M. Dane Waters",The Journal of Politics, 2002, 64 (1): pp.285-287.
[20]Held, David, "Models of Democracy", Cambridge, 1997, MA: Polity Press: Held, David. 2006. Models of Democracy 3rd edition. Cambridge, MA: Polity Press. From http://books.google.com/books?id=QYVZ3TjL0-UC 18 December 2023.
[21]Lipset, Seymour Martin (ed.), *The Encyclopaedia of Democracy*, London: Routledge, 1995.
[22]Bowler, Shaun, Donovan, Todd and Tolbert, Caroline J. (eds), 'Citizens as Legislators: Direct Democracy in the United States', (Columbus, Ohio: Ohio State University Press, 1998).
[23]Barber, Benjamin R. "Strong Democracy: Participatory Politics for a New Age", Berkeley: University of California Press, 1984. From http://books.google.com/books?id=2YbevnCXAhgC on 17 December 2023.
[24]Budge, Ian, 'The New Challenge of Direct Democracy', Cambridge: Polity Press, 1996, p. 2.

on this topic has, until relatively recently, remained predominantly descriptive and normative.[25] Echoing the sentiments of the ancient Greek philosopher Aristotle, the essence of direct democracy lies in the mechanism of "all command each and each in his turn all". Ancient Athens, in pursuit of this ideal, embraced a form of government stemming from mass meetings, exemplifying the principle that underpins the spirit of direct democracy. Thus, in the realm of direct democracy, the pursuit of the best decisions transcends mere voting—it is about forging consensus through thoughtful deliberations on various options through mass meetings.[26] Straying from formal representative structures, direct democracy champions the idea of people making decisions themselves through open public discussions.[27] Anchored in key principles, it asserts the sovereignty of the people as an inalienable force that cannot be represented. It mandates the expression of the general will through direct participation, with decisions shaped by the rule of the majority.[28]

In "Politics," Aristotle examined the nature of political communities and the best forms of government. He classified different types of governments and discussed the concept of the "polis" (city-state) as the highest form of political organization.

Direct democracy, in essence, dismantles the conventional boundaries between the governing and the governed, blurring the lines separating the state from civil society. It's a system where the state and society seamlessly converge, forming a nexus of popular self-government. Looking back to ancient Athens during the 4th century BC serves as a beacon of direct democracy—a pure and ideal system of popular participation.[29] Here, every significant decision emerged from mass meetings of the Assembly or Ecclesia, where all citizens had a stake. Meeting a remarkable 40 times a year, this assembly settled crucial issues through a unique process.[30] Full-time public officials were chosen by lots, ensuring their integral connection to the larger citizen body. The rotational nature of posts aimed at broadening citizens' governance experience, fostering the widest possible participation.[31] A council of 500 citizens took on the role of an executive steering committee, while a 50-strong committee made proposals to this council. Ancient Athens embodied the pinnacle of direct popular rule, where decisions were crafted through a dynamic interplay of citizens, mass meetings, and a commitment to rotating

[25]Lupia, Arthur and John G. Matsusaka, "Direct Democracy: New Approaches toOld Questions." In: Annual Review of Political Science 7.1, 2004, pp. 463–482.
[26]Bowler, Shaun and Donovan, Todd, "Demanding Choices: Opinion, Voting, and Direct Democracy", Ann Arbor, Mich.: University of Michigan Press, 1998.
[27]Bowler, Shaun, Donovan, Todd and Tolbert, Caroline J. (eds), "Citizens as Legislators: Direct Democracy in the United States", Columbus, Ohio: Ohio State University Press, 1998.
[28]Auer, Andreas and Bützer, Michael (eds), "Direct Democracy: The Eastern and Central European Experience", (Aldershot: Ashgate, 2001).
[29]G. Busolt and H. Swoboda, *Griechische Staatskunde I-II* (MUnchen 1920-26). P. Clochb, *La dinwcratie athenienne* (Paris 1951). W. Dinsmoor, *review of Hesperia 1 in AJA 37* (1933) 180-82. M. I. Finley, *Democracy Ancient and Modern* (London 1973). G. Glotz, *La cite grecque* (Paris 1928). M. H. Hansen, *The Sovereignty of the People's Court in Athens in the Fourth Century B.C. and the Public Action against Unconstitutional Proposals* (Odense 1974), and Eisangelia, *The Sovereignty of the People's Court in Athens in the Fourth Century B.C. and the Impeachment of Generals and Politicians* (Odense 1975). B. Holden, The Nature of Democracy (London 1974).
[30]*Ibid*.
[31]A. O. Larsen, *Representative Government in Greek and Roman History* (Berkeley and Los Angeles 1955). J. Lively, *Democracy* (Oxford 1975). E. Meyer, *Einfuhrung in die antike Staatskunde* (Darmstadt 1968). W. A. McDonald, *The Political Meeting Places of the Greeks* (Baltimore 1943). P. J. Rhodes, *The Athenian Boule* (Oxford 1972). G. Sartori, "Democracy" in Encyclopaedia of the Social Sciences. E. S. Staveley, *Greek and Roman Voting and Elections* (London 1972). H. A. Thompson and R. L. Scranton, "Stoas and City Walls on the Pnyx." Hesperia 7 (1943) 269-301. H

Switzerland is known for its unique political system, which includes elements of direct democracy. Direct democracy allows citizens to participate directly in decision-making processes rather than relying solely on elected representatives.

governance responsibilities. It stands as a testament to the power of direct democracy, a system that goes beyond voting to embrace the active, unmediated engagement of citizens in the art of self-governance.[32]

Similarly, in Switzerland, direct democracy started way back in the olden days.[33] It began with people gathering and voting in medieval times, and the ideas from the American and French revolutions played a role.[34] In 1848, citizens' initiatives and required votes on the constitution became important.[35] More elements were added, like the optional vote in 1874 and citizens' initiatives in 1891. Over time, they introduced referendums on international treaties and resolutive referendums.[36] In 2023, Switzerland has a thriving democracy with citizens' initiatives, optional votes, and a unique 'double yes' option. Every Swiss citizen above the age of 18 can participate in referendums without a minimum turnout. Required referendums are necessary for changing the constitution or international agreements, needing approval from both the people and the cantons. Citizens' initiatives need 100,000 valid signatures to trigger mandatory referendums. Optional referendums, introduced within 100 days of a law or treaty, let citizens influence federal decisions. Each canton has its approach, using tools like finance referendums and the power of recall. The Federal Chancellery manages federal elections and direct democracy with cantonal help.

[32] *Ibid.*
[33] Serdült, Uwe, "Switzerland." In Referendums around the World: The Continued Growth of Direct Democracy, ed. M. Qvortrup. Basingstoke: Palgrave MacMillan, 2014, p. 67.
[34] Kobach, Kris, "The Referendum: Direct Democracy in Switzerland", London: Dartmouth Publishing Company Ltd, 1993; Kriesi, Hanspeter, and Alexander H. Trechsel, "The Politics of Switzerland: Continuity and Change in a Consensus Democracy",New York: Cambridge University Press, 2008, p. 49.
[35] Kaufmann, Bruno, Rolf Büchi, and Nadja Braun, "Guidebook to Direct Democracy in Switzerland and Beyond", 2008 edn Bern: Benteli Hallwag Druck AG; Kobach, Kris, "The Referendum: Direct Democracy in Switzerland", London:Dartmouth Publishing Company Ltd, 1993.
[36] Linder, Wolf, "Direct Democracy." In Handbook of Swiss Politics, eds. U. Klöti, P. Knoepfel,H. Kriesi, W. Linder, Y. Papadopoulos, and P. Sciarini. Zurich: Neue Zurcher Zeitung Publishing, 1993; Sullivan, James William, "Direct Legislation by the Citizenship through the Initiative and Referendum", New York: Twentieth Century Publishing Company, 1892.

Federal referendums are carefully scheduled, and the Chancellery verifies signatures to ensure authenticity. Campaigners get no public aid, only a small space in the official pamphlet. Despite limited funds, initiatives like the 'Sunday Initiative' have succeeded. Since 2000, around 10.8 national issues have been voted on each year. The media, voter participation, and campaign dynamics play a role. As the Swiss consider e-voting, the future of their democracy might involve the internet.

Why should Kenya adopt direct democracy?

As rightly stated, in the pulsating heartbeat of Kenya's democracy, whispers of imperfection echo through its corridors of power. Each day unfurls a tapestry of challenges – a dance with resurgent authoritarianism, the stifling grip on the citizenry,[37] the brutal silencing of civil voices, and the haunting specter of inequality and corruption.[38] Amidst the cacophony, a progressive Constitution stands as a beacon, yet the shadows of misuse and norm violations loom large. Kenya's democratic journey, though adorned with the trappings of electoral fairness,[39] conceals a more insidious erosion. Non-electoral freedoms, the very essence of democratic life, falter in the face of stifled expression, media constraints,[40] restricted demonstrations, and socio-economic imbalances.[41] The historical echoes of democratic fragility reverberate, revealing a foundation teetering on shaky constitutional and political ground. Thus, democratic backsliding is, at

Kenya operates under a representative democracy rather than a direct democracy. In a representative democracy, citizens elect representatives to make decisions on their behalf.

[37]Kenya National Commission on Human Rights, 'Human Rights Violated and Crisis Ignited Unrests With Tragic Consequences: Urgent Action Needed', 13th July 2023. From https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1165/Press-Release-Human-Rights-Violated-and-Crisis-Ignited-Unrests-With-Tragic-Consequences-Urgent-Action-Needed on 18 December 2023.
[38]Maryam Omar, *The Implications of Corruption on Kenya's Sustainable Development and Economic Growth*, A research project submitted in partial fulfillment for requirement for degree of masters in International Studies, University of Nairobi, 2020.
[39]Nantulya P, "Seven Takeaways from Kenya's Consequential Election", African Centre for Strategic Studies, September 7, 2022. From https://africacenter.org/spotlight/seven-takeaways-from-kenyas-consequential-election/ on 18 December 2023.
[40]Reporters Without Borders, 'The year since Kenyan president's election marked by new hostility towards media', 2023. From https://rsf.org/en/year-kenyan-president-s-election-marked-new-hostility-towards-media on 17 December 2023.
[41]*Ibid.*

Corruption in Kenya has historical roots, and it has been present in various forms over the years. Factors such as weak institutions, lack of transparency, and a culture of impunity have contributed to the persistence of corruption.

least on this score, a misnomer in our opinion, because the boundaries of the playing field are yet to be altered, and this occurrence is part of a continuum within which Kenyan democracy has historically oscillated. To unravel this enigma, a survey of undemocratic behaviors in the present political landscape offers suggestive evidence, inviting us to delve into the very heart of the democratic premise.

In the euphoria of the 2010 Constitution's birth, Kenya exhaled the heavy breath of oppressive regimes past.[42] The departure of draconian forces promised a new era – a long-awaited El Dorado, brimming with rapid development and inclusive growth. Kenyans envisioned a brighter tomorrow, yet after 13 years, the envisioned prosperity appears elusive. Despite economic reforms, Kenya's reality is starkly different. The dream of sustained growth remains a mirage, and the per capita income languishes below the threshold that typically separates democracies from dictatorships. Doomsday predictions have lingered since the inception of Kenya's grand democratic experiment, suggesting inevitable failure and fragmentation. Critics argue that transplanting a democracy model tailored for limited, homogeneous populations into Kenya's multiethnic, economically challenged context was a recipe for challenges. Since the transformative transition in 2010, events and circumstances paint a somber picture – a narrative that suggests Kenyans have yet to experience true democracy. Instead, what unfolds is a disheartening tale of hypocrisy, challenging the very essence of democratic aspirations in the nation's evolving journey.[43]

[42]Barkan D, Mutua M "Turning the corner in Kenya", 2010. Foreign Affairs; Akech M "Institutional reform in the new constitution of Kenya", In: International center for transitional justice, 2010, pp 15–32.
[43]Alexia van Rij, "Corruption in Kenya. Understanding a Multifaceted Phenomenon", Notes de l'Ifri, Ifri, September 2021.

The government of Kenya hardly derives its legitimacy from the consent of the governed. Rather than aligning with the popular will, it predominantly regulates affairs to favor private interests, contrary to the delineations of the Constitution of Kenya. Political office holders, entrusted with serving and defending the people, leverage their wealth and connections to oppress and dominate. The exercise of power unfolds as a bewildering blend of blackmail, oppression, thuggery, opulence, and affluence juxtaposed against abject poverty and silenced masses. Governance in Kenya is a stark paradox. Numerous scholars explicitly recognize that recent regimes, including those of Uhuru and Ruto, are not alone in manipulating state machinery for political ends. The precedent set by Kibaki's regime, as well as those of Moi and Jomo Kenyatta, reveals a historical pattern of governments ruthlessly employing state force to advance their social transformation agendas and define their version of state security. The cycle persists – yesterday it was Uhuru, today it is Ruto, and tomorrow may usher in another leader. The nuances of the agenda being implemented may be subject to agreement or disagreement, but the core issue lies in the enduring concentration of power available to any leader who can muster a legislative majority.

In the electoral theater, Kenyans exhibit rationality, carefully choosing candidates who align with promises made during campaigns.

Kenya has frequently ranked high on corruption perception indices, indicating that corruption is perceived to be prevalent within the political sphere. Public perception of corruption can influence trust in political institutions and leaders.

Incumbents, failing to deliver on public necessities like infrastructure and basic services, often face the electorate's wrath. However, this sway in influence swiftly fades post-election, leaving citizens powerless in securing essential services, notably in healthcare. This paradox persists as even the economically disadvantaged, with a higher voter turnout, find themselves bearing the brunt of ineffective regimes. Kenya mirrors other democracies where bureaucracy operates with minimal day-to-day accountability. The participatory democracy envisioned by Stiglitz, a perspective of inclusion and empowerment in decision-making at various societal levels, remains an ideal rather than a reality in Kenya.[44] Even when people participate, their views are often dismissed as impractical. Genuine participation involves giving voice and influence to shape critical decisions, yet Kenya grapples with a norm of silencing the people and lacks transparency in socio-political and economic decisions, leading to stagnation and regression.[45] The aspiration for a truly participatory democracy remains a distant echo in Kenya's evolving political landscape.

The impunity of government officials often escalates to the point of resorting to intimidation and force, particularly in securing the regime's stability and tenure.[46] Political leaders, in a brazen display of power abuse, deploy thugs and state security agents to suppress opponents and dissenting voices.[47] The government, in its relentless pursuit, aims to control ordinary citizens, a practice now endemic

[44]Joseph E. Stiglitz, "Participation and Development: Perspectives from Comparative Development Paradigm", Review of Development Economics, Vol. 6. Issue 2, 2002, p. 162-182.
[45]*Ibid.*
[46]Kenya Human Rights Commission, "State of the Nation Address: It was a Big Deception", November 17, 2023. From https://www.khrc.or.ke/index.php/2015-03-04-10-37-01/press-releases/831-state-of-the-nation-address-it-was-a-big-deception on 17 December 2023.
[47]Danflow L, 'Ruto says he will defend media freedom amid poor rankings', The Star, 25 June 2023. From https://www.the-star.co.ke/news/realtime/2023-06-25-ruto-says-he-will-defend-media-freedom-amid-poor-rankings/ on 17 December 2023.

The function of Parliament is critical to the democratic governance of Kenya. Its role in lawmaking, oversight, and representation contributes to the checks and balances within the government system, promoting accountability and transparency.

in Kenya. Despite sovereignty resting with the people, this array of challenges suggests that power is no longer effectively in the hands of the populace. The compelling evidence of a few cliques usurping government power and authority, actively suppressing the will and aspirations of the majority of Kenyans has led to the denial of basic human and political rights to a substantial portion of the population, contravening legal prescriptions. In Kenya, the representation of the people's will, as manifested through Parliament and the Executive, seems disconnected from the genuine popular will. A stark situational contradiction emerges, where the decisions of the Executive and Legislative branches obstruct the popular will. This power dynamic, in its expressive context, subverts fundamental objectives and directive principles outlined in the Constitution of Kenya, emphasizing that all sovereign power belongs to the people and should be exercised under the Constitution.

In the case of ***Assets Recovery Agency vs Flutterwave Payment Technology and 2 Others***,[48] Prof. Sifuna emphasizes the accountability of public institutions sustained by public funds. These institutions, along with their personnel, are expected to be guided by the public interest, embodying patriotism, transparency, and accountability as core constitutional values. Prof. Sifuna stresses that their decisions and actions must be open, and beyond reproach, inspiring public trust and scrutiny while avoiding opacity or question-begging maneuvers.[49] Simply put, democracy embodies rule by, of, and for the people. Kenya, as a democratic nation, has embraced a system of representative democracy, wherein representatives, often Members of Parliament, are entrusted with voicing the people's opinions. However, as Kenyans grapple for their fundamental democratic rights, key public institutions like Parliament suffer from a substantial loss of credibility. Citizens no longer harbor significant confidence in the ability of MPs and other public officeholders to address pressing issues such as corruption, poverty, or HIV/AIDS. Despite over three-quarters of parliamentarians losing their seats in the last two general elections, this hasn't translated into meaningful change. New representatives swiftly adopt the questionable practices of their predecessors. The concept of direct democracy, advocated by Jean-Jacques Rousseau, contends that citizens should directly participate in creating laws governing their lives. He argued that laws not directly crafted by citizens lack validity, and imposing such laws is akin to enslavement. Democracy, at its core, hinges on the principle that all sane individuals should equally contribute to shaping their country's laws. However, post-election, elected representatives assert their sole capability to make decisions, disregarding the broad choices made by voters.

The journey toward democratization in Kenya is far from complete, even with the new constitution. Notably, citizens lack a say in the government's decisions regarding critical decisions such as external borrowing, reflecting a clear absence

[48] *Civil Suit No. E044 of 2022 [2023].*
[49] *Ibid.*

of bottom-up citizen participation. Kenyans remain excluded from crucial aspects like budget-making and other national affairs. In the realm of Kenya's debt crisis, questions loom about instilling greater spending discipline in governments and politicians. Recent experiences, especially with external borrowing, reveal the government's knack for creatively sidestepping established borrowing rules. An alternative to enhance spending discipline lies in direct democracy, granting citizens more direct influence over public spending. It is also disheartening that Kenyans do not influence crucial appointments such as District Commissioner, District Officer, Chief, County Commissioner, Ministers, Nominated MPs, and others, despite the significant power and influence these positions hold over citizens. Many of these appointments are merely presidential decrees, further underscoring the need for a more inclusive and participatory democratic process in Kenya.

Representative democracy provides a balance between the efficient functioning of government and the need for citizen participation.

The previous and current wave of human rights violations and other doleful acts by those in authority sparks deep concerns about addressing this pressing issue. The dawn of the new Constitution of Kenya in 2010 was heralded as a transformative moment, grounded in democratic principles of law, human rights, and the active participation of the people. Recognizing that the people are the source of all state authority, this Constitution not only reshaped the government's structure by affirming independent offices and institutions but also bolstered accountability through an expanded Bill of Rights, embracing public participation and public interest.[50] The constitution's enactment through a democratic and participatory referendum showcased the resolute determination of the Kenyan people. Article 73 outlines the responsibilities of leadership in Kenya. It emphasizes that authority vested in a State officer is a public trust, to be wielded in harmony with the Constitution's purposes and objects.[51] It demands respect for the people, upholding the nation's honor, dignifying the office, and fostering public confidence in its integrity.[52] Furthermore, the Constitution places the onus on State officers to serve the people, not merely wield power over them.[53] It establishes a government structure with a clear separation of powers among the executive, legislative, and judiciary, ensuring a system of checks and balances to safeguard the principles upon which Kenya's constitutional foundation rests.

Direct democracy has witnessed a resurgence globally, evident in recent referendums across Europe and growing popularity

[50] *CS National Treasury and Planning & AG v Okiya Omtatah and Others, Civil Application No. E304 of 2023 [2003].*
[51] Constitution of Kenya 2010, Article 73(1)(a).
[52] *Ibid.*
[53] Constitution of Kenya 2010, Article 73(1)(b).

In addition to managing general elections, the IEBC is responsible for overseeing referenda. This involves coordinating the process of proposing, approving, or rejecting constitutional changes through a popular vote.

at the local level in Germany, South Africa, and even within the European Union. The rising appeal of direct democracy stems from the belief that it could bolster the legitimacy of political decisions and potentially curb the rapid growth in government spending and debt. Looking at Switzerland's political landscape unravels a captivating narrative of direct democracy. Here, the cantons stand as pillars in a robust federalist system, wielding authority over political realms unless explicitly delegated through a national referendum. In 2010, cantons autonomously shouldered 42 percent of government spending, showcasing a tapestry of diversity in taxes, public spending, and political institutions. Direct democracy in Switzerland is not a mere ceremonial dance; it's a force shaping policies at federal and local levels. Referendums and voter initiatives act as checks on public spending, aligning policies more closely with the median voter's preferences.

How can Kenyans regain their sovereign power?

As discussed, in the vibrant tapestry of our democratic journey, we've inherited a version tainted by misdirection, distancing us from the essence of true governance. What would possibly be the content and character of a democracy where the people and the law are no longer of reference and value? A huge leeway has been created in the circumstance, giving the privileged few in leadership positions, the leverage to plunder the system. Yet, amid this democratic erosion, hope flickers. The resolute rejection of this downward spiral is evident in various forms—voices rising against alienation, poverty, and the erosion of legal rights. Thus, there's a beacon of change, a referendum, a dynamic avenue for Kenyans to reclaim their sovereign power. Unlike the past, the 2010 Constitution grants citizens the power to initiate referendums, transcending the limitations of state-prepared consultations. The constitutional process unfolds in precise steps, each a stride toward a more inclusive democracy.[54]

First, Kenyans craft a proposal for constitutional change, rallying the support of a specified minimum number of registered voters. The Independent Electoral and Boundaries Commission (IEBC) meticulously verifies this support by conducting a signature verification exercise. If the required signatures are obtained, the IEBC proceeds to verify the proposal's content. The proposal then journeys through the chambers of at least 24 county assemblies, gaining momentum. Parliament becomes the crucible where ideas are tested, and if approved, the proposal reaches the threshold for a national referendum. In this democratic spectacle, the people wield their sovereign power directly, casting their votes on the proposed constitutional change. If the majority endorses it, the Constitution metamorphoses to mirror the collective will of the people. Yet, challenges linger. Representatives in county assemblies and Parliament, though integral to the process, may pose hurdles to the attainment of the will of Kenyans. However, as observed earlier, and in a bid to reclaim their social, economic, and political rights, Kenyans have consistently risen to the occasion. Some have sought to do this peacefully through the ballot as noted, but that has not produced any current hot enough

[54]Constitution of Kenya 2010, Article 257.

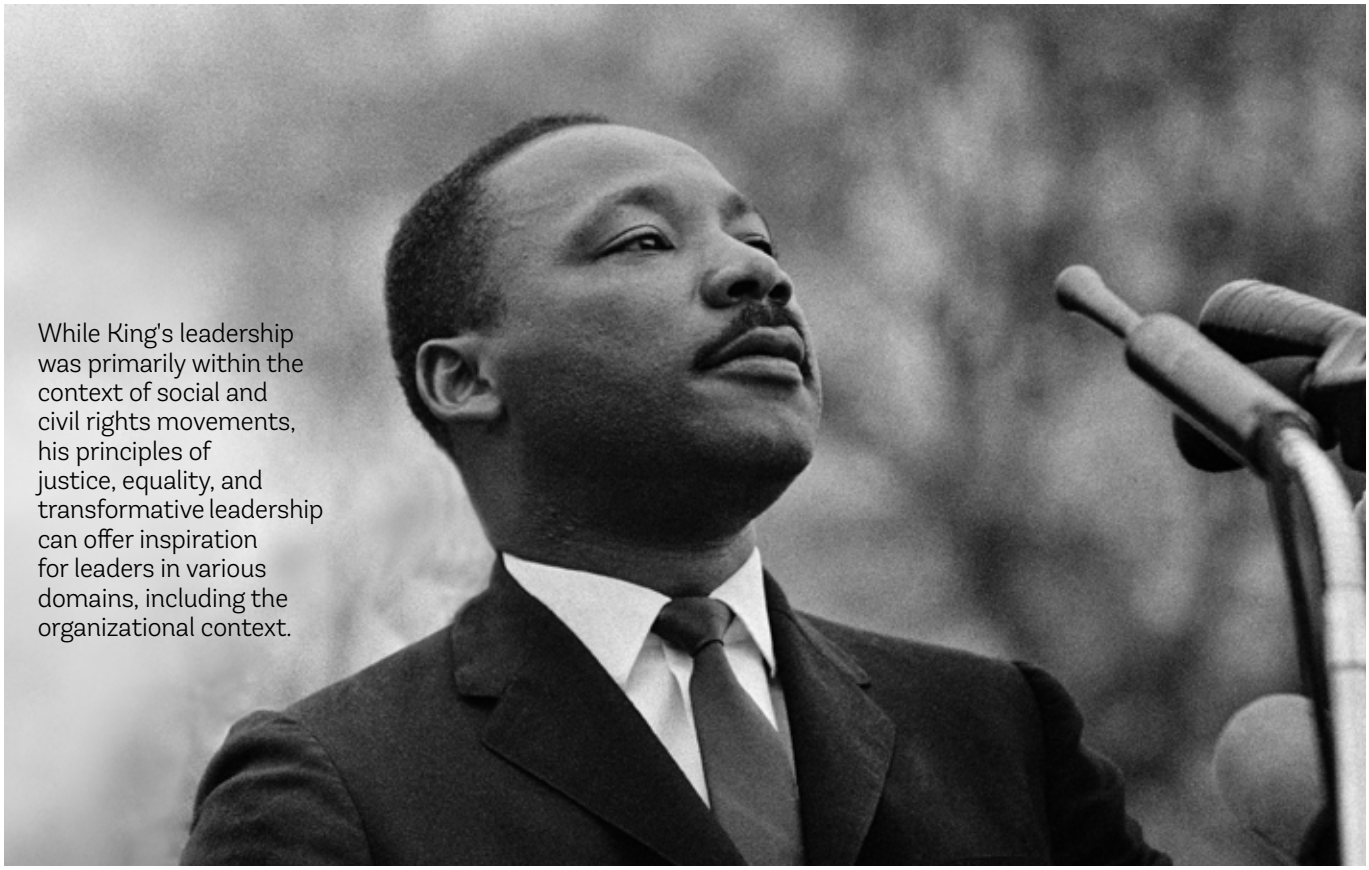
to create a scare on the tough skin of politicians. Others have sought to do it through protests on several occasions where many have been successful. Therefore, to avoid the 'hard way becoming the only way' which may result in irreversible anarchy, the political officeholders should warmly welcome 'soft measures' such as a referendum.[55] Members of County Assemblies (MCAs) and Parliamentarians must warmly allow Kenyans to go back to the drawing board to properly sketch and build our democracy around the people and the law. A redefinition of the practice will only include that process that would entrench 'due process' and put the people at the center of political decisions and authority.[56] We must see in reality, power belonging to the people, and leadership being chosen freely by the people, working for the good of the people. Again, in Kenya, effort must be concentrated on building strong institutions as against strong individuals. In all, let the law be preeminent, and rule over all.

Moreover, in the unfolding saga of Kenyan empowerment, another avenue beckons: the power to recall representatives and usher in trustworthy leaders devoted to steering the nation toward a triumphant reclaiming of people's power. As enshrined in Article 1 of the Kenyan Constitution, the people hold sovereign power, a tenet echoed in Article 104 and Section 27 of the County Governments Act 2012 where the right of recall emerges as a powerful tool, a departure from the parliamentary supremacy of the Westminster-inspired past. Section 27 to 29 of the County Governments Act charts the course for recalling an MCA, establishing grounds rooted in the fabric of accountability. For MCAs, whether nominated or elected, recall becomes a possibility upon grounds such as gross violation of the Constitution, incompetence, gross misconduct, or conviction of an offense with a prison term of at least six months. Yet, the dance of democracy has its cadence—recall initiation waits in the wings until twenty-four months post-election, a timeline fraught with challenges as the nation teeters on the precipice. The frustrating cadence of this process reveals itself further; a recall petition can only be filed once during an MCA's term, creating a vexing limitation on a critical mechanism of accountability. More confounding is the leniency allowing a recalled MCA to run in the ensuing by-election, a loophole that tests the bounds of civic responsibility. Nevertheless, as Kenya stands at the crossroads, yearning for a recalibrated democracy, the power of recall is also a crucial brushstroke on the canvas of change. It is time for Kenyans to not only seize the right to recall but to sculpt a political landscape where leadership is synonymous with accountability, paving the way for a future where the people truly steer the destiny of their nation.

Moreover, in the symphony of Kenyans regaining control, another crescendo emerges—civil disobedience, a powerful harmony echoing the people's desire to reclaim sovereign power. Nonviolent resistance becomes

The constitution establishes Kenya as a sovereign democratic state. The political system is characterized by regular elections, where citizens participate in the selection of their leaders.

[55]Tierney, S., "Constitutional Referendums: The Theory and Practice of Republican Deliberation", Oxford: Oxford University Press, 2012.
[56]United Kingdom Constitution Unit and the Electoral Reform Society, *Report of the Commission on Referendums*, London: Constitution Unit and the Electoral Reform Society, 1996.



While King's leadership was primarily within the context of social and civil rights movements, his principles of justice, equality, and transformative leadership can offer inspiration for leaders in various domains, including the organizational context.

a conduit for citizens to voice discontent, a collective push for transformative change.[57] Unveiling the realm of civil disobedience in Kenya demands a nuanced analysis, intertwining historical, legal, and strategic dimensions. Delving into Kenya's storied past, understanding the rhythms of civic movements and political evolution becomes paramount. Insights gleaned from struggles for independence and democratic rights guide the orchestration of effective strategies, casting light on potential challenges. The historical echoes shape today's socio-political terrain, shaping the dance of civil disobedience with a backdrop of lessons learned. Navigating this path further requires a legal compass, exploring the boundaries of civil disobedience within Kenya's legal framework. While constitutionally protected rights provide a foundation, participants must tread carefully, mindful of potential legal consequences. Strategic disobedience becomes a dance with laws, exposing gaps for constructive dialogue on legal reform. Moreover, crucial to this movement is the beat of public awareness, a cornerstone for successful civil disobedience. Educational campaigns, social media, and grassroots mobilization become conduits for informed citizenry, fostering collective responsibility. The success hinges on widespread support, a force that can sway opinions and prompt representatives to heed concerns. Additionally, as stated, a rhythm of nonviolence is paramount, aligning with ethical resistance principles and broadening support. Peaceful protests, sit-ins, and strikes disrupt the status quo without alienating potential allies. Training participants in nonviolent tactics maintains the moral high ground, mitigating the risk of state repression. Similarly, organization also emerges as a backbone, ensuring a cohesive movement with clear goals, leadership structures, and communication channels. Lessons from global movements led by figures like Gandhi and Martin Luther King Jr. provide guiding principles for enduring organizational strategies. Demonstrators, armed with well-articulated demands, should be open to engaging with authorities for constructive solutions. In this orchestrated dance, Kenyans can

[57]Sussman, G.," When the Demos Shapes the Polis: The Use of Referendums in Settling Sovereignty Issues", Los Angeles, CA: Initiative and Referendum Institute, University of Southern California, 2002.

strategically wield civil disobedience, harmonizing their efforts to reclaim sovereign power and steer positive change in our political landscape.[58]

How can Kenyans meaningfully exercise direct democracy?

Even though the availability of necessities such as affordable healthcare, security, and food depend on political will, and therefore politicians, most Kenyans no longer trust them. They see them as dishonest, selfish, tribal, and largely incompetent in leadership. This has seen the more educated and enlightened urban dwellers becoming more politically active. Direct democracy urgently needs to be expanded in Kenya so that the voters do not merely get to vote every five years to elect parliamentarians and the president, and then leave it to these people to 'represent' them until the next election comes along. Citizens ought to be able to effectively monitor and check the government throughout its term. They should be able to submit motions and agenda for public debate whether the government favours them or not. Most importantly they should be able to easily recall underperforming representatives.

In 1963 when Kenya gained independence from the British most citizens had simple and common needs that could easily be addressed by parliament. Things have changed, however, and people now have varying beliefs and aspirations as well as varying social lifestyles. Hence, the current parliamentarians simply do not fully represent the wishes of the entire electorate. Reflecting on Kenya's journey since independence in 1963, the landscape has transformed. The electorate, once primarily illiterate, has evolved into an educated and informed force, ready to engage in substantive debates about their future. The current parliament, however, falls short of representing the diverse beliefs, aspirations, and social lifestyles of this enlightened populace. As we embrace the era of direct democracy, the call is for a paradigm shift. Expertise becomes a guiding principle, and citizens, equipped with varied knowledge,

Kenya gained independence from British colonial rule on December 12, 1963. Since then, the country has experienced a complex and multifaceted journey marked by political, economic, social, and cultural developments, as well as challenges and achievements.

[58]Schiller, Theo, '"Secondary Democracy" in the European Union and the Role of Direct Democracy', in Norbert Kersting and Lasse Cronqvist (eds), *Democratization and Political Culture in Comparative Perspective*, Wiesbaden: VS Verlag für Sozialwissenschaften, 2005.

Politicians in Kenya may change their party affiliations, either by joining a different party or forming new ones. This dynamic nature of party membership adds fluidity to the political landscape.

should play a pivotal role in decision-making. The shortcomings of the current parliament, lacking experts in critical fields like Genetically Modified Organisms, cloning, stem cell research, or nuclear power, underscore the need for a system where citizens, possessing abundant expertise, take the lead in shaping their collective future.

In this realm of direct democracy, Kenyans aspire to be more than voters; they aim to be active participants, influencers, and guardians of their nation's trajectory, ensuring that decisions align not just with political will but with the collective wisdom and expertise of the enlightened citizenry. Ironically, instead of this, of late individuals with no meaningful expertise and no professional qualification - even hooligans - have gotten into parliament, their actions and deeds being no different from those of common thugs! More than ever before, the common mwananchi is more convinced that he/she should also play a significant role in policymaking. Kenyans are particularly angered by the ineffectiveness of their MPs since they have been entrusted with overseeing the welfare of the citizens, yet most of them only vote on issues as directed by their political parties. Our parliamentarians don't vote on issues based upon whether they are effective or right, but rather whether their party - Jubilee vs. ODM, or UDA vs ODM- favours it. As this happens, the people are often forgotten.

Chimni reminds us that critique without construction is an empty gesture.[59] It would be self-centered of us not to contribute thoughtful suggestions on the genuine attainment of direct democracy in Kenya. Switzerland is a country with historically low human rights violations and government spending, which many argue is related to its intensive use of direct democracy. More specifically, in Switzerland, it is always expected that government will be based on the consent of the governed, which is the case. Embarking on a visionary exploration, let us envision Kenya's potential journey toward effective direct democracy, drawing inspiration from Switzerland's democratic odyssey. Rooted in Kenya's history, traditional systems of communal decision-making provide a cultural foundation for direct democracy. Lessons from independence struggles and constitutional evolution contribute to the democratic fabric, offering a unique tapestry for Kenya's democratic aspirations.

Taking a cue from Switzerland's trajectory, Kenya could introduce pivotal milestones. Empowering citizens, Kenya could adopt a citizens' initiative mechanism, requiring a significant number of validated signatures to trigger the enactment of laws having a substantial bearing on the well-being of Kenyans. Reflecting regional diversity, each Kenyan county could tailor its approach to direct democracy. Instruments like finance referendums and legislative referendums could allow for nuanced decision-making. The more local the level, the greater

[59]B.S. Chimni, 'Third World Approaches to International Law: A Manifesto', 8 International Community Law Review 3, 2006, pp. 5-6.

the opportunities for citizens to actively participate. Kenya's electoral bodies, in collaboration with counties, could navigate the orchestration of direct democracy. Stringent validation processes, information dissemination, and adherence to standardized rules would be essential for maintaining the integrity of the democratic process. Moreover, public assistance for campaigners could be debated, with considerations for equitable representation. A balance, akin to Switzerland's model, might involve providing a platform for campaign information without undue financial influence.

Importantly, Kenya's media landscape could play a pivotal role. A code of conduct, similar to Switzerland's 'handbook of journalism', could ensure accuracy and impartiality. Voter education through booklets, containing arguments from initiative committees and government recommendations, could be fundamental. Kenya might also continue exploring modernization avenues, including the use of the Internet for direct democracy processes. E-voting experiments, carefully executed, could pave the way for more inclusive and accessible participation. Meaningful direct democracy in Kenya could thus go a long way towards strengthening the concept of dialogue and consensus-building in parliament and in national politics at large. Politicians will always opt to reach a compromise satisfying the greatest number of interests rather than take hard-line positions and be overruled by the people in a referendum.[60] Major parties such as ODM, UDA, and KANU would not be taking chances by ignoring the small parties as legislation passed by narrow margins stands little chance of surviving a referendum. Wider support and consensus will thus be sought in advance, and all this will lead to a better and more unified Kenya. Since corruption is rampant among the political class, and since it is also naturally possible to sway or influence the decisions of a few people, it would be safer to entrust decision-making to the entire citizenry. It is not feasible to sway or bribe 50+ million Kenyans – decisions made by the people will most likely be ones that are of societal benefit.

Embracing direct democracy would shatter the imbalance of power that currently favours the political class while leaving the citizens alienated and powerless. The chance for citizens to play an active role in political decision-making will act towards raising the esteem of the general public.[61] The populace would also mature politically due to frequent participation in decision-making, thereby making them better voters and better citizens in general. Kenyans should be free to choose their institutions and have their bylaws. They should also be free to organize their unique judicial system, housing, and agricultural policies. Minority-triggered referendums or citizens' initiatives may provide a way of forcing onto the political agenda an issue that the incumbent government or legislative majority would prefer not to confront.[62]

Referendums and citizens' initiatives enable the people to express their clear will on a controversial matter.

The Kenyan media landscape is characterized by its vibrancy, with a mix of traditional and digital platforms catering to diverse audiences. While facing challenges, the media continues to play a crucial role in fostering an informed and engaged citizenry in Kenya.

[60]Smith, G., "Democratic Innovations: Designing Institutions for Citizen Participation", Cambridge: Cambridge University Press, 2009.
[61]International IDEA, "Direct Democracy: The International IDEA Handbook", Stockholm: International IDEA, 2008. From http://www.idea.int/publications/ catalogue/direct-democracy-international-idea-handbook on 19 December 2023.
[62]Bulmer, W. E., 'Minority-Veto Referendums: An Alternative to Bicameralism',Politics, 31/3 (October 2011), pp. 107–20.

Ireland has a well-established electoral system known as the Single Transferable Vote (STV) for its general elections and local elections. The STV system is a proportional representation system that allows voters to rank candidates in order of preference.

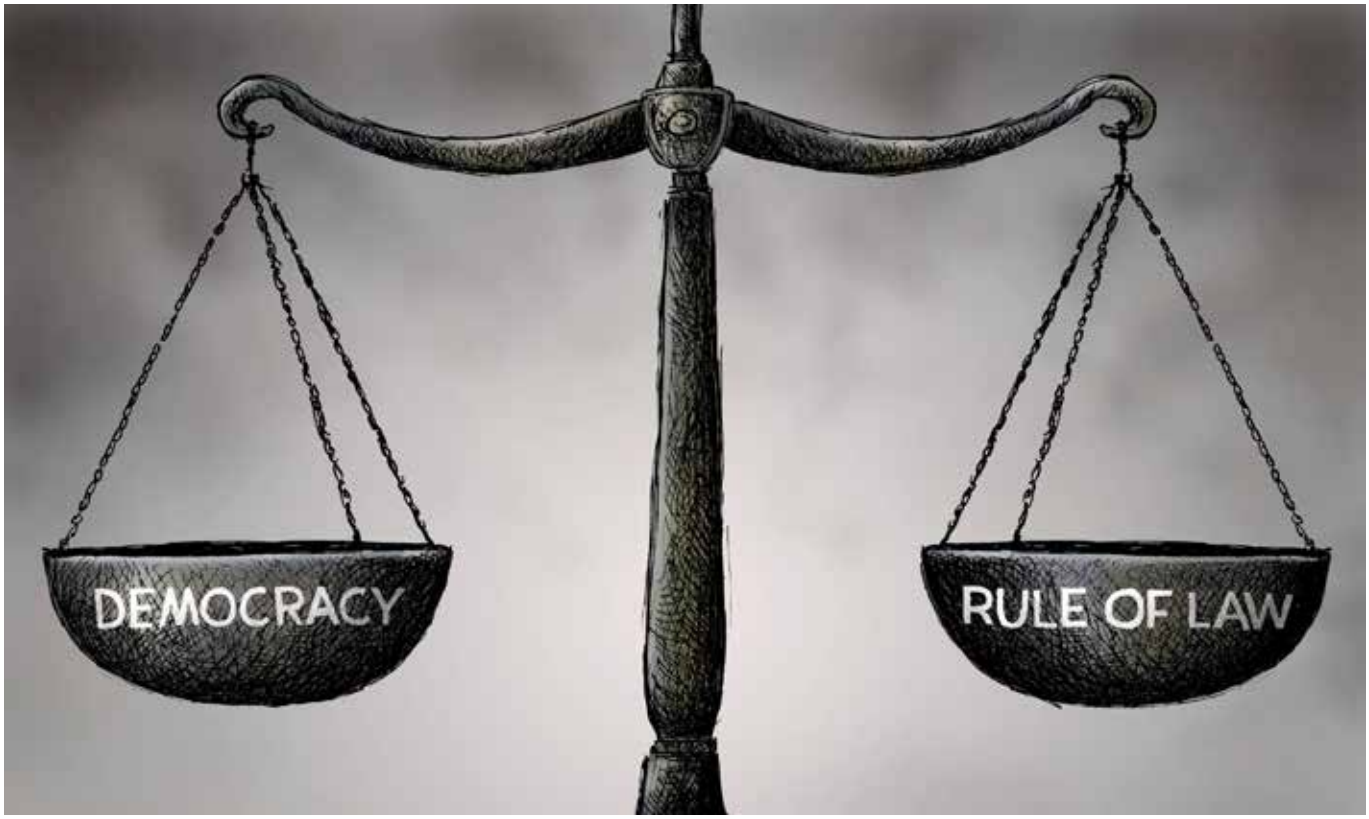
In so doing, they may settle the issue: once the people have spoken, debate can move on to other topics.[63] Even if the first referendum on a given topic does not settle an issue, a second referendum usually will.[64] For example, the referendums on abortion in Portugal (1998 and 2007) and on electoral reform in Ireland (1958 and 1968) were able to settle these issues. While Kenya cannot be classified among the dictatorships or undemocratic nations that dot the African continent, a lot has to be done to solidify and strengthen its emerging democratic culture. Direct democracy in Kenya is surely the way to go as it will promote political awareness as well as stir public debate on national issues thereby giving broader legitimacy to political decisions.[65]

However, the path of direct democracy, while promising, is not without its challenges.[66] A looming obstacle is voter fatigue—exhaustion that arises when these mechanisms are employed too frequently, especially on complex and technical issues. In the face of numerous decisions demanding time and knowledge, many voters may disengage, casting a shadow on the participatory process. Even in Switzerland, renowned for its participatory democracy, less than half of eligible voters typically participate in referendums and initiatives. Those without strong opinions on an issue often abstain, leaving decisions in the hands of a fervent minority. To counter voter fatigue, the timing of direct democracy ballots can be synchronized with other elections, and public information campaigns can be deployed. However, the consideration of turnout quotas emerges as a prudent measure to prevent a passionate minority from dictating decisions for the majority.[67]

A subtle concern also arises as politicians may exploit referendums to evade responsibility for tackling challenging issues, especially when internal divisions plague the governing party or coalition. By deferring these matters to the people, politicians may sidestep the obligation to provide leadership and escape public accountability for decision consequences. Critics argue this approach lacks principled leadership. Moreover, direct democracy captures public sentiment on specific issues at a given moment, lacking the holistic perspective that evaluates a party or coalition's performance over several years. Overreliance on direct democracy may prioritize short-term popular policies, like tax cuts, at the expense of long-term goals, as exemplified by California's experience with public debt and public services.

Furthermore, the recurrent application of direct democracy mechanisms may strain the political

[63]Qvortrup, M., "A Comparative Study of Referendums: Government by the People", Manchester: Manchester University Press, 2nd edition, 2005.
[64]Donovan, Todd and Karp, Jeffrey A., 'Popular Support for Direct Democracy', Paper presented for the 20th IPSA World Conference in Fukuoka, 2006.
[65]Held, David et al., "Global Transformations: Politics, Economics and Culture", Cambridge: Polity Press, 1999.
[66]Kaufmann, Bruno and Waters, M. Dane, "Direct Democracy in Europe: A Comprehensive Reference Guide to the Initiative and Referendum Process in Europe", sponsored by the Initiative and Referendum Institute Europe, Durham, NC: Carolina Academic Press, 2004.
[67]Zovatto, Daniel, 'Direct Democracy Institutions in Latin America', in J. Payne, D. Zovatto, F. Carrillo and A. Allamand, *Democracies in Development: Politics and Reform in Latin America*, Washington, DC: International Development Bank and International IDEA, 2002, pp. 249–65.



Representative democracies uphold the rule of law, where laws apply equally to all citizens, including those in government. The legal framework provides a basis for governance and protects individual rights and freedoms.

system, heightening expectations and burdening the state with demands it struggles to address, potentially undermining the overall legitimacy of the democratic system. If successive decisions by the people clash, policy incoherence may arise, emphasizing the importance of considering the state's capacity and the necessity for coherent policies when determining who can initiate referendums and on which subjects.[68] Rich and powerful interests sometimes wield referendums and citizens' initiatives as tools to advance their financial or social agenda, potentially at the expense of the common good. The process may inadvertently favor those with substantial resources, as seen in the United States, where concerns about well-funded special interests distorting the initiative process have sparked criticism. To counter this, careful attention is crucial to shaping rules around referendums and initiatives, especially regarding signature gathering and campaign financing.

Some scholars further argue that direct democracy processes tend to tilt in favor of conservative policies over progressive ones. Non-elite citizens, often less educated and cosmopolitan, may hold more traditional or reactionary values, potentially hindering progressive reforms when decision-making shifts from politicians to ordinary citizens. In referendums, the 'no' side, advocating for the status quo, typically enjoys a structural advantage, placing the burden of proof on those advocating change. However, the evidence for the regressive tendency of direct democracy is debated, as popular majorities have, in many instances, embraced progressive change at the ballot box. Additionally, the cost of conducting polls is a substantial consideration. It imposes logistical challenges on electoral management bodies, local authorities, security services, and other state agencies. Civic education and engagement from political parties and campaign groups are also imperative. In resource-constrained developing countries, where voting may be susceptible to violence, frequent reliance on direct democracy may

[68]LeDuc, Lawrence, *The Politics of Direct Democracy: Referendums in Global Perspective*, Peterborough, Ont. and Orchard Park, NY: Broadview Press, c. 2003.

Open and robust public debate is a characteristic of representative democracies. Citizens, civil society, and the media play roles in shaping public opinion, holding representatives accountable, and contributing to informed decision-making.

prove impracticable, necessitating a careful balance in its application.

Moreover, referendums and initiatives, especially those reliant on a simple-majority adoption requirement, have the potential to exacerbate societal divisions, jeopardize the rights of minorities, and escalate tensions based on race, ethnicity, language, or religion.[69] A poignant example unfolded in 2012 in Latvia when a citizens' initiative sought to amend the constitution to recognize the linguistic rights of the Russian-speaking minority. The campaign heightened tensions between Latvian-speaking and Russian-speaking segments of the population, underscoring the fragility of societal bonds. In democracies characterized by fragmentation and weak consolidation, or in scenarios where constitutional settlements hinge on delicate compromises, the majoritarian impact of referendums might undermine agreements and thwart efforts to foster inclusive arrangements. Introducing rules necessitating supermajorities or double majorities, under specific circumstances, could alleviate such concerns. Alternatively, constitutional measures could entrench minority rights, excluding them from the scope of direct democracy. For instance, a proposed referendum might require certification by the Constitutional Court to ensure it aligns with minority rights before undergoing a public vote. This dual-pronged approach seeks to navigate the delicate balance between majority decisions and the protection of minority rights in the intricate landscape of direct democracy.

Conclusion: A new democratic equilibrium

Kenya is yet to fully realize the potential of democracy and constitutionalism thus there is a need to reconstruct its democracy in a manner that can empower its people to realize their human potential in a significant manner and the most plausible way is by implementing comprehensive direct democracy. However, its implementation is not anticipated to be a walk in the park. Effective efforts ought to be made by the public, relevant institutions, and the government itself in advancing the rights and freedoms that remain theoretically stated in the Constitution. As Ngcobo, J held in a South African case, ***Doctors for Life International v Speaker of the National Assembly and others***,[70] that a nation's sovereign authority belongs to its citizens, who themselves should participate in government, Kenya must go back to the drawing board to properly sketch and build its democracy under the country's peculiar environment. Only then can it be a functioning democracy that truly empowers the people and produces governments to address their needs. If it does not function, then it merely creates a facade without spirit or substance. But until then, Kenya's democracy remains as it ever was; messy and intertwined with a large dose of authoritarianism.

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[69]Kaufmann, Bruno and Filliez, Fabrice, *The European Constitution: Bringing in the People: The Options and Limits of Direct Democracy in the European Integration Process*, Brussels: IRI Europe, 2004.
[70]*(CCT12/05) [2006] ZACC 11; 2006 (12) BCRL 1399 (CC); 2006 (6) SA 416 (CC).*

Examining IEBC's enforcement of Kenya's Electoral Code of Conduct

By Ronald Odhiambo Bwana

The IEBC establishes and enforces a code of conduct for political parties, candidates, and their supporters to ensure a peaceful and fair electoral environment.

I. Introduction

Elections in Kenya, be they presidential, gubernatorial, senatorial, or of a member of a county assembly, are generally competitive. The authority to govern i.e. sovereignty is drawn from the people who exercise their will by voting in elections. The Independent Electoral and Boundaries Commission (IEBC) was established under Article 88 of the Constitution of Kenya with the core mandate of conducting and supervising referenda and elections to any elective body or office established by the Constitution.[1] The IEBC is also charged with the mandate of settling electoral disputes including those relating to or arising from nominations but excluding election petitions and disputes after the declaration of election results.

The regulation and enforcement of electoral procedures and conduct play a vital role in ensuring free, fair, and transparent elections. Free and fair elections are determined by various parameters including 'whether any party or group has been prevented or arbitrarily restricted from co-operating in the pursuit of electoral goals, or from accessing the media or communicating its views; and whether the election has taken place in a generally secure environment'.[2] To that end, Article 88(4) (j) of the Constitution enjoins IEBC to develop a code of conduct for candidates and parties contesting elections. The Electoral Code of Conduct is a crucial instrument that sets out the standards and guidelines for political parties, candidates, and their supporters to follow during the electoral process. It is a "tool which contributes to freedom and fairness; to effective choice; to a representative and credible process; to transparency and accountability; to inclusive practices; to reducing adversarial relationships; and to the emergence and consolidation of a democratic political culture".[3]

An effective electoral code of conduct not only promotes fair campaign practices but also

[1]Constitution of Kenya, Article 88(4).
[2]Guy Goodwin-Gill, 'Codes of Conduct for Elections' (1998) Inter-Parliamentary Union Geneva, 2.
[3]Ibid, 3.

Nominated Member of Parliament Sabina Chege

enhances confidence among the electoral participants and electorate in the integrity of the electoral process. However, this is not true of Kenyan election campaigns which have experienced its fair share of intrigues such as clashes during rallies, as well as the defacing of campaign posters and abuse of party symbols by independent candidates.[4] Enforcement of the Code of Conduct has proved challenging owing to, among others, the multiplicity of institutions with not very well-defined functions as well as overlapping mandates. This paper thus seeks to assess the enforcement of the electoral code of conduct by the IEBC. In so doing, the paper will critically analyse the Supreme Court decision in *IEBC v Sabina Chege* where it was held that the electoral body has the mandate to enforce the electoral code through its electoral code enforcement committee. The question that looms large is whether the decision signifies a paradigm shift towards cleaner and more transparent elections or if it is merely hot air, clothing IEBC with a constitutional robe of sand, or rather a mandate it does not have.

II. The Electoral Code of Conduct

The Electoral Code of Conduct (hereafter "electoral code") is a set of rules and guidelines designed to police the behaviour of political parties, candidates, and their supporters during the electoral process and is set out in the second schedule to the Elections Act. It covers diverse aspects including the place of the media, campaign conduct, hate speech, violence, bribery, and other election-related offences. The primary aim of the code is to ensure conducive conditions for the conduct of pacific, free, and fair elections as well as to promote a climate of tolerance in which political activity may take place without fear, coercion, intimidation, or reprisals.[5]

The Elections Act mandates that political parties and persons participating in elections or referendums in terms of the Constitution of the Act subscribe to and observe the electoral code in such a manner that the IEBC may determine subject to paragraph 6 of the Code.[6] Participation in an election by a political party or candidates is, therefore, conditional on the party's or candidate's subscription to the electoral code.[7] In other words, non-subscription by a political party or candidate of the electoral code is a sufficient ground for disqualification for contesting elections. The Elections Act criminalizes attempted participation in elections without subscribing to the electoral code.[8]

The electoral code explicitly specifies persons to whom it should be subscribed. These are every political party participating in the election of a president, a member of Parliament, a county governor, a member of a county assembly, every candidate, and every leader,

[4]The Carter Center, 'Kenya 2017 General and Presidential Elections' (2018) Final Report, 49.
[5]Electoral Code of Conduct, s 3.
[6]Elections Act 2011, s 110(1).
[7]Ibid, s 110(2).
[8]Ibid, s 110(3).

chief agent, agent, or official of a referendum committee.[9] The application of the electoral code is not limited only to parties and candidates but it also binds the government and every political party, leader, office bearer, agent, and member of a political party or a person who supports a political party, and every candidate nominated under the electoral laws for any election.[10]

The code enjoins those bound by it to publicly and repeatedly condemn violence and intimidation; refrain from any action involving violence or intimidation; ensure that no arms or weapons of any kind are carried or displayed at political meetings or any march, demonstration, or other event of a political nature; refrain from any attempt to abuse a position of power, privilege or influence, including parental, patriarchal, state or traditional authority for political purposes including any offer of reward or threat of penalty and acknowledge the authority of the Commission in the conduct of the election or referendum.[11]

The Electoral Code of Conduct is typically established by the electoral management body or relevant authorities to govern the behavior of political parties, candidates, and other stakeholders during the electoral process.

III. Enforcement of the Electoral Code of Conduct

The enforcement of the electoral code draws from the Elections Act and the Elections Offences Act. In terms of the Elections Act prosecution of any breaches of the electoral code should be undertaken by any IEBC officer as may be designated by the IEBC. Such an officer has the same powers conferred on a public prosecutor by the Constitution and the Criminal Procedure Code.[12] In other words, the Elections Act vests IEBC with prosecutorial powers for breaches of the electoral code in courts.

On the other hand, the Election Offences Act designates the Director of Public Prosecutions (DPP) as the enforcer of the electoral code[13] and such prosecutions should be commenced within twelve (12) months of the date of the election to which the offence relates.[14] The Election Offences Act also enjoins the Chief Justice to appoint special magistrates to try offences related to elections, including breaches of the electoral code.[15] Hearing of such offences shall be held on a day-to-day basis until completion under relevant circumstances.[16]

In pursuance of the electoral code, paragraphs 7-9 entrust IEBC with its enforcement. Paragraph 7 of the electoral code outlines an array of measures that IEBC can take where it forms the opinion that any political party or referendum committee participating in any election or referendum or the leader, office-bearer, or member of a political party or person who supports the political party or referendum committee or any candidate at any election, has breached the code. The measures

[9]Electoral Code of Conduct, paragraph 1.
[10]Ibid, paragraph 2.
[11]Ibid, paragraph 6.
[12]Elections Act 2011, s 110(6).
[13]Elections Offences Act 2016, s 21. See also s 20.
[14]Ibid, s 22 (1).
[15]Ibid, s 23(1)
[16]Ibid, s 23(2).

include imposing penalties such as fines, formal warnings, prohibitory orders barring the utilization of public media, and prohibitory orders barring the publishing or distributing campaign literature and electoral advertising or limiting the rights of the political party to do so.

Alternatively, under paragraph 9, the IEBC may *suo motu* or in consequence of any report made to it, institute proceedings in the High Court in the case of any alleged infringement of the electoral code by a political party or by the leader, any office-bearer or member of a political party or person who supports a political party or any candidate. An interpretation of paragraph 9 yields the conclusion that the proceedings instituted by the IEBC to the High Court regarding breaches of the electoral code may be civil or criminal.

The electoral code equally establishes the Electoral Code of Conduct Enforcement Committee (hereafter "Enforcement Committee) composed of at least five members of IEBC and chaired by a member appointed by the IEBC Chairperson.[17] Every candidate, official, and agent is bidden to acknowledge the authority of the Committee to enforce the provisions of this Code on behalf of the Commission, ensure compliance with summons issued to the party, its candidates or representatives by the Committee, cooperate in the official investigation of issues and allegations arising at election period and respect and comply with the orders issued by the Committee.[18]

The enforcement committee has the powers to issue summons to the person, political party, or referendum committee against whom a complaint has been received as having infringed the provisions of this Code and any other person whom the Commission has reason to believe to have infringed the provisions of the electoral code to attend its meetings.[19] In conducting its business, the enforcement committee may examine the person summoned and may allow the person to have legal representation.[20] The Committee shall exercise the powers provided under the electoral code to punish any person found to have infringed the Code.[21]

As evident, the above ambiguities and overlap of mandate underlie the enforcement of the electoral code of conduct. Parliament seems not to agree in whose purview the authority to enforce the electoral code of conduct lies. Things are even complicated by the fact that the Elections Act creates a parallel enforcement mechanism.[22] Whereas it entrusts an officer of IEBC to prosecute breaches of the electoral code in section 110, paragraph 15 of its second schedule i.e. electoral code of conduct entrusts enforcement powers to the enforcement committee. The matter is further convoluted by the Elections Offences Act which entrusts enforcement of the electoral code in the DPP. These opposing statutory provisions have worsened the uncertainty regarding the enforcement of the Electoral Code of Conduct and precipitate this paper's analysis of the Supreme Court's decision in *IEBC v Sabina Chege*.[23]

IV. The Supreme Court decision in IEBC v Sabina Chege (SC Petition No. 23 (E026) of 2022)

i. Procedural history

The case arose out of an appeal by the IEBC against the decision of the Court of Appeal in Civil Appeal No. E255 of 2022 which upheld the High Court decision in Constitutional Petition No. E073 of 2022. The facts of the case are that the IEBC through its enforcement committee instituted proceedings against Hon. Sabina Chege alleging breach of the electoral code of conduct, in particular, that she claimed that the Jubilee Party rigged the 2017 presidential elections. Hon. Sabina Chege was thereafter summoned to appear before the enforcement committee on 15th February 2022, for a hearing of the complaint against her. In line with the summons, she appeared before the enforcement committee wherein she raised a preliminary objection challenging, amongst others, the jurisdiction of the enforcement committee to hear the matter. The preliminary objection was, however, dismissed by a ruling of the enforcement committee.

[17]Electoral Code of Conduct, Paragraph 15 (1).
[18]Ibid, paragraph 15 (3).
[19]Ibid, paragraph 15(4).
[20]Ibid, paragraph 15(5).
[21]Ibid, paragraph 15(8).
[22]See *Republic v IEBC; Jessica Mbalu (Interested Party); Ex Parte Philip Kaloki* (2021) eKLR, [22].
[23]SC Petition No. 23 (E026) of 2022.

Aggrieved by the enforcement committee's ruling, Hon. Sabina Chege filed a petition at the High Court, Petition No. E073 of 2022, *Sabina Wanjiru Chege v Independent Electoral and Boundaries Commission*. In the said petition, Sabina Chege challenged the enforcement committee proceedings. She also sought conservatory orders staying further proceedings. She urged that the Committee violated her fundamental rights protected under, *inter alia*, articles 1(1), 2(1) & (4), 3(1), 20(1), 22, 23, 47(1) & (2) and 50 of the Constitution. She therefore sought amongst other orders, a declaration that the summons and statement of breach both dated 11th February 2022, and served by the enforcement committee, were unlawful and unconstitutional.

The IEBC on the other hand, urged that it acted in consonance with the law and that being an elected woman representative for Murang'a County and a member of Jubilee Party, Hon Sabina Chege was bound by the electoral code of conduct by paragraphs 1 and 2 of the said code. IEBC also asserted that in terms of Article 252(1)(a) and (d) of the Constitution read together with section 107 of the Elections Act, it was empowered to: conduct its investigations, issue summons to persons suspected to have breached the Code, examine them and arrest those suspected of having committed election offences.

Justice Mrima allowed Sabina Chege's petition, effectively quashing the summons and statement of breach leveled against her, as well as the proceedings conducted before the Committee. The trial court determined that the Committee was unconstitutional, null, and void *ab initio* for being in contravention of Articles 2(4), 3(1), 249 and 252 of the Constitution.[24] Mrima J also issued orders quashing parts of Sections 7, 8, 10, and 15 of the Code under the Second Schedule of the Elections Act as well as parts of Rules 15(4) and 17(1) and (2) of the Rules of Procedure on Settlement of Disputes establishing and granting powers to the Committee to summon witnesses and conduct hearings of complaints based on allegations of breach of the Code.[25]

Dissatisfied with the High Court judgment the IEBC moved the Court of Appeal vide Civil Appeal No. E255 of 2022. The Court of Appeal framed five issues for determination three of which merit attention in this paper, being: whether the Respondent (Sabina Chege) was bound by the Code; whether the Committee had jurisdiction to summon the Respondent, hear the alleged complaint against her, make findings thereon and possibly impose sanctions against her and whether the impugned parts of the Code were unconstitutional. In a judgment delivered on 15th July 2022, the Court of Appeal dismissed the appeal for being unmeritorious affirming, in effect, the High Court's decision.[26]

On the issue of whether Sabina Chege was bound by the electoral code the Court of Appeal argued that the code was only binding on those who had subscribed to it. It was therefore the Court of Appeal's ruling that the electoral code was not binding on Sabina Chege on the premise that she was not a candidate in the 9th August 2022 General Elections at the time of the Committee's proceedings and at all material times thereafter. The upshot was that since Sabina Chege was not bound by the code then the enforcement committee had no authority to enforce the code against her.[27]

On the question of whether the Committee had jurisdiction to summon the Respondent, hear the alleged complaint against her, make findings thereon, and possibly impose sanctions against her, it was the Court of Appeal's opinion that IEBC was not one of the specific commissions and entities under Article 252(3) of the Constitution vested with the power to issue summons and examine witnesses. On the issue of whether the impugned parts of the Code were unconstitutional, the Appellate Court stated that the impugned provisions were inconsistent with the Constitution by Article 2(4) to the extent that the Elections Act purported to confer on the Committee substantive prosecutorial and judicial or quasi-judicial powers not availed to IEBC under the Constitution. Further, that the wielding by the Commission of policing, prosecutorial and quasi-judicial powers offended the immutable principles of due process and violated the rule against bias.

ii. Proceedings at the Supreme Court

Aggrieved by the finding of the Court of Appeal, IEBC appealed to

[24]SC Petition No. 23 (E026) of 2022, para 8.
[25]Ibid.
[26]Ibid, para 14.
[27]Ibid, para 15.

Supreme Court of Kenya offices

the Supreme Court on five grounds: that the Court of Appeal erred in law by finding that paragraph 15 of the Second Schedule to the Elections Act was unconstitutional because it empowered the IEBC to summon witnesses, finding that the Electoral Code of Conduct Enforcement Committee was an unconstitutional outfit, interpreting the provisions of Article 252(3) of the Constitution to mean that only the Commissions and the Independent Office listed therein have the power to summon witnesses, failing to consider that Article 88(4)(j) and (5) of the Constitution mandated IEBC to prescribe a code of conduct for all parties and candidates participating in an election and applying the wrong principles when construing or interpreting the Constitution by not construing the Constitution as one integrated document, each clause supporting each other and not destroying it and consequently rendering the Electoral Code of Conduct ineffectual and otiose.

The Supreme Court proceeded to frame four issues for determination thus, whether the Appellant had jurisdiction to summon the Respondent (Sabina Chege), hear the alleged complaint against her, and make findings thereon; whether the impugned parts of the Code were unconstitutional; whether the Electoral Code of Conduct was binding upon the Respondent and whether the Respondent's Cross-Petition was incompetent.

iii. Submissions of the parties

a) IEBC

IEBC contended that according to Article 252(1) (a) of the Constitution, each independent commission is empowered to conduct investigations on its initiative or a complaint made by a member of the public. In addition, Article 88(4) (e) empowers it to settle electoral disputes relating to nominations while paragraph 15(4) of the Code empowers it to issue summons.[28] On electoral disputes, they transcend the entire electoral process from voter education to registration of observers. Therefore, disputes emanating therefrom are electoral issues that IEBC could consider under Article 88(4) (e), which was the basis upon which IEBC was empowered to enforce the Code.[29]

Drawing a comparison from legislation that clothed other Commissions with powers to summon and examine witnesses the IEBC asserted that the position adopted by the High Court and Court of Appeal would render other constitutional commissions established under Article 248 ineffectual, stripping them of power to summon witnesses anchored in enabling statutory provisions. Further, the electoral code was binding on Sabina Chege on account of her being a member of the Jubilee Party and a Member of Parliament.[30]

b) Sabina Chege

Sabina Chege submitted that although IEBC had powers to initiate *suo motu* investigations such powers did not extend to conduct of trials. Additionally, she argued that IEBC is not among the Commissions listed under Article 252(1) of the Constitution with powers to summon and examine witnesses. In terms of Article 88(4) (e), she stated that it only vested IEBC with the power to settle electoral disputes arising out of nominations and does not confer

[28]Ibid, para 26.
[29]Ibid, para 27.
[30]Ibid, para 28.

it with the power to conduct trials for breaches of the electoral code.[31] Further, that IEBC did not provide evidence demonstrating that she had subscribed to the Code by the time she was charged. Furthermore, she contended that the gazettement of the electoral period referred to by the IEBC concerned the 2022 elections which she did not offer herself as a candidate. In other words, that the code of conduct was not binding on her.[32]

c) Summary of the findings by the Supreme Court

The Supreme Court found that the electoral code was designed to enable IEBC to perform its constitutional and statutory mandate, thus it was empowered to enforce the Code of Conduct through the issuance of summons and conducting trial proceedings.[33] It was the Court's view that breaches of the electoral code amounted to pre-election disputes whose settlement entitled IEBC to conduct investigations, summon witnesses, hear complaints, and make determinations thereof.[34] The Court was thus of the opinion that stripping IEBC of the power to summon persons and conduct trials would render it a constitutional white elephant.

Alnashir Popat

Regarding the constitutionality of impugned parts of the electoral code, the Court citing its decision in *Alnashir Popat & 7 others v Capital Markets Authority*,[35] held that they were constitutional since the overlap of IEBC's role was authorized by statute i.e. Elections Act 2011. The court argued that since the Capital Markets Authority Act authorized the Capital Markets Authority to be a judge in its cause by being the investigator and enforcer of capital markets infractions in Kenya then IEBC, in the same manner, had investigatory and enforcement powers to discipline errant players during the electoral period. Further, since it had found that IEBC had the power to enforce the electoral code then the impugned parts were constitutional.

On the issue of whether the Code of Conduct bound Sabina Chege, the Supreme Court determined that whereas Sabina Chege was a member of Jubilee Party the electoral code was not binding on her because IEBC had not adduced evidence showing that Jubilee

[31]Ibid, para 32.
[32]Ibid, para 33.
[33]Ibid, para 59.
[34]Ibid, para 58.
[35](2020) eKLR.

Understanding and interpreting statutes is a fundamental aspect of legal practice, and adherence to these laws is essential for maintaining order and justice within a society.

Party had indeed subscribed to the Electoral Code for the 2022 election period. In the words of the court: "We note that Jubilee party was also not a party in this cause. Neither can we glean from the record that the Appellant adduced proof that Respondent was either a member or official of the Jubilee Party. Due to the inconclusive nature of the evidence on this, we find that the Respondent cannot be found liable in the instant case".[36]

V. Analysis and discussion

i. Weaknesses of the Supreme Court decision

a. Holding that IEBC has the mandate to summon witnesses, examine them, conduct trials, and make determinations thereof

The weakness of the Supreme Court's decision on this issue is that it was premised on the wrong interpretation of the Constitution that ignored the textual interpretation and instead favouring the holistic interpretation. It is submitted here that contrary to IEBC's contention that the electoral code of conduct is a derivative of Articles 82, 84, 86(d), 87, and 88(5),[37] it is a derivative of Articles 84 and 88(4) (j) which only grants the IEBC prescriptive jurisdiction in coming up with the electoral code of conduct and not its enforcement. Further, coming up with the legislation to give effect to Article 87 precluded the prescription of the electoral code of conduct by Parliament. To this end, it is imperative to explore the intention of the drafters of the Constitution as to the nature of the electoral code of conduct, in particular, whether it is a constitutional instrument or a Statute and whether a breach of the code amounts to an electoral dispute in terms of Article 87 entitling IEBC to invoke its jurisdiction.

Whether the electoral code is a constitutional instrument or statute

The genesis of the electoral code of conduct is to be found in the Constitution. Article 81 outlines the general principles of the electoral system including free and fair elections, which are free from violence, intimidation, improper influence, or corruption.[38] Article 82 on the other hand, enjoins Parliament to enact legislation providing for, inter alia, the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections.[39] Put differently, legislation under Article 82 confers on IEBC the competence to conduct, regulate, and supervise elections or referenda, nominations notwithstanding.

Article 88 establishes the IEBC whose functions include the development of a code of conduct for candidates and parties contesting elections.[40] In the same manner, Article 84 makes compliance with the electoral code of conduct a precondition for participation in elections by candidates and political parties. It follows that the drafters of the Constitution intended that the electoral code of conduct as envisaged by Article 88 be a constitutional instrument and not an Act of Parliament or rather a Statute. In other words, the code of conduct

[36] *IEBC v Sabina Chege*, para 65.
[37] Ibid, para 19.
[38] Constitution of Kenya, Article 81(e) (ii).
[39] Ibid, article 82(1) (d).
[40] Ibid, article 88(4) (j).

ought to be a normative derivative of the Constitution. What is, therefore, meant by a constitutional instrument? Mrima J's decision is instructive.

For Mrima J, constitutional instruments, which are neither provided for (at least explicitly) nor defined by the Constitution or legislation, are instruments that have the force of law, but do not include the Constitution, the legislations passed by Parliament or County Assemblies, the statutory instruments or subsidiary legislation, international instruments, common law or customary law.[41] He continues to note that "constitutional instruments may be described as special kinds of instruments which directly derive their basis and legitimacy from the Constitution and not from a statute".[42] Further that "the power to make such instruments is usually, directly conferred to a person or entity by the Constitution. The instruments are also not subject to the rigors of the law-making processes as provided for in the Constitution and the law".[43]

About legislative input on constitutional instruments, Mrima J asserts thus: "The holders of the powers to formulate such instruments are usually not called upon to comply with the legislative processes provided in the Constitution and the law, but the resultant instrument must measure to the expected constitutional

Justice Anthony Mrima

parameters and must embrace the spirit of the Constitution".[44] Justice Mrima goes ahead to give an example of a constitutional instrument in terms of Article 22(3) which enjoins the Chief Justice to make rules which would ensure that the Bill of Rights remains justiciable guarantees but not constitutional ropes of sand. As such the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (Mutunga Rules) were birthed in pursuance of Legal Notice No. 117 of 28th June 2013.

Statutes or legislation, are the creation of Parliament and County Assemblies.[45] Statutes must undergo specific processes in the Parliament and County Assemblies and can only assume the sanctity of the law with the assent of the President, in the case of national laws, and that of a County Governor in the case of County legislation.[46] The Constitution may make provisions for Parliament or County Assemblies to make certain laws or the Parliament and County Assemblies may do so of their own volition and in discharging their cardinal mandates.[47]

Schedules thereto are not subsidiary legislation but Statutes unto themselves.[48] In other words, a schedule to a Statute stands on the same pedestal as a provision of such a Statute. This position finds support in the Court of Appeal's decision in *Centre for Rights Education & Awareness & 2 Others v. John Harun Mwau & 6 Others*[49] where the court, citing Halsbury's Laws of England,

[41]Sabina Chege v IEBC (2022) eKLR, para 84.
[42]Ibid, para 85.
[43]Ibid, para 86.
[44]Ibid, para 87.
[45]Constitution of Kenya, Article 260.
[46]Sabina Chege (n 30), para 94.
[47]Ibid, para 95.
[48]Elisha Ongoya, 'The Role of Institutions in the Resolution of Election Disputes in Kenya', 161.
[49]Civil Appeal Nos. 74 & 82 of 2012.

expressed itself thus: "A schedule to an Act is to be construed by the functional construction rule, as an adjunct to the main body of the Act but fully part of it. Any conflict between the inducing section (or any other section of the Act) and the schedule is to be resolved without regard to the fact that some of the relevant words are contained in the schedule rather than in the section".

Coming back to the electoral code of conduct, the above exegesis yields the conclusion that the electoral code is indeed a Statute as it forms part of the Elections Act 2011 and was enacted in pursuance of Article 87(1) as opposed to Article 88(4) (j).[50] It must not be lost that in terms of the architecture of the Constitution, the electoral code ought to be a constitutional instrument developed by IEBC and not a Statute arising out of Parliament. To that end, as enacted by Parliament the electoral code of conduct offends Article 88(4) (j) of the Constitution since in coming up with the code, Parliament usurped the role of Parliament. As such the electoral code is a nullity.

Suffice to add, in as far as the code ought to have been a constitutional instrument and not a statute the role of IEBC was only limited to the development of the code of conduct and not its enforcement. On enforcement, the Constitution authorized IEBC to legislate and nothing prevented it, in coming up with the code, from specifying the institutions that would enforce the code. As aforementioned the IEBC's competence only extended to the development of the electoral code of conduct it then suffices that the IEBC, or any other body for that matter, cannot arrogate unto IEBC the powers to enforce the code.

I am inclined to agree with Mrima J's holding that in as much as the IEBC has powers to conduct investigations on its initiative or a complaint made by a member of the public it may not summon a witness to assist in its investigations nor can it conduct trials since such power is not granted by the Constitution as per Article 252.[51] This is, however, not to say that an Act of Parliament cannot vest IEBC with the power to issue summons to witnesses to aid it in its investigations provided that the IEBC does not proceed to conduct trials after such investigations. Such a Statute cannot be the electoral code since as has been noted above the code is a nullity. The conclusion that follows is that enforcement of the electoral code is not within the purview of IEBC thus it has no power to summon, examine witnesses, or conduct trials on breach of the electoral code.

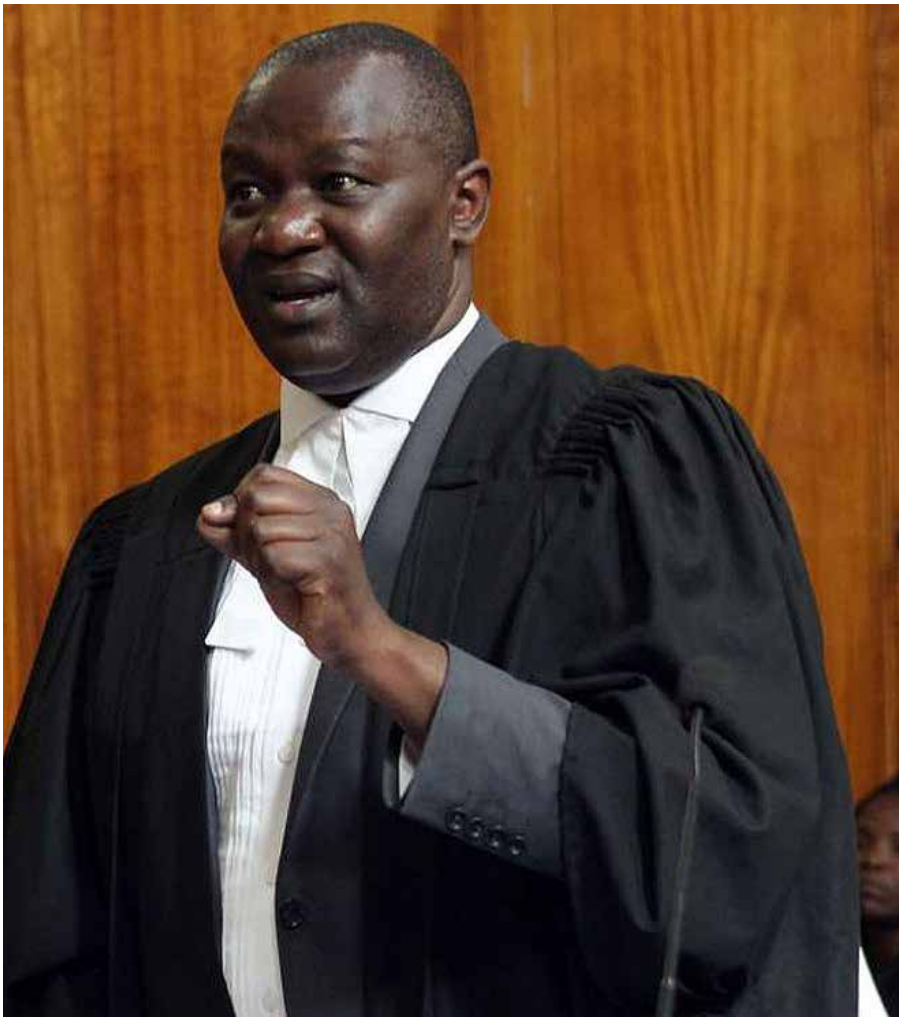
Whether a breach of the electoral code of conduct amounts to an electoral dispute

Concerning electoral disputes, Article 88 vests IEBC with the power to settle electoral disputes including disputes relating to or arising from nominations but excluding election petitions and disputes after the declaration of election results. Article 87 calls on Parliament to enact legislation to establish mechanisms for the timely settling of electoral disputes. Electoral disputes are neither defined by the Constitution nor by legislation. With that void, electoral disputes can be identified as disputes relating to or arising out of elections including disputes relating to nominations, election petitions, boundary delimitation, voter registration, and election offences.

Free and fair elections demand sound dispute resolution mechanisms.[52] According to Ongoya, election dispute resolution refers to a "system of judicial or quasi-judicial mechanisms through which election actions can be legally challenged and electoral rights protected".[53] For Ojienda and Adude, electoral dispute resolution mechanisms are "administrative and quasi-judicial, especially as pertains to intra-party pre-election disputes, as well as judicial, mostly as concerns post-election disputes".[54] Institutions for settling electoral disputes are of two kinds: administrative quasi-judicial, and judicial. The administrative and quasi-judicial electoral dispute settlement bodies are the political parties, the IEBC's peace and electoral code enforcement committees as well as the political parties' disputes tribunal. The judicial bodies are the election courts.[55]

[50]See *Republic v IEBC; Jessica Mbalu (Interested Party); Ex Parte Philip Kaloki* (2021) eKLR, [22].
[51]Sabina Chege v IEBC (2022) eKLR, para 140.
[52]Elisha Ongoya, 'The Role of Institutions in the Resolution of Election Disputes in Kenya', 152.
[53]Ibid.
[54]Tom Ojienda and Lydia Mwalimu Adude, 'Electoral Dispute Resolution Mechanisms in Kenya' (2022) 8 Journal of Conflict Management and Sustainable Development 3, 44.
[55]Tom Ojienda, 'Electoral Dispute Resolution: Managing Team Dynamics in Election Petitions' (2021) 7 Journal of Conflict Management and Sustainable Development 4, 5.

For Ongoya, Ojienda and Adude,[56] breaches of the electoral code qualify as electoral disputes, specifically pre-election disputes, and entitle IEBC to invoke its enforcement jurisdiction. This position may have been informed by the fact that breaches of the code of conduct can only occur during an election period but not after the declaration of election results. It is hereby submitted that while IEBC has powers to settle electoral disputes through its dispute resolution mechanisms such as peace committee, breaches of the electoral code are criminal and thus can be best dealt with through the courts and not by IEBC sitting as a quasi-judicial or administrative tribunal. This argument draws support from Article 88(4) (j) of the Constitution which limits IEBC's role to the development of the code of conduct and section 110 of the Elections Act, as read with section 21 of the Elections Offences Act, which authorizes IEBC to enforce the electoral code through the courts. Put differently, by their very nature, breaches of the electoral code are not determinable by IEBC through its internal dispute resolution mechanisms.



Lawyer Tom Ojienda

b. Holding that the electoral code of conduct is constitutional

The parts of the electoral code whose constitutionality was challenged were paragraphs 7, 8, 10, and 15 as well as parts of Rules 15(4) and 17(1) and (2) of the Rules of Procedure on Settlement of Disputes establishing and granting powers to the Committee to summon witnesses and conduct hearings of complaints based on allegations of breach of the Code. The Supreme Court's determination of this matter was at best pedestrian.[57] It is submitted here that the *Alnashir Popat case* is distinguishable from the *Sabina Chege case* and is not a good authority as pertains to the enforcement of the electoral code of conduct. This is for the reason that the logic behind the decision in the *Alnashir Popat case* was that the expeditious disposal of disputes that arose in the operations of the capital markets, the functions set out in Section 11(3) (cc) (h) [of the Capital Markets Authority Act] demanded such functions be performed by the same body to enhance efficiency and realize the objectives of the Act. If one were to apply the Supreme Court's reasoning in *Alnashir Popat* the conclusion that would follow is that efficiency in performance of IEBC's functions demanded that enforcement of the electoral code be performed by a separate body other than the IEBC. Indeed, that was the intention of the drafters of the Constitution who in Article 88(4) (j) limited IEBC's role to developing the code of conduct. The Elections Act as well as the Elections Offences

[56]Ibid, 59
[57]SC Petition No. 23 (E026) of 2022, para 55-60.

Act equally vested the power of conducting trials for breach of the electoral code in the courts.

As to the constitutionality of the impugned sections it is noted that they purportedly granted powers to the enforcement Committee to summon witnesses and conduct hearings of complaints based on allegations of breach of the Code. In terms of Article 88(4) (j) IEBC has no role in enforcing the electoral code. Similarly, Parliament has no role in coming up with the electoral code as that is the preserve of IEBC. In other words, the electoral code ought to be a constitutional instrument but not a Statute. By the fact that the electoral code is a Statute, it infringes Article 88(4) (j) in that Parliament usurped the role of IEBC. It might also be argued that the electoral code is unconstitutional because IEBC delegated its powers of developing the electoral code to Parliament, which powers it cannot delegate.

The Supreme Court's conclusion that the impugned sections of the electoral code were constitutional leaves a lot to be desired. It is general knowledge that the starting point in interrogating the constitutionality of a statute is the cardinal presumption that the statute is constitutional. Determining the issue, as held in a long line of authority including *Council of Governors v A-G and another*,[58] involves interpreting the impugned section and the relevant provisions of the Constitution that are alleged to be offended by the impugned section.

The court was called upon to determine the object and purpose of the impugned statute to discern the intention expressed in the Act itself having regard to the effect of the impugned Act. Whereas the Supreme Court determined the object of the electoral code an interpretation of the impugned sections of the electoral code against the relevant provisions of the Constitution that the code allegedly offended was lacking.

Holding that the electoral code of conduct was not binding on Sabina Chege

Paragraph 1 of the electoral code outlines the persons whose subscription to the electoral code is mandatory. These are every political party participating in an election, every candidate, and every leader, chief agent, agent, or official of a referendum committee. Paragraph 2 thereof enacts that the code is binding on the Government and every political party, leader, office bearer, agent member of a political party or person who supports a political party, and every candidate nominated under the electoral laws for any election. Compliance with the code of conduct is also mandated by Article 84 of the Constitution.

It is submitted here that the Supreme Court forgot the team it was playing for. Instead of playing for the team rule of law, it was playing for team Sabina Chege relying on a procedural technicality that IEBC has not led to evidence that the Jubilee Party subscribed to the electoral code of conduct for the 2022 election period. On procedural technicalities, Article 159(2) (d) enjoins courts and tribunals to administer justice without undue regard to procedural technicalities. If anything, not all facts require proof. The Evidence Act calls upon Courts to take judicial notice of matters of general notoriety which require no proof. The Supreme Court should have taken judicial notice that as a high-ranking politician, Sabina Chege was a member of the Jubilee Party. The IEBC did not need to prove that the Jubilee Party had subscribed to the electoral code since it had led to evidence that the party was participating in the 2022 elections implying that it has subscribed to the code of conduct.

VI. Conclusion

The electoral code would have enhanced conducive conditions for conducting pacific, free, and fair elections as well as promoted a climate of tolerance in which political activity may take place without fear, coercion, intimidation, or reprisals if rightly enacted. Its inclusion in the Elections Act makes it a Statute instead of a constitutional instrument as envisaged by Article 88(4) (j) of the Constitution. As regards the role of IEBC in the electoral code, the IEBC's competence was only limited to the development of the code and not its enforcement. As such any attempt by IEBC to enforce the code of conduct is nothing but hot air since such authority is bestowed on it by an unconstitutional electoral code of conduct enacted in disregard of constitutional requirements.

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[58](2017) eKLR. See also *Ndyanabo v A-G of Tanzania* (2001) EA 495.

The quandary of impeachment in Kenya

By George Webo

Impeachment is a constitutional process that allows for the removal of certain public officials from office. The process is typically used for high-ranking government officials accused of serious wrongdoing.

Introduction

The Constitution of Kenya promulgated in August 2010 has widely been described as a transformative one for containing required aspects of a progressive democratic society including the bill of rights, separation of powers, and the rule of law. One of the key changes in this Constitution is the establishment of a two-level system of government with the introduction of devolution. Kenya is therefore divided into forty-seven devolved units (counties)[1] making it a quasi-federal state. Each of these counties has a distinct government comprising a county executive and a legislative assembly. However, where there is a conflict of laws, national legislation prevails over county legislation.

Noteworthy is the legislative role of oversight through checks and balances which accompanies the separation of powers in the counties. At the national level, both the Senate and National Assembly perform an oversight role where the National Assembly performs oversight over national revenue and its expenditure[2] while the Senate conducts oversight over national revenue allocated to counties as well as on state officers.[3] At the county level, the county assemblies in their exercise of legislative power exercise oversight over the county executive committee and other county organs.[4] Oversight goes hand in hand with, among others, checking the actions and conduct of county officials and organs in the exercise of their duties. This is where the idea of impeachment comes from concerning governors who are the county chiefs. Whenever a public officer abuses their power, office or displays conduct that is inconsistent with the law of the land, they are to be held accountable for these deeds.[5] In counties, the county assembly which is the legislative arm of the devolved units may impeach a governor or his deputy if their conduct meets the threshold provided for in the Constitution and statutes.

This Article will focus on the legal principles behind the impeachment process in Kenya, highlight noted

[1]Constitution of Kenya, Article 6 (1), FIRST SCHEDULE
[2]Constitution of Kenya, Article 95 3) c
[3]Constitution of Kenya, Article 96 (3), (4)
[4]Constitution of Kenya, Article 185(3)
[5]Constitution of Kenya, Article 75

flaws and challenges faced in the process taking into account the period from 2013 to 2023 and finally give recommendations on how to improve the process with a summarized conclusion.

The law governing impeachment of county governors

Article 181 of the constitution provides grounds on which a county governor may be removed from office which includes gross violation of the Constitution and gross misconduct.

The Constitution also empowers parliament to enact legislation providing for the procedure of removing a governor from office[6] on the grounds specified in Article 181 (1). Consequently, the 10th parliament in its exercise of the legislative power in Articles 1(3) (a) and 95 (5) of the Constitution enacted the County Government Act. Section 33 provides the procedures necessary for the removal of a governor from office. An MCA may move a motion for the removal of the governor by notice to the speaker of the county assembly and supported by at least a third of the members of the house.

If the motion is supported by at least two-thirds of the members, then the speaker of the county assembly shall serve the speaker of the senate with a notice of a resolution after which they will convene a meeting of the charges to hear and determine charges against the governor.

A special committee of the Senate comprising 11 members may be appointed to investigate the matter and report back to the Senate whether their findings are substantial. The delegation of senators will then take a vote on the impeachment charges against the governor and if a majority votes to uphold the impeachment, the governor ceases to hold office.

The problem

In my view, this power of impeachment given by the Constitution to the county assemblies in Kenya has been widely abused. It is my view that the constitutional expectation of the provision for the removal of a governor from office is not being realized effectively post-2010. Many impeachment motions are tabled against the governors just to frustrate them and this has adverse effects on service delivery and smooth running of the counties. I find an absurdity in the provisions for impeachment of a governor against the provisions for removal from office of other elected public officials.

Lack of a standardized process of removal of a governor from office vis-à-vis other elective public positions

The removal of a governor from office in Kenya is almost similar to the process of removal of a president but when it comes to the threshold for votes in the Senate, a simple majority is required[7] as opposed to the two-thirds threshold in the case of a removal of a President. Members of County Assemblies with the support of Senators easily table and pass motions of impeachment inferably because of the less tiresome process of doing so. In my advancement of this assertion, below is an analysis of part of the provisions for the removal of senators, women representatives, Members of the National Assembly, and Members of the County Assembly from office by way of recall.

Removal of members of parliament and county assembly from office

A study of Sections 27 and 28 of the County Government Act unfolds a complex procedure with strict provisions for the removal of a member of the county assembly from office by way of a recall. A member of the county assembly cannot be recalled within 24 months after they have been elected into office and not later than 12 months immediately before the next general election. The Act further states that a recall petition cannot be filed against a member of the county assembly more than once during the term of the member.

Moreover, filing the recall petition with the IEBC together with the list of names, identity card numbers and signatures of the voters supporting the recall petition are also required.

The process is even more complex when it comes to the members of parliament (both the National Assembly and the Senate). For the process of a recall of a member of parliament to be initiated, the High Court has to confirm its finding that there exist the circumstances necessary for a recall of such a member.[8] Also, a member of parliament cannot be recalled more than twice during their term in office. Recalling a member twice is not only prohibited by the express wording of the Constitution but also impliedly by the restrictions on time.

[6]Constitution of Kenya, Article 181 (2)
[7]Elections Act No. 24 of 2011, section 33(7)
[8]Election Act No. 24 of 2011, Section 45(3)

The timeframe for this process is so limited like that of the member for county assembly that it is almost impossible to recall any member of parliament during their term in office.

Usually by dint of Articles 101 (1) and 177(1)a of the Constitution election of members of parliament and county assembly respectively are held together in a general election every 5 years which means that a single term in office lasts five years. Cutting the first twenty-four months and the last twelve months from the five years, the electorate is only left with two years to exercise their right to recall. It is therefore almost impossible to remove a member of parliament from office due to the tiresome process. This is because it takes a lot of time for the high court to determine whether or not the grounds of recall raised against the member of parliament are true.


Ferdinand Waititu, former Kiambu governor

However, one will raise questions as to why the process of removal of a governor from office is not as detailed as the other seats. The governor is the executive head of a county and in fact, many functions and institutions initially held by the national government have been devolved. In any case, the running of the county will be affected after a governor has been impeached even though the County Government Act requires that the governor shall continue performing the functions of the office pending the outcome of the proceedings. Therefore, the impeachment of such an authority as that of a governor has a huge impact on the county and its residents. This calls for an extensive procedure of reaching such points, aware of the impact.

In addition, whereas members of parliament can only be removed once from office through a recall, MCAs can impeach governors as many times as they can, this left me wondering how this can be, yet these are two groups of leaders both elected by the same electorate in the counties yet the law applies to them differently. Is it inconsistent with the national values of equality equity in Article 10[9] as read with Article 27 of the constitution which guarantees equal protection and benefit of the law?

The analysis above proves that the law on the removal of elected leaders from MCA to the governor is not equal. The provisions of removal of a governor are simple and less tedious than for the rest of the seats which should not be the case. Over the last 10 years, this is the reason why there have been many impeachments in counties.

Impeachment is being abused for political ends

Rarely are occasions where the governor and the county assembly have similar or almost similar political affiliations and at the same time fight. In most cases, where there exist political differences between the assembly and the governor, the governor suffers the victim. Members of county assemblies will easily remove a governor from office especially

[9]Constitution of Kenya, Article 10 (2)b


Mike Mbuvi Sonko, former Nairobi Governor

when the two bodies, the county executive and the assembly, fail to cooperate. The nature of Kenyan politics is that where there is a meeting of minds between the legislature and the executive, harmony and cooperation automatically exist, this aspect not only seems to have been devolved but also has characterized a couple of impeachments on the flip side of the coin.

Take for instance the impeachment of Ferdinand Waititu, former Kiambu governor in January 2020, the County Assembly tabled the charges against him as gross violation of the Constitution, the County Government Act, the Public Finance Management Act and the Public Procurement and Disposal Act and the Senate upheld the impeachment. However, it is understood that Waititu was also anti-Building Bridges Initiative which had automatically placed him in the opposition within government side.

The same was in the impeachment of Mike Mbuvi Sonko as the governor of Nairobi City County and was impeached on December 17th, 2020 understandably because he refused to submit and cooperate with the state in signing the budget allocation to the Nairobi Metropolitan Services.[11] Although it was cited that Sonko had grossly abused the Constitution and abused his office, it was clear in the eyes of many that the politics of the day had an impact on the impeachment.

Lastly, in the impeachment of June of the same year, 2020, Anne Waiguru, a first-time governor of Kirinyaga County was impeached but the Senate saved her. The Members of the County Assembly had cited gross misconduct, a gross violation of the Constitution, abuse of office and undermining their authority as the grounds for impeachment but it was apparent that Anne Waiguru was pro-BBI and a member of the Kieleweke faction of the ruling at that time therefore her political inclination was being used against her.

It is also not a coincidence that within that period most governors who were impeached were from the ruling party, Jubilee. Most of the impeached governors were also not pro BBI which cements the fact that the impeachment process was politically instigated. Impeachment was used as a tool for settling political scores and this is likely to happen in the future if we don't put in measures to regulate the process. This is the most preferred reason considering the political climate of Kenya at that time.

The number of impeachment motions against the success of the process

It is noteworthy that most of the impeachment processes have ended

[10]Constitution of Kenya, Article 27(1)
[11]The Star E-Paper, Impeachment: *A fair process or a political weapon?* (By Gideon Keter), 25th December, 2020

Granton Samboja, former Taita Taveta's Governor

Martin Wambora, former Embu Governor

up unsuccessful at the Senate which raises eyebrows as to what transpires in the county assemblies before these impeachments are forwarded to the Senate. In my view, the best explanation for this occurrence is regards to the capacity of the members of the county assembly to deliberate on the grounds of the impeachment and determine whether they are substantial.

A short thesis on the impeachment of various governors since the onset of devolution indicates that about ten of the impeachments were either defeated in the Senate or the court. Martin Wambora, the governor with nine lives survived four impeachments in a bid to get him out of office of Embu governor. In the first impeachment in 2014, the impeachment was upheld by the Senate but he was reinstated by the High Court in a surprising turn of events. Whatever followed in the impeachments of Kericho governor Paul Chepkwony, Muranga's Mwangi wa Iria, Nyeri's Nderitu Gachagua, Taita Taveta's Granton Samboja and Kirinyaga's Anne Waiguru and the recent two impeachments of Meru governor Kawira Mwangaza portray a similar result at the Senate where the house rules that the grounds presented by the respective county assemblies do not meet the required constitutional threshold for an impeachment motion to succeed.

The information above drew to my attention whether the members of county assemblies, the speakers, and their attorneys are conversant with what materially constitutes the grounds for impeachment. Keeping in mind the resources used in conducting these proceedings plus the amount of time spent in the hearings by the Senate and the courts only to find that the impeachment does not stand.

Recommendations

This study makes several recommendations that will be necessary in dealing with the impeachment of governors in Kenya henceforth.

I. There is a need to limit the number of impeachment motions that can be tabled against a governor and after reasonably prescribed periods. I find the three months provided in section 33(8) of the County

Anne Waiguru, Kirinyaga governor

Kawira Mwangaza, Meru governor

Government Act too short and skewed towards more of the frustration of the governor. This will address the scenarios depicted in Martin Wambora impeachment motions as well as those of Kawira Mwangaza.

II. There is a need to balance the process of removal of elected public officials. The process of removal of an MCA or an MP favors the elected member more than that for removal of a governor, yet they are elected through the same process by the same citizens.

III. Lastly, there are alternative mechanisms for impeachment. This may be in the form of payment of fines among other solutions. I take this stand most especially in addressing the question as to whether harmony is likely to prevail between the governor and the county assembly if at all the impeachment is not upheld by the senate. Mostly, proceedings before the Senate are highly polarized and this may affect the future relationship of the two.

IV. Giving the judiciary a definite active role in the impeachment process. The County Government Act fails to establish the place of the judiciary in the impeachment process yet we see aggrieved parties heading to courts from the Senate after the conclusion of impeachment proceedings.

Conclusion

Citing Article 181 of the Constitution and Section 33 of the County Government Act, the drafters of the Constitution envisioned a devolved system of governance with accountability and responsibility on the part of the heads of these devolved units. In any case there happens to be a breach of their duty, the governors have a right to be heard after which their case will be determined by a vote of the Senate.

The hearing is supposed to be done in a manner consistent with the national values and principles of governance, principles of natural justice which includes the rule against bias on any ground and principles of the legal system. Therefore, this excludes any basis on aspects like politics which are unconstitutional. Moreover, the outcome should be fair and reasonable with respect to human rights in administrative law.

The weaponization of criminal law to restrict freedom of expression in Kenya

By Deckstar Adaki

"Freedom is hammered out on the anvil of discussion, dissent and debate"
Hubert Humphrey

Freedom of expression is a cornerstone of democratic societies, promoting pluralism, tolerance, and the open exchange of ideas. However, its scope and limitations may vary based on legal traditions, cultural contexts, and evolving societal norms.

Introduction

In grand political theatrics at the close of the last year, Dr. Margaret Nyakang'o, the controller of the budget, took center stage in an unsettling saga, facing a blockbuster lineup of criminal charges. As revealed in an investigative dossier dispatched from the Directorate of Public Prosecutions (ODPP) to the Directorate of Criminal Investigations (DCI), Dr. Nyakang'o and her co-conspirators find themselves entangled in a web of accusations, including operating a Sacco without a licence, forgery, and conspiracy to defraud-a plot twist worthy of a suspenseful crime novel.[1] Dr. Nyakang'o was arraigned at a Mombasa court where she appeared before Chief Magistrate Alex Ithuku, vehemently denying all charges, only to be handed a ticket to freedom on a Kshs. two million bond or a cash bail of Kshs. five hundred thousand.[2] But hold on because there is more to the accusations, casting doubts on the veracity of the claims against Dr. Nyakang'o.

Dr. Nyakang'o, our protagonist, the straight-talking (albeit polite) controller of the budget, has shown a rare kind of diligence and commitment, one that is ordinarily frowned upon by the usual thieving types.[3] Dr. Nyakang'o recently blew the whistle on financial misdeeds within the government, calling out the Treasury for the economic nosedive, a move that seemed to have triggered a series of unfortunate events leading to her arrest. Accusations flew like confetti–tripling salaries,[4] off-the-books payments, and a whopping

[1] *Republic V Margaret Nyakang'o and 10 others, criminal case No. E1674 of 2023.*
[2] *Ibid.*
[3] Mwalimu Mati, 'Then They Came for Dr. Margaret Nyakang'o...', Debunk Media, December 6, 2023. From https://debunk.media/then-they-came-for-dr-margaret-nyakango/ on 7 December 2023.
[4] Achieng S, 'Budgeted Corruption': How Taxpayers Lost Ksh.1B As Treasury Paid State Officers Three Times Their Salaries', Citizen TV, November 04, 2023. From https://www.citizen.digital/news/budgeted-corruption-how-taxpayers-lost-ksh1b-as-treasury-paid-state-officers-three-times-their-salaries-n330692 On 5 December 2023.


Controller of Budget Margaret Nyakang'o

83% of government revenues disappearing into the abyss of debt repayment.[5] Moreover, as the curtain raised on the controller of budget's review of county budgets, we discovered a sequel to financial chaos. Counties, playing their part, overspent on wages and benefits, with a disregard for regulations on foreign travel that would make any scriptwriter cringe.[6] Delegations ballooned and sitting allowances flowed like a river.[7] Indeed, the timing of her arrest, reminiscent of a poorly scripted political thriller, could not be more suspicious – a tale of harassment and intimidation.

But fear not, for our heroine Dr. Nyakang'o found a temporary haven in the High Court, where Justice Lawrence Mugambi hit pause on the criminal proceedings, citing a suspicious plot by the government to either oust or muzzle her with concocted charges, thanks to the West Mugirango Member of Parliament (MP) Stephen Mogaka.[8] The MP dubbed the proceedings against Dr. Nyakang'o as political theatrics worthy of an Oscar nomination, with accusations of witch hunts, ulterior motives, and an unceremonious attempt to discredit our Iron Lady. In this high-stakes courtroom saga, his lawyer, Danstan Omari, delivered his lines with flair, painting a vivid picture of a targeted protagonist. The charges, he argued, were mere political theatrics, a plot to force Dr. Nyakang'o offstage without the courtesy of due process.[9] As the legal battle unfolds, will justice prevail, or will Dr. Nyakang'o become the tragic hero in this dark political comedy?

Dr. Nyakang'o's plight is just a glimpse into the government's playbook, where the law becomes a weapon to hush dissent and intimidate those who dare question their dubious deeds.[10] This chilling strategy not only mutes political critiques but also casts a shadow over voices daring to speak out against the government's unlawful acts such as corruption and human rights violations. Amidst dismissals and abandoned prosecutions, numerous individuals, merely exercising their freedom of expression, find themselves arrested, entangled in pre-trial detention, and ensnared in costly legal battles.[11] This government's selective pursuit of cases suggests a sinister agenda – not genuine justice, but a calculated effort to instill fear among dissenting voices. If the government were truly committed, we would witness a parade of corrupt officials and human rights violators behind bars. This blatant abuse of state machinery, trampling on human rights, has earned

[5]The Saturday Standard, 'Investigate Nyakang'o's claims against Treasury', November 3, 2023. From https://www.standardmedia.co.ke/testbed/business/editorial/article/2001484587/investigate-nyakangos-claims-against-treasury on 5 December 2023.
[6]Omullo C, 'Controller of Budget report sparks alarms over salaries and travel splurge by county governments', Nation Media Group, December 4, 2023. From https://nation.africa/kenya/counties/controller-of-budget-report-sparks-alarms-over-salaries-and-travel-splurge-by-county-governments-4452818 on 5 December 2023.
[7]*Ibid.*
[8]*Hon Stephen Mogaka V ODPP and DCI, Case No. HCCHRPET/E496/2023.*
[9]*Ibid.*
[10]*See Republic v Nuru Maloba, CR E1059/2023.*
[11]Malalo H and Mersie A. 'Kenyan opposition politicians arrested, tear gassed during protests', Reuters, March 20, 2023. From https://www.reuters.com/world/africa/kenyan-police-fire-tear-gas-disperse-cost-of-living-protests-2023-03-20/ on 4 December 2023.

Kenya international condemnation, tarnishing the very fabric of constitutional freedom of speech and expression.[12]

As a result, this paper delves into the dark art of wielding Kenya's criminal law to stifle freedom of expression in Kenya. It unveils instances where the legal system becomes a tool to crush political dissents, harass journalists, and constrict the activities of civil societies. The issue is not that the Kenyan Constitution lacks safeguards for free speech; rather, it is the ease with which free speech can be silenced due to an inefficient prosecution system and the glaring absence of political accountability. Adding to the quagmire, Kenya's justice system is notorious for its congestion and inefficiency, subjecting individuals to prolonged, expensive delays that may deter even the innocent from seeking justice for their rights. The unfolding events thus expose a system where the scales of justice seem tipped against those who dare to speak truth to power.

Freedom of expression includes a wide range of forms of expression, such as spoken or written words, artistic expression, symbolic speech, and the right to access information.

The exploitation of criminal law in curtailing the freedom of expression

The essence of free speech springs from the liberal notion that there must exist a realm where individuals are shielded from societal pressures. Rooted in this philosophy is the fundamental belief that the only justifiable reason for encroaching upon an individual's freedom is when their actions pose harm to others.[13] This sanctum of freedom from coercion encompasses what is referred to as the 'liberty of conscience, in the most comprehensive sense'.[14] According to this perspective, everyone not only has the right to form opinions on practical, speculative, moral, or theological matters but is also free to articulate these opinions. This freedom extends to the expression of ideas, no matter how unpopular, offensive, or potentially harmful they may be, with the exception being instances where these expressions cause tangible harm to others.[15] A society that, overall, fails to uphold these liberties cannot rightfully claim the title of a free society, regardless of its governing structure.

The pillars of freedom of the press and freedom of discussion stand as linchpins vital for any open society and, by extension, for any liberal democracy.[16] These principles form the theoretical bedrock of liberal

[11]Malalo H and Mersie A. 'Kenyan opposition politicians arrested, tear gassed during protests', Reuters, March 20, 2023. From https://www.reuters.com/world/africa/kenyan-police-fire-tear-gas-disperse-cost-of-living-protests-2023-03-20/ on 4 December 2023.
[12]Kenya National Commission on Human Rights, 'Human Rights Violated and Crisis Ignited Unrests With Tragic Consequences: Urgent Action Needed', 13th July 2023. From https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1165/Press-Release-Human-Rights-Violated-and-Crisis-Ignited-Unrests-With-Tragic-Consequences-Urgent-Action-Needed on 6 December 2023.
[13]On Liberty, John Stuart Mill writes: 'The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others' (Mill 1884:63).
[14]*Ibid*.
[15]See Articles 24(1) and 33(2), Constitution of Kenya 2010.
[16]Simon J, Lauría C and Flores O, 'Weaponizing the Law: Attacks on Media Freedom', Tow Centre for Digital Journalism, April 2023, p. 15.

Freedom of expression is essential for the functioning of democratic societies. It allows citizens to participate in public discourse, criticize government actions, advocate for social change, and contribute to the marketplace of ideas.

theory.[17] Without the audacity to question, challenge, or give the government a reality check, our growth would be stuck in a quaint little garden of conformity. Albert Einstein, the sage of skepticism, hit the nail on the head when he warned against the perils of blind faith in authority – a surefire way to suppress the truth.[18] We cannot march forward as a society if we're tiptoeing around the old guard in silent obedience. Dissent is not just a pesky inconvenience; it is the crucible where new-age thinkers are forged, and where growth frontiers stretch beyond the horizon. While some democracies might treat criticism like a hot potato, dissent is the secret sauce that spices up critical thinking and analytical prowess, giving birth to perspectives so fresh they practically have dew on them.[19]

In the case of *Manika Ghandhi Vs Union of India {1978} 2 SCR 621*, the Supreme Court of India stated that;-

> *"Democracy is based essentially on a free debate and open discussion for that is the only corrective of government of actions in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential."*[20]

Similarly, in the case of *Hector Vs. Attorney General of Antigua and Barbuda & Another*,[21] the Privy counsel stated;-

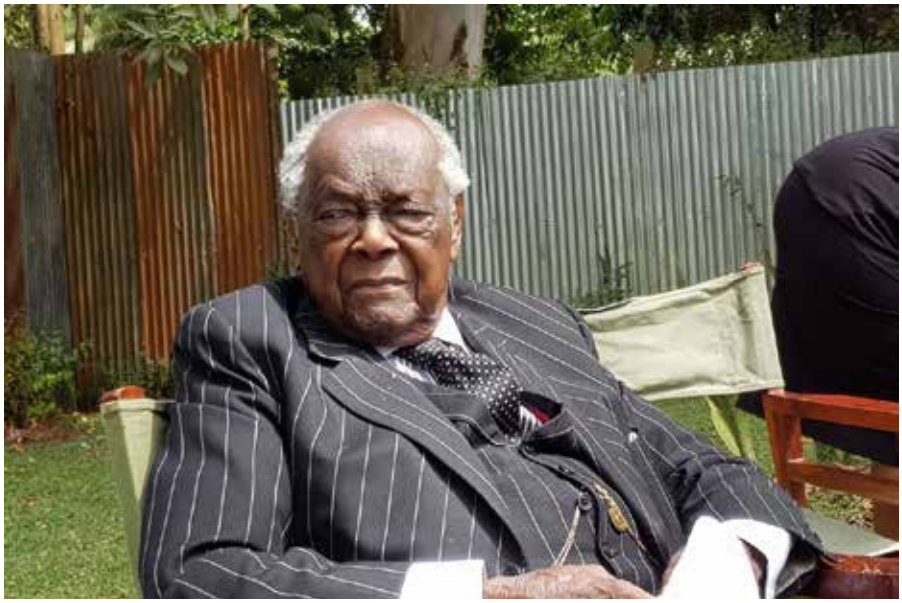
> *"In a free and democratic society, it is almost too obvious to need stating that those who hold office in government and who are responsible to public administration, must always be open to criticism. An attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time, it is no less obvious that the very purpose of criticism leveled to those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office."*[22]

"We are an open, democratic society founded on freedom and justice", proclaimed President Ruto in his inaugural address, 2022, echoing the sentiment

[17]United Nations Special rapporteur on the promotion and protection of the rights to freedom of opinion and expression, Irene Khan, Reinforcing media freedom and the safety of journalists in the digital age, A/HRC/50/29, 20 April 2022; European Union Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, Safety of journalists and the fighting of corruption in the EU, July 2020.
[18]Thompson J, "Blind Belief In Authority". From https://themindsjournal.com/quotes/blind-belief-in-authority/ on 6 December 2023.
[19]See East African Court of Justice, Media Council of Tanzania v. Attorney General, Judgement of March 28, 2019, https://globalfreedomofexpression.columbia.edu/cases/media-council-of-tanzania-v-attorney-general/ on 6 December 2023.
[20]*Manika Ghandhi Vs Union of India {1978} 2 SCR 621.*
[21]*Hector Vs. Attorney General of Antigua and Barbuda & Another (1991) LRC (const) 237 (PC) [1990] 2 ALLER 102.*
[22]*Ibid.*

that freedom and justice are the bedrock of our democratic society. A sentiment so deeply embedded that the 2010 Constitution stands resilient, its relevance unwavering. Indeed, the constitutional shield protects freedom of expression, a cornerstone upheld not only nationally but also in international agreements that Kenya is a party to—a vow that echoes through time as long as our Constitution endures. Article 33 of the Constitution of Kenya enshrines the freedom of expression, articulating that:

> *(1) Every individual possesses the right to freedom of expression, encompassing:*
> *(a) The liberty to seek, receive, or impart information or ideas;*
> *(b) Freedom of artistic creativity; and*
> *(c) Academic freedom and the liberty of scientific research.*
> *(2) However, the right to freedom of expression does not extend to:*
> *(a) Propaganda for war;*
> *(b) Incitement to violence;*
> *(c) Hate speech; or*
> *(d) Advocacy of hatred that:*
> *(i) Constitutes ethnic incitement, vilification of others, or incitement to cause harm; or*
> *(ii) Is based on any ground of discrimination specified or contemplated in Article 27 (4).*
> *(3) While exercising the right to freedom of expression, every individual is obligated to respect the rights and reputation of others.*[23]



The late Charles Njonjo

Since the old pre-colonial days, dissenting voices have been like the background music to our democracy concert. These rebellious melodies orchestrated the grand symphony of the independence movement, giving the British rule a run for its tea and crumpets. Our history, adorned with revolutions birthed from dissent, is like a chaotic ballroom dance that somehow manages to preserve freedom and flaunt the dazzling attire of tolerance and diverse thoughts.

Yet, in the bustling arena of political discourse, the freedom of expression enshrined in our 2010 Constitution and promised by our leaders to uphold, is often disrupted. While commitments to safeguard freedom of expression have been voiced by successive governments, actions on both national and county stages sometimes contradict these proclamations. Dissenters find themselves muzzled; their voices stifled under the weight of alleged "crimes" conveniently unearthed by the government. Sometimes, the government uses draconian laws such as the criminal defamation law,[24] and laws dealing with hate speech to silence dissent.[25] These laws are prone to misuse and have been repeatedly used for political purposes against critics at the national and county levels. This is a stark reality that has blemished the democratic values of our country.

Even before President Ruto, the previous regimes have had a formidable array of well-honed instruments at the disposal of those in authority within the criminal justice system, artfully designed for high-ranking officials bold enough to defy the silence in the presence of corruption. In the era of President Daniel Arap Moi, Charles Njonjo, the then Attorney General,

[23]Article 33, Constitution of Kenya 2010.
[24]*See Republic v Nuru Maloba, CR E1059/2023.*
[25]Kenya National Commission on Human Rights, 'Human Rights Violated and Crisis Ignited Unrests With Tragic Consequences: Urgent Action Needed', 13th July 2023. From https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1165/Press-Release-Human-Rights-Violated-and-Crisis-Ignited-Unrests-With-Tragic-Consequences-Urgent-Action-Needed on 6 December 2023.

John Githongo

liberally arrested and charged unruly Members of Parliament accused of mileage claim mischief.[26] It was a symphony of fear that silenced many crusaders against corruption, allowing them to serve out their terms ignobly but unscathed. Others, like Joseph Murumbi, made a noble exit, resigning to escape the clutches of corruption during the reign of the first President, Jomo Kenyatta. While constitutional office bearers may seem more liberated today in holding the government accountable, the cautionary tale of Dr. Nyakang'o echoes the perils of poking the beehive without a suitable shield. In our current realm of impunity and state capture, there are limits to how far one can push.[27]

Let's rewind to the saga of John Githongo, the former Permanent Secretary for Governance and Ethics, who dared to expose the Anglo Leasing heist of Kshs. fifty-six billion in 2005. Instead of applause, Githongo received death threats, was forced into exile, and watched his promising career crumble.[28] The subsequent investigations meandered half-heartedly over 17 years, conveniently buried under the rug of collective amnesia. In another case, Edward Ouko, the Auditor General extraordinaire, also sounded alarms about high-level corruption threatening the very fabric of the Kenyan state. His revelation of the $2 billion Eurobond fiasco in 2014 led to a personal rebuke from then-President Uhuru Kenyatta and an immediate investigation against him.[29] As we approach a hefty installment payment on this sovereign debt, evidence of its use for our benefit remains elusive, yet the rule of law demands our allegiance. Ouko's reward for his efforts? Harassment, snubbing, and a smear campaign to tarnish his reputation.[30] Sensational charges, including a mythical one-million-shilling iPad phone bill and accusations of tribalism, were hurled at Ouko to destroy his public image. Luckily, Keriako Tobiko, the DPP at the time, refused to prosecute on false allegations.[31]

In a year since President Ruto's inauguration, his globe-trotting pursuits for increased trade and investment have left throbbing concerns unaddressed[32]. When confronted by the controller of the budget, Margaret Nyakang'o, the government instead unearths an alleged crime she committed before becoming the controller of the budget. This maneuver exposes the untrustworthy and authoritative nature of the government when faced with scrutiny. It further

[26]Mwalimu Mati, 'Then They Came for Dr. Margaret Nyakang'o...', Debunk, December 6. 2023. From https://debunk.media/then-they-came-for-dr-margaret-nyakango/ on 7 December 2023.
[27]*Ibid.*
[28]*Ibid.*
[29]*Ibid.*
[30]*Ibid.*
[31]*Ibid.*
[32]Mwangi I, "President Ruto Defends Foreign Trips, Says Part Of Mandate', Capital FM, October 29, 2023. From https://www.capitalfm.co.ke/news/2023/10/president-ruto-defends-foreign-trips-says-part-of-mandate/ on 5 December 2023.

shows how the weaponization of criminal law has become a narrative woven into the fabric of governance, justified under the guise of protecting public order and enforcing accountability. While acknowledging the need to prosecute crimes, the powers that be, especially at the national level, too often misuse or turn a blind eye to the misuse of criminal laws—a strategy deployed to quell critical or minority voices in the name of maintaining order. The promise of an open, democratic society, once resounding, now echoes with the discord of suppressed expression. Can Mr. Ingonga, Keriako Tobiko's successor, uphold the same fairness as he wields the constitutional scepter to file charges against Dr. Nyakang'o? I sincerely hope history echoes justice.

CS Moses Kuria

In the year 2023, Kenya was transformed into a theater of chaos, courtesy of a surge in police theatrics during anti-government demonstrations led by the Azimio la Umoja-One Kenya Coalition Party. Raila Odinga's opposition brigade turned the streets into their stage, venting frustrations about everything from electoral shenanigans to wallet-wounding living costs and tax acrobatics.[33] March kicked off the drama, followed by encore performances in May and July. However, the real showstopper was the police, who seemed to have exchanged their batons for a playbook on excessive force, leaving a trail of injured and deceased demonstrators in their wake. According to the Armed Conflict Location & Event Data Project (ACLED), 2023 saw over 840 demonstrations across Kenya. Security forces decided to forcefully crash the party in 26% of these instances – a significant jump from 15% in 2022.[34] The Azimio Coalition's events seemed to be police magnets, with law enforcement crashing half of their shindigs, resulting in more than 35 unfortunate casualties.[35] The tears in these tales are not just figurative; they stain the very fabric of a narrative marred by excessive force, tragedy, and the collateral damage of those caught in the tumultuous whirlwind of dissent. This brutal policing spree is a stark contrast to the Kenya Kwanza Alliance's human rights-centered promises. These acts unravel the perplexing surge in violent police interventions during the anti-government spectacle, a performance that's eroding trust in Kenya's law enforcement and doing zilch to silence the dissidents.[36]

In more surprising events, former Trade cabinet secretary Moses Kuria ominously predicted Raila Odinga's demise on July 19, 2023, a slated day for protests. Interior cabinet secretary Kindiki Kithure further issued a stern warning, asserting there's no right to "riot and destroy property," setting the stage for a governmental standoff with protesters. President William Ruto, not one to mince words, declared

[33]Diallo M, "Kenya Opposition Leader Raila Odinga Says Protests Will Continue", Voice of Africa, July 25, 2023. From https://www.voanews.com/a/kenya-opposition-leader-raila-odinga-says-protests-will-continue-/7195913.html on 7 December 2023.
[34]Kenya: Police Use Excessive Force in Response to Anti-Government Demonstrations, 26 September 2023. From https://acleddata.com/2023/09/26/kenya-situation-update-september-2023-police-use-excessive-force-in-response-to-anti-government-demonstrations/ on 8 December, 2023.
[35]*Ibid.*
[36]Owino W, "IG Koome: Azimio protests are still illegal', The Standard, March 26, 2023. From https://www.standardmedia.co.ke/national/article/2001469719/ig-koome-azimio-protests-are-still-illegal on 8 December 2023.

Embakasi East MP Babu Owino

the protests as lawlessness and vowed to mobilize every resource to protect the nation's interests. In this riveting year of political turmoil, Azimio Coalition co-principal Martha Karua alleged that the courts had become the weapon du jour to muzzle their anti-government demos.[37] According to Karua, the courts are morphing into tools of suppression, a sentiment captured in her proclamation, "...the courts are being weaponized to silence dissent maandamano".[38] The Narc Kenya party leader threw shade at the police, accusing them of making strategic arrests to disrupt legitimate political activities. In her words, "When police arrest to sabotage legitimate political activities and turn up in court alleging conspiracy, then know the courts are being weaponized".[39] Examples of these arbitrary arrests included the arrest of Embakasi East MP Babu Owino, who was charged with the crime of conspiracy to cause chaos or subversive activities. The Ghetto president, Calvin Gaucho, and five others joined these political theatrics, all of them standing defiantly before Milimani Chief Magistrate Lukas Onyina, denying the charges.

More recently, Nuru Okanga, an activist affiliated with the Orange Democratic Movement (ODM), found himself facing charges for allegedly insulting President William Ruto through his YouTube account.[41] The prosecution claimed that the accused penned these disparaging remarks on the 20th of November 2023. The court heard that the accused articulated words deemed contrary to Section 23 of the Cybercrime Act.[42] On the 29th of November 2023, Okanga was apprehended and transported to the Central police station before the prosecution formally pressed criminal charges against him. This is despite the UN Human Rights Committee emphasis that , *"the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties" because "all public figures . . . are legitimately subject to criticism and political opposition," such that States "should not prohibit criticism of institutions, such as the army or*

[37]People's Daily, 'Courts are being weaponized to silence dissent' – Karua, 2023. From https://www.pd.co.ke/news/karua-claims-courts-are-being-weaponized-192024/?amp= on 7 December 2023.
[38]*Ibid.*
[39]*Ibid.*
[40]Nyamasege W,"Babu Owino, 6 others charged with conspiring to commit subversive activities", K24 Digital, 20 July, 2023. From https://www.k24tv.co.ke/news/babu-owino-6-others-charged-110242/ on 8 December 2023.
[41]Osoro J, 'ODM Activist Nuru Okanga Charged With Insulting President Ruto', Capital FM, November 30, 2023. From https://www.capitalfm.co.ke/news/2023/11/odm-activist-nuru-okanga-charged-with-insulting-president-ruto/ on 4 December 2023.
[42]*See Republic v Nuru Maloba, CR E1059/2023.*

the administration".[43] Thus the legal pursuit against Mr. Okanga is trivial, bordering on frivolous, and seems to be an unwarranted drain on the court's resources. After all, Mr. Okanga is entitled to express his opinions.

Similarly, in the case of *Robert Alai v The Hon Attorney General & another [2017] eKLR*, the petitioner herein was charged in Criminal Case Number 3626 of 2014 at Kiambu Chief Magistrate's court, with the offence of undermining the authority of a public officer when he posted on Twitter (now X) the words *"Insulting Raila is what Uhuru can do. He has not realized the value of the presidency. Adolescent President. This seat needs maturity"*. The Court, in impugning the constitutionality of the alleged offence, held that Kenya is a democratic state with a democratically elected leadership. The people of Kenya have a democratic right to discuss the affairs of their government and leadership because of their right to freedom of expression guaranteed by Article 33 of the Constitution. They cannot freely express themselves if they do not criticize or comment about their leaders and public officers.[44] More importantly, public officers have to tolerate criticism in an open and democratic state because people usually exercise the rights granted to them by the Constitution.[45]

The threat of arrest, a looming specter, creates a pervasive chilling effect on potential activists and whistle-blowers. The legal process, fraught with the possibility of prolonged pre-trial stages, further serves as a breeding ground for harassment. Even in baseless cases, the accused cannot endure the arduous legal journey, often withdrawing their words/actions to escape the legal, financial, and personal toll. Meanwhile, complainants face little consequence for frivolous cases, creating an imbalance in the scales of justice. In last year's saga of human rights violations, the actions of several government officials and police stood in stark contrast to the fundamental human rights enshrined in Kenya's Constitution and international treaties. The rights to life, peaceful assembly, association, and freedom of expression were trampled upon with each egregious act, betraying Kenya's commitments under the African Charter on Human and People's Rights and the International Covenant on Civil and Political Rights. Even the UN Principles on the use of force and firearms, which allow force only when strictly necessary, were disregarded in the chaotic theater of protests. Tear gas, the dubious darling of law enforcement, should

Kileleshwa MCA Robert Alai

[43]U.N. Human Rights Committee, General Comment No. 34, CCPR/C/GC/34, Sept. 12, 2011, para 38. From https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf on 9 December 2023.
[44]*Robert Alai v The Hon Attorney General & another [2017] eKLR, para 30.*
[45]*Ibid, para 33.*

Concerns about censorship or punishment for expressing certain views can have a chilling effect, discouraging individuals from freely expressing their opinions.

be a last resort, according to these principles. Yet, in Kenya, it is often deployed without restraint, violating the principle of proportionality and causing harm to both protesters and bystanders. Lethal force, permitted only to protect life, is used with alarming frequency, turning the streets into a perilous battleground. The authorities, as signatories to international conventions, bear the responsibility to respect and uphold the right to peaceful assembly, avoiding actions that criminalize this right. Fair and equal treatment must prevail, and those violating the law should be held accountable.

Within the bounds of the Kenyan Constitution, every citizen enjoys the entitlement to freedom of expression, assembly, and association, granted that such rights are exercised lawfully and with due regard for the rights of others.[46] The National Police Service Act and the Public Order Management Act intricately delineate the parameters for overseeing public gatherings, striving to ensure public safety while upholding the constitutional rights of citizens. Notably, Article 19 (1) of the constitution states that the Bill of Rights is an integral part of Kenya's democratic state, and is the framework for social, economic and cultural policies. Clause 3 states that the rights and fundamental freedoms in the Bill of Rights (a) belong to each individual and are not granted by the state; and (c) are subject only to the limitations contemplated in the constitution. The right to peaceful assembly and demonstrations is enshrined in Article 37 of the Constitution. These gatherings serve as a platform for various protesting groups and the public to articulate specific concerns, notably the rising cost of living. Legal frameworks further provide guidelines for managing public gatherings, delineating the roles and responsibilities of both law enforcement officers and protesters.

The International Covenant on Civil and Political Rights (ICCPR), a document Kenya eagerly subscribed to, further declares that everyone is invited to a grand gala of opinions – interference is not allowed, unless you're a party pooper. Article 19 of the ICCPR particularly states that everyone has the right to hold opinions and to freedom of expression, including "freedom to seek, receive and impart information and ideas of all kinds". This includes views considered to be "offensive."[48] But wait, the fine print further reveals that such rights come with a side of special duties and responsibilities, akin to walking a tightrope over a pool of legal mumbo-jumbo. Restrictions, if any, should be as rare as a unicorn sighting and only summoned by the law, necessary for protecting the delicate egos and reputations of others, or for safeguarding national security, public order, public health, or morals. The U.N. Human Rights Committee has explained that governments must take "extreme care" to ensure that any law that may restrict freedom of expression meets the strict requirements of the ICCPR, namely that any restriction is necessary, provided by law, and only for (a) respecting the rights or reputations of others, or (b) protecting national security, public

[46]Article 37, Constitution of Kenya 2010.
[47]ICCPR, 999 U.N.T.S. 171, art. 19.
[48]U.N. Human Rights Committee, General Comment No. 34, CCPR/C/GC/34, Sept. 12, 2011, para 11. From https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf on 9 December 2023.
[49]*Ibid*, para 30 (citing ICCPR, article 19(3)).
[50]*Ibid*, para 34.

order, public health, or morals.[49] The Committee has further clarified that criminal laws cannot be invoked "to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information". Additionally, there's a three-part test demanding that the restrictions be law-bound, respect-loving, and necessary.[50]

However, in the labyrinth of Kenya's political theatrics, as discussed, most seem to dance outside the international standard waltz, causing the international community to raise an eyebrow. The Kenyan government has severally attempted to tame these unruly acts, but the clash with constitutional and international freedom of expression standards persists. In the unsettling saga of Dr. Nyakang'o, I fervently hope she is innocent. I deeply loathe the age-old tradition where corruption-busting heroes are handed a script of charges, tailor-made to sprinkle them with the same corruption glitter or accuse them of treason, to turn the public against them, ensuring that even if they spill secrets, it falls on deaf and cynical ears.[51] But shouldn't the DPP channel the same gusto into unraveling the mysteries of the Kshs. 62 billion cash payments Dr. Nyakang'o uncovered? The conspicuous absence of any public effort by the DPP to probe the glaringly guilty parties in Dr. Nyakang'o's recent revelations is like a neon sign flashing "political justice victim in the making". It is the latest act in the play, where justice takes a back seat, and the corruption game continues its marathon run.[52] As we usher in the new year, we remind our leaders that the right to freedom of expression emerges not just as a standalone luminary but as an enabler, a backstage magician making other rights sparkle. We solemnly condemn the arbitrary use of criminal law, painting it as the dark villain in this human rights narrative, casting a chilling spell on expression and giving rise to a cascade of rights violations.

Conclusion

Enough of this charade! It is high time we slam the brakes on this legitimacy circus. Every Tom, Dick, and Harry should be armed with the right to poke, prod, scrutinize, and demand answers from the government. Snatching away these rights is a one-way ticket to becoming a society so lethargic it makes a sloth look hyperactive. Laws should not be wielded like a sledgehammer to squash our fundamental freedoms of speech and expression; that's a recipe for a snooze-fest, not progress. Let us face it, if judges of the superior courts started throwing tantrums every time they got a nasty message, they would be drowning in contempt cases. Criticism is not the enemy; it is the unsung hero in the saga of improvement. Want to upgrade our decision-making game? Embrace the art of critique. And no, pointing fingers at the executive, judiciary, bureaucracy, or armed forces does not make you anti-national – it is just democracy flexing its muscles. Let us not be allergic to the thoughts that make

our blood boil. Intolerance, with its icy grip on freedom of thought, is the archenemy of democracy. When dissent runs dry, democracy withers away, and we are left with a sad excuse for a nation. The executive, legislature, and judiciary need to get their act together and play nice to safeguard our constitutional and democratic norms. After all, it is the youth's future hanging in the balance, and we cannot afford to bequeath them a hot mess.
So, dear prosecution, drop those cases that involve nothing more scandalous than peaceful expression or assembly. Train the police to distinguish between real threats and someone just airing their opinions. And judges, especially in the lower courts, get a crash course on the art of recognizing protected speech so we can toss out the nonsense and get back to the business of a functioning, bickering democracy.

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[51]Mwalimu Mati, 'Then They Came for Dr. Margaret Nyakang'o...', Debunk, December 6. 2023. From https://debunk.media/then-they-came-for-dr-margaret-nyakango/ on 7 December 2023.
[52]*Ibid.*

Festive hues in Kenya's hardship

By Kelvin Nyamache

For us in Kenya, this festive season arrives as a poignant respite, capping a tumultuous year marked by economic, social, and political upheaval. The collective fate of our people has dwindled over time, with the younger generation grappling with the burdens imposed by a faltering national landscape. Unemployment, inadequate healthcare, exorbitant education costs, unaffordable housing, escalating hunger, poverty, and deficient social and economic infrastructure have collectively anchored Kenya's masses to the lower echelons of developmental progress.

Amidst unfulfilled promises and shattered aspirations, the populace resiliently endures challenging times, pondering when relief will materialize amidst heightened social and economic uncertainties, a narrative often interpreted differently by the political elite.

Nevertheless, the indomitable spirit of the Kenyans refuses to be subdued. While the devout Christian embraces Christmas as a spiritual reprieve for the nation, other revelers seize the yearly ritual to partake in the social aspects of festive indulgence and camaraderie. This day stands as the pinnacle toward which many strive throughout the year, undeterred even by the enduring hardships of fuel scarcity.

The historical context of Jesus's time in Palestine bears semblance to Kenya's current circumstances. Governed by Pontius Pilate and with Herod as the Tetrarch of Galilee, the occupation force, including tax collectors and soldiers, collaborated with local leaders to inflict untold hardships on the populace. The poor languished, the sick found little solace, and lepers were ostracized

President Ruto celbrating Christmas with children.

under stringent rules. Widows, orphans, and the disabled existed on the fringes of society with minimal social regard.

The advent of Jesus aimed to usher in a revolutionary social paradigm, a fresh perspective on the essence and purpose of humanity as divine creations destined for abundant life in God's Kingdom. Christmas embodies good news for a world plagued by hate, violence, oppression, poverty, and disease. According to ancient prophets, the arrival of Christ would inaugurate a kingdom of peace where "the

For Christians, Christmas is a religious holiday commemorating the birth of Jesus Christ, whom they believe to be the Son of God. Religious observances often include church services, prayers, and the retelling of the nativity story.

wolf will live with the lamb, and the infant will play near the hole of the cobra". Jesus propagated the values of this kingdom, inaugurating a civilization of love as a conduit to peace in this world and union with God in the hereafter.

Jesus' exemplary ministry set a precedent—healing the sick, restoring sight to the blind, empowering the weak, and advocating for the oppressed and marginalized. In essence, Jesus's arrival emphasized humanity's core social responsibility in the kingdom: to feed the hungry, give drink to the thirsty, clothe the naked, house the stranger, tend to the sick, and visit the prisoner. It succinctly encapsulates the concept of being a keeper of one's neighbor, whoever that neighbor may be. Thus, the celebration of Christmas should inherently embrace these values articulated by Jesus; otherwise, the essence of Christmas becomes meaningless.

Christmas is not just a celebration; it is a celebration of hope. In the face of adversity, the commemoration of Jesus Christ's birth should ignite hope in God's imminent intervention. Rather than succumb to despair, Christmas becomes a time for Kenyans to inspire each other toward virtue, justice, and integrity, steadfastly believing in the ultimate triumph of good over evil. Sustaining hope involves embodying the humanistic principles of Jesus and living out his kingdom values within our diverse spheres of influence and activity. On this note, I extend heartfelt wishes to all Kenyans for a tranquil Christmas celebration, undeterred by the challenges of our times.

Through the lens of the landless

Critiquing the Supreme Court's decision in Fanikiwa Limited & 3 Others -vs- Sirikwa Squatters Group and 17 Others

By Ali Munira Omar

In The Platform's July Issue No. 90, I commented on the Supreme Court's decision of ***Dina Management Limited -vs- County Government of Mombasa, Chief Land Registrar and 5 Others***. The court in the said case resolved the doctrine of a bona fide purchaser for value without notice. The court was categorically clear that if the process of acquiring land is flawed, then one's title can be defeated. The court stated:

> *"Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title was defective, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, H.E. Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co. (1993) Ltd, who in turn could pass to the appellant."*

As the Supreme Court continues to develop jurisprudence on proof of ownership of land and protection of bona fide purchasers of land, I wish to comment on yet another recent landmark decision, where the same court in the case of ***Fanikiwa Limited & 3 Others -versus- Sirikwa Squatters Group and 17 Others*** set aside the decision of the High Court and the Court of Appeal that had recognized the land rights of Sirikwa group members.

The thought-provoking decision involved the family of the late Mark Too where more than 3,000 members of the Sirikwa squatters claimed ownership of 25,000 acres

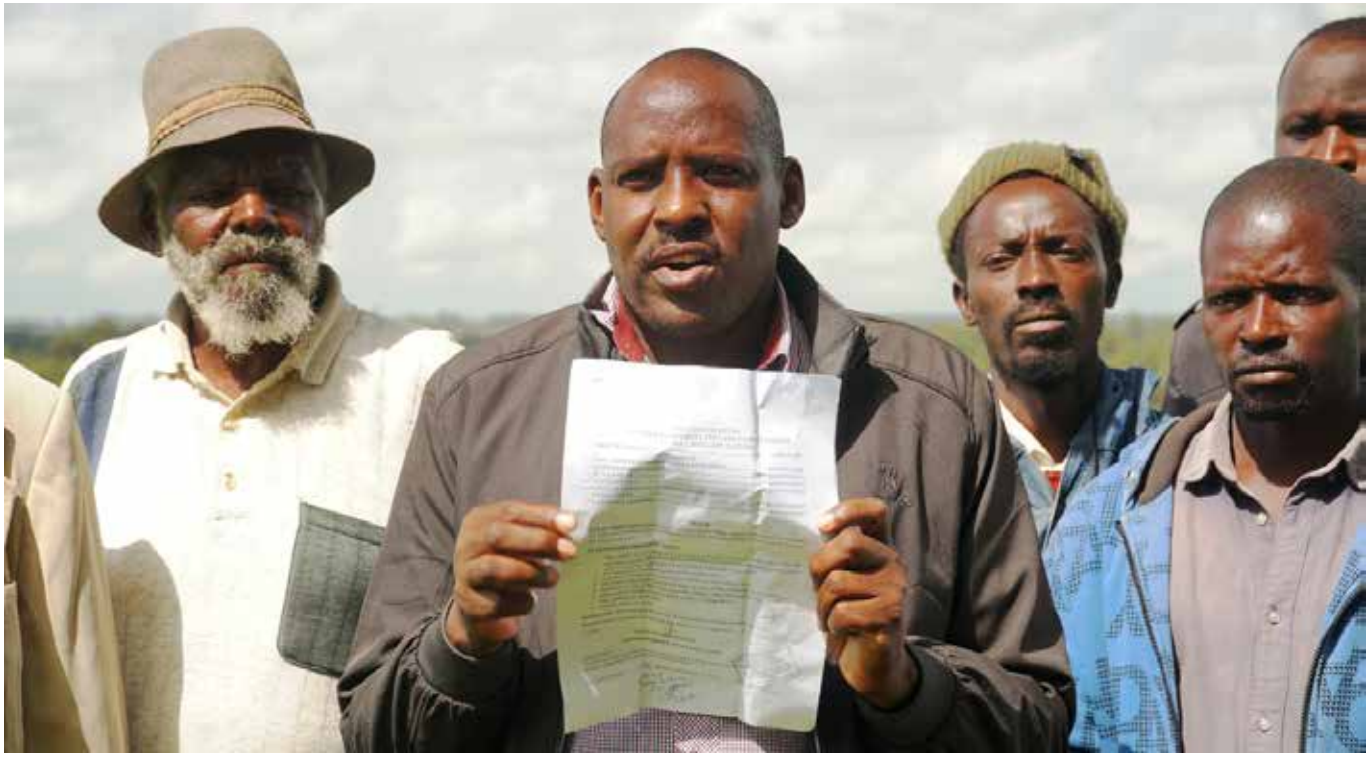
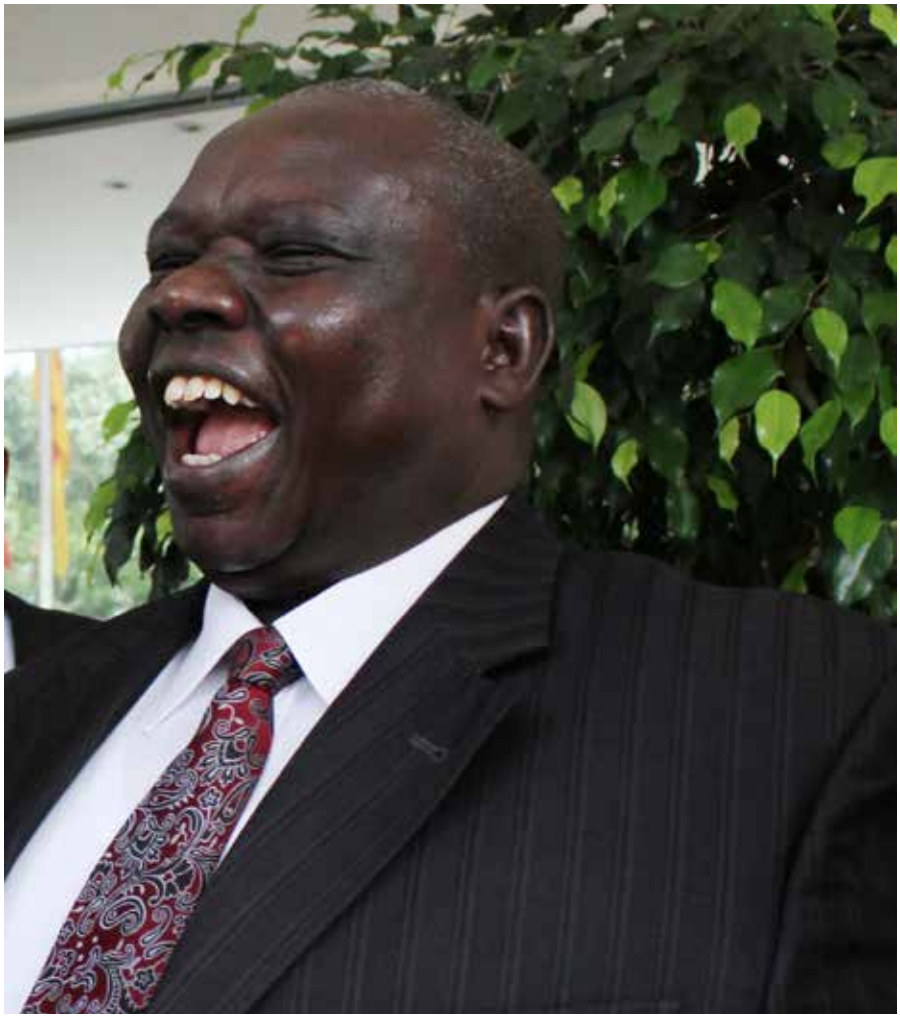


PHOTO BY UASINGISHUNEWS.CO.KE

Sirikwa squatters Group Chairman Robert Cherono with a court order.

of land located near the Eldoret International Airport against the deceased's family members. They were promised the land by the late President Moi. Let's delve into the arguments fronted by the disputants and the decisions by the trial and appellate courts.


The late Mark Too

The claim by Sirikwa Squatters Group

The brief background of the case is that the Sirikwa Squatters Group claimed that in the early 1920s, just like many indigenous communities, their forefathers were forcefully evicted and dispossessed of the disputed land by the British colonialists. They further claimed that the member descendants continued to live on the land as labourers. Later, East African Tanning and Extract Company (EATEC), formerly **Lonrho East Africa (later renamed Lonrho Agribusiness**) made an undertaking to surrender the land to resettle the descendants. As they waited for the formal transfer and registration of the land in their names, Sirikwa claimed that the late Mark Too (former chairman) and Korir (the property manager) of Lonrho Agribusiness in abuse of power took advantage of their positions and fraudulently processed titles in their names. They then sold the same to third parties. Some of the buyers of the disputed land include two people. i.e Fanikiwa Ltd Company (where Mark Too was a director) and Mark Too as an individual.

Sirikwa argued that the titles registered in favour of Too were tainted with fraud and the court should order its cancellation so that a new title could be issued in Sirikwa's favour. They also challenged the survey of the land and the subsequent subdivision to the benefit of third parties by a private surveyor since the process was not authorized by the Director of Survey.

Mark Too and Fanikiwa Limited's case

It was the case of the late Mark Too that the disputed land was surrendered for conversion of tenure from leasehold to freehold and not to settle Sirikwa members. That the land was private and therefore not available for settling Sirikwa members.

Fanikiwa is a Limited Liability Company duly incorporated in Kenya whose director was Mark Too. It claimed to have bought the land without having the knowledge that the land was surrendered to settle Sirikwa members. It has to be noted that Fanikiwa Ltd (one of Mark Too's companies) was not a party in the trial court and therefore filed an appeal against the decision of the trial court because it was a registered proprietor of several of the titles that were cancelled by the trial court.

The decision of the Trial Court on whether the legitimate expectation to be settled on Lonrho Agribusiness lands was legal

The primary bone of contention before the High Court (and later Environment and Land Court) was whether the legitimate expectation to be settled on Lonrho Agribusiness land was lawful. Related to this was whether the surrender of the disputed land by

Some of the Sirikwa squatters Group committee members at the disputed land.

Lonrho Agribusiness Limited was to convert the tenure from leasehold to freehold or it was for resettling members of Sirikwa as was promised by the late President Moi.

The High Court had to decide whether the disputed land was private or public land. The evidence tendered is that the land in dispute was registered under the Registration of Titles Act (RTA), Cap 21 Laws of Kenya (repealed) and therefore the surrender of the lease was governed by RTA which does not provide for conversion of tenure directly from leasehold to freehold.

The implication is that the land that was previously registered in the name of Lonrho Agribusiness (East Africa) Limited reverted to the Government and was to be managed by the Government under the regime of the repealed Government Lands Act.

The court held that the new titles issued to Mark Too were issued against the legitimate expectation of Sirikwa. According to the court, the legitimate expectation is an overriding interest and so the fact that Mark Too is registered as proprietor of a portion of land does not extinguish Sirikwa's legitimate expectation to be settled on the land.

The Appellate Court's findings and analysis on the contention by Mark Too that genuine squatters were already settled on Lonrho Agribusinesses' land

Aggrieved by the decision of the High Court, the late Mark moved to the Court of Appeal where the court scrutinized the evidence submitted in the High Court and made a very compelling observation which I wish to quote verbatim as follows:

> *"Mark Too and Korir contended that all the genuine squatters on Lonrho Agribusinesses land were settled and that Sirikwa was an amorphous group of self-seekers. In our minds, this was a confirmation of Sirikwa's assertion that there had been discussions and Lonrho Agribusiness had agreed to allocate land to settle Sirikwa's members.*
>
> *There are, however, three basic problems with the contention that the genuine squatters were settled by Lonrho Agribusiness. First, Korir gave a paltry list of 73 people as the squatters who were settled, begging the question whether those were the people working on Lonrho Agribusinesses huge estates of approximately 25,000 acres. Second, whilst Mr. Too was very meticulous in identifying the parcels of land that had been acquired by himself and Fanikiwa, there was no such specificity about the parcels of land on which the genuine squatters were settled.*
>
> *Lastly, if indeed the genuine squatters were settled, how could Government officers, shortly before Sirikwa lodged its petition, have been confirming that they were at an advanced stage of settling the*

Sirikwa squatters? We do not think the contention by Mr Too and Mr Korir is credible, and we reject the same."

The appellate found in favour of Sirikwa and the family of Mark Too moved to the Supreme Court. The case turned on whether:

i. Sirikwa's legitimate expectation was legal.
ii. Sirikwa were genuine squatters.
iii. Mark Too and Fanikiwa Ltd were bona fide purchasers for value without notice.
iv. Fanikiwa's right to be heard was violated.

I now proceed to comment on the determination of the following four issues that were before the Supreme Court.

i. Legitimate expectation

One of the reasons why the apex court overturned the Court of Appeal's decision was that the legitimate expectation by Sirikwa to be settled on the land after being surrendered by Lonrho Agribusiness was not lawful. Determining the appeal, the court stated:

"Former President Moi had no legal capacity or authority to allocate or confer any legitimate interest in the subject suit parcels to members of Sirikwa or any other entity. Therefore, Sirikwa does not have a legitimate expectation to acquire and be allocated the suit parcel."

The court further held:

"We declare that the finding by the superior courts (Court of Appeal and the High Court) to the effect that the President's approval of allocation of the suit parcels and the subsequent surrender of the titles was for purposes of settling Sirikwa's members, violated and arbitrarily deprived Lonrho Agribusiness, of its rights over and interests in the suit parcels as guaranteed under Article 40 of the Constitution.

The Court of Appeal reviewed the evidence of the trial court to determine whether the conclusion reached by the trial court was just. Some of the evidence that was produced in court was documentary evidence in the form of letters proving commitment for over ten years by government officers like the Commissioner of Lands, the Director of Survey and Settlement and the Attorney General to settle Sirikwa members.

"We think, with respect, that on a preponderance of probabilities, the documentary evidence placed in the trial court succeeded to justify the conclusion he arrived at, that the surrender to the Government of Kenya was not for conversion of tenure but the suit land remained public land available for alienation by the Government to Sirikwa. We,

A notice erected by Mark Too's family on the land.

too, come to the same inevitable conclusion."

The Court further held:

> *"In the full circumstances of the case, given the authority and official positions of the Government officers who made the promise, and that repeatedly, for over a decade, and some of them in the context of litigation, the commitments made by them created in Sirikwa an expectation that was reasonable.*
>
> *The letters we have referred to are among many others which all spoke the same language: The Commissioner of Lands, the Director of Survey and Settlement and the Attorney General were all aware of Sirikwa's occupation of, and claim to, the suit properties, which had been surrendered to the Government of Kenya and they were all in agreement that the process of regularization or formalization of Sirikwa's claim and occupation needed to be completed expeditiously."*

According to the clear legal framework governing land registered under RTA, the findings reached by the two courts were sound in my view. Therefore, the Supreme Court's decision suffered from failure to consider the purpose of the legislation which provided that land held under leasehold upon its surrender could not change directly to freehold. Secondly, the legitimate expectation was legal based on the formal communication from government officers aforesaid.

In a nutshell, the evidence and law before the court was against the late Mark Too and the Supreme Court arrived at an erroneous finding that Mark Too was legally protected under Article 40 of the Constitution.

ii. Whether Sirikwa were genuine squatters

The apex court was also too quick to observe that Sirikwa never occupied the disputed land. This is what it said:

> *"The evidence on record further shows that no member of Sirikwa ever took actual physical possession of the suit parcels. They have never occupied it. The failure to take possession and occupy the land means that Sirikwa were not squatters on the suit parcels. What is deducible from the evidence is that their claim is based on heritage from their forefathers who became dispossessed of their land by the colonialists and subsequently became workers. This evidence cannot support the claim by Sirikwa that they were squatters in the absence of occupation of the suit land.*
>
> *Also, the allegations of lineage (where no evidence was adduced) in our view is a complex web. We say so because in the absence of evidence to show who was the child of whom? Who exactly should be compensated by whom? Which proprietor? The record shows there were many proprietors as the suit parcels changed ownership severally.*
>
> *As claimed by Sirikwa, upon the forceful eviction of its members' forefathers from the suit parcels in the 1920s, the said forefathers and their lineage worked on the suit parcels as farmhands. By then the parcels had since been adjudicated and titles issued. This begs the question, whose workers, were they? Didn't the farm owner own the land in question? Can workers then turn around and invoke the right to their place of work as squatters and if so, can they do so over 70 years later? So, who should shoulder the responsibility of compensating the claim? Was it a form of reparations to be paid on behalf of the colonialists? All these pertinent questions were not asked and we are therefore of the view that members of Sirikwa were not squatters on the suit parcels and have no legal basis to bring a claim asserting a right to the suit parcels."*

The superior judges energetically interrogated the failure of Sirikwa to occupy the land but failed to ask the questions raised by the evidence in the trial and appellate court on whether the land was surrendered for settlement of Sirikwa or another purpose.

As was the Appellate Court's observation, there was no evidence supporting the claim by Lonrho Agribusiness company that a list of 73 people as squatters were settled on part of the land. Neither was there explicit evidence on which part of the disputed land the 73 squatters settled on thus the court found in favour of Sirikwa.

Considering our troubled history of land grabbing by well-connected politicians and business people before the 2010 Constitution, the Supreme Court ought to have noted the glaring inconsistencies, contradictions and paucity of evidence in support of Mark Too's case.

Declaring that the High Court and the Court of Appeal erred in their finding without directing their minds and looking into the questions posed by the two courts is a travesty of justice.

In my light, the questions posed by the Court of Appeal were serious questions that needed a response from the late Mark Too because it is

trite law that he who alleges must prove through cogent, credible and consistent evidence. Without the same, then the court was unjustified in finding in favour of Sirikwa. In light of this, the Supreme Court's judgment was overly one-sided against the weight of the evidence and the law adduced.

Besides, as discussed in the preceding issue of legitimate expectation, the court was not justified to conclude that Sirikwa were not genuine squatters because they did not occupy the disputed land when there was evidence that Sirikwa waited legitimately expected for many years that the land would be regularized so that they could take possession.

iii. Bona fide purchaser for value without notice

While advancing the argument that Mark Too as the chairman of Lonrho Agribusiness (EA) Ltd and Fanikiwa Ltd were not innocent purchasers of the surrendered land, the Court of Appeal had this to say:

> *"In this appeal, Mr. Too, as the chairman of Lonrho Agribusiness (EA) Ltd at the material time and as the majority shareholder, director, brain, and mind of Fanikiwa, was certainly aware of the real purpose for the surrender of the suit properties which was to settle members of Sirikwa. It debunks the assertion by Mark Too and Fanikiwa that they were bona fide purchasers of the surrendered properties for settlement of Sirikwa members for value without notice. The close proximity between themselves and Lonrho Agribusiness makes their contention a sheer smokescreen that is easy to see through. It is difficult to believe that from their vantage positions in this matter, they were unaware that the suit properties were specifically surrendered to settle members of Sirikwa."*

The court further held:

> *"Even more telling, however, which speaks to a grand land grab perpetuated by Mark Too and his associates, the picture that emerges from a scrutiny of the record is that he could not by any stretch of imagination have been an innocent purchaser for value without notice. We have already referred to the sale agreement of September 30, 2003- more than 3 years after Lonrho Agribusiness (EA) surrendered the suit properties to the Government of Kenya. That agreement, though on its face indicating itself as being between Lonrho Agribusiness and Mark Too, in the body, at the recitals, claims to be between the former as the vendor, and Fanikiwa Limited, as the purchaser. Mark Too is named as party number 3 to the agreement, but is assigned no role, being called merely 'Mr Too' as we have already observed.*
>
> *Whereas clause 4 of it speaks of a deposit of 10% of the purchase price to be paid by the purchaser (which must mean Fanikiwa), on or before the date of the agreement, the agreement does not say that payment of the same is made or acknowledged, by the execution of the agreement. Indeed, there is no proof of any kind that the said deposit was paid by Fanikiwa. Nor is there direct or any proof that the balance of the purchase price was ever made in accordance with clause 5.2 on the completion date, which is deemed as '45 days after the signing of this agreement' under clause 1(a)."*

The court also made the following observation:

> *"Thus, Mark Too's claim, not having been the purchaser under the agreement, that he lawfully purchased the said land parcels for consideration while referring to the agreement, is a curiosity. And all he says about that payment is that he 'paid the full consideration for the purchase of the said parcels' through his advocates. He does not say how much money he paid, on which dates, and by what means. Nor does he display copies of cheques, bank statements, receipts or other evidence of such payment.*
>
> *That letter is addressed to no one in particular. It is 'To whom it may concern.' It then goes on to say that the lawyers are writing on the Instructions of Hon Mark Kiptabei Too. Next, it literally amends the agreement by claiming that they acted for Mr Too and Fanikiwa 'jointly referred to as the Purchaser."*

The court further observed:

> *"The agreement, as we observed, referred to Fanikiwa only as the purchaser. The advocates go on to say that they paid the purchase price of One Million Sterling Pounds and Kshs 31 Million to the vendor's advocates. Like Mr Too, the advocates in the wholly gratuitous letter, addressed to no one in particular, do not give details of when, and by what means, they made the payments.*
>
> *All of this information would have been specially and peculiarly in the knowledge of Mark Too in asserting that he was a bona fide purchaser for value, but he did not offer it. There is no proof, in the face of frontal challenge to their alleged valid purchase of the suit lands or part thereof, that Fanikiwa paid the purchase price. That*, to our mind,

deals a fatal blow to their claims to being bona fide purchasers for value without notice."

Both the High Court and Court of Appeal found against the family of the late Mark Too on the basis that evidence before them was not in his favour.

> *"Mark was part and parcel of the misrepresentation and fraudulent allocation and transfer to himself and Fanikiwa of the parcels of land that were expressly surrendered for settlement of the Sirikwa squatters. He was simply the prime mover in the scheme to swindle Sirikwa of the surrendered land and cannot be described by any stretch of imagination as an innocent purchaser."*

The foregoing conclusion by the court was buttressed by the observation that Mark Too did not enjoy protection under the doctrine of an innocent purchaser for value without notice because when he pleaded the principle of indivisibility of title, he failed to demonstrate to the courts how his title was indefeasible. The land reverted to the government and was therefore available for settlement of Sirikwa members. Legally, Mark did not have private propriety interest capable of being protected by the court.

Conversely, the Supreme Court overturned the decision of the appellate court and held that the land was a private land and therefore unavailable for the settlement of Sirikwa members.

The Supreme Court had already decided in the Dina matter that if the process of acquiring land was improper, then title to such land is not good and is incapable of being passed to a third party. The court was presented with another rare opportunity to explore at some length the bona fide purchaser doctrine but chose to protect an interest in land that was proved to have been unlawfully and fraudulently acquired which to me is particularly concerning.

iv. The right to be heard

Another issue that was before the superior court was the issue of the right of Fanikiwa to be heard. Fanikiwa and other third parties who were land buyers alleged that their right to be heard by the High Court was violated because they were not parties in the trial court.

The Court of Appeal, deciding on this issue agreed with Sirikwa's lawyer argument that Fanikiwa, was fully aware of the case but elected to stand by idly hence Fanikiwa's right to be heard was not violated. According to the court, Fanikiwa was accorded an opportunity to be heard, through its director and majority shareholder (Mark Too) but for reasons best known to itself elected not to participate. The majority shareholder knew of the case but chose to stand by and watched the proceedings play out to conclusion. Thus, he could not turn around and claim that he was denied an opportunity to be heard.

Additionally, the other buyers of the land excised from the disputed land, their right to be heard was not violated based on the fact that the advocates who prepared the conveyances for the affected properties were the advocates for Mark Too and Korir in the trial court. The court held that their right to be heard was not violated since the said buyers were not denied an opportunity to be heard.

A glaring mistake by the Supreme Court on the right to be heard

In the Court of Appeal, Fanikiwa Ltd contended that its right to a fair hearing was violated by the trial court because Mark Too and Fanikiwa Ltd were two distinct legal entities. As such, Fanikiwa submitted that it ought to have been allowed to defend itself. The Supreme Court affirmed Fanikiwa's position.

I respectfully disagree with the argument that Mark Too and Fanikiwa Ltd are two distinct persons. This is fundamentally misguided and legally unsustainable because Mark Too was a director of Fanikiwa Ltd. He knew of the case against him. As a director of Fanikiwa, he was notified of the case but waived his right to be heard. At no time did the court not accord him the opportunity to be heard. The fact that he stood idly while the case was proceeding in the High Court was enough to construe as waiving his right to be afforded an opportunity of being heard.

Conclusion

In my humble opinion, without being sentimental and with great respect to the learned judges, the Supreme Court should have decided on the principle of legitimate expectation and the doctrine of *bona fide* purchaser based on the history and evidence of how the land was acquired and why it was surrendered. It should have directed its mind to realize the impact of its judgment on the many Kenyans living on land with disputed titles including rural settings and informal settlements. In my judgment, the decision of the superior court is wanting.

Munira Ali Omar is an Advocate of the High Court working with Haki Yetu Organization as a Land Programme Officer.

Kenya's former President Uhuru Kenyatta and Israeli Prime Minister Benjamin Netanyahu signing agreements in Jerusalem in 2016.

PHOTO BY AMIR COHEN/AFP VIA GETTY IMAGES

What's East Africa's position on the Israel-Hamas war?

An expert unpacks the reactions of Kenya, Tanzania and Uganda

By Michael Bishku

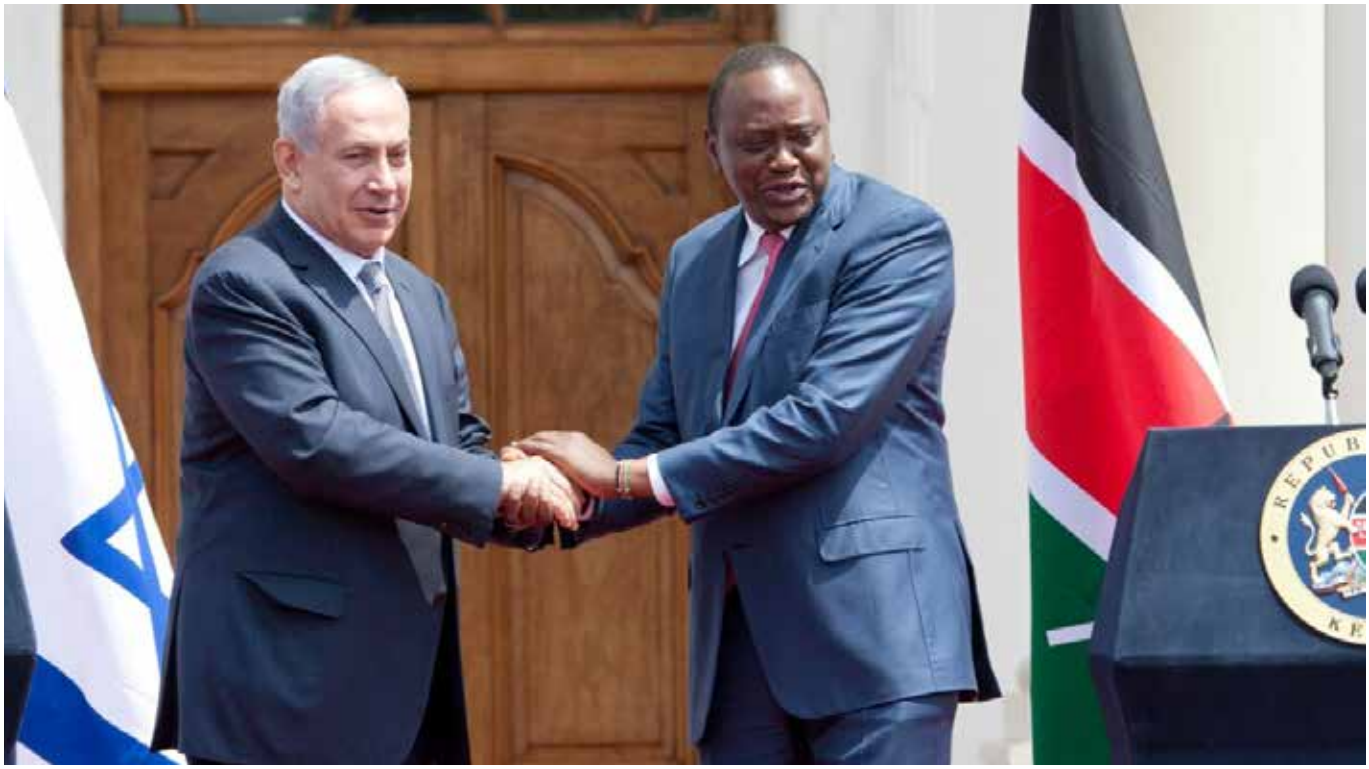
The reactions of some East African countries to the ongoing conflict in Gaza have been less dramatic than South Africa's. South Africa's parliament has passed a resolution calling for the closure of its embassy in Tel Aviv. Algeria and South Africa have been the most supportive of the Palestinians. Thus far only South Africa and Chad have withdrawn their representatives from Tel Aviv.

In contrast, the reactions from East African capitals have been less dramatic. At the outset of the current conflict in Gaza, Kenya's President William Ruto expressed solidarity with Israel and condemned terrorism and attacks on innocent civilians in the country.

Uganda and Tanzania condemned all forms of violence and called for restraint to stem further loss of human life.

As a scholar of Middle Eastern and African history, I have researched the relationship between Israel and African countries including those in East Africa.

It is my conclusion that the reactions of the East African states to the conflict in the Middle East are shaped by two things: the perceived



Kenya's former president Uhuru Kenyatta and Israeli prime minister Benjamin Netanyahu.

national threat of terrorism by Islamist factions and, for those states with democratic institutions, domestic public opinion.

In my view, these three countries are unlikely to change their stance unless the current conflict escalates. On the one hand they will continue to limit their actions to voting in the United Nations for resolutions in support of the Palestinians. On the other, they will continue to solicit technical assistance – especially in agriculture and security – from Israel.

The history

Relations between African countries and Israel have been tested before. For example, in 1973, 25 independent African states cut diplomatic relations with Israel after its occupation of Egyptian territory. These included East African states, such as Kenya, which had enjoyed particularly close relations with Israel since its independence from Britain in 1963.

East African countries colonised by Britain sought technical assistance after independence. This was particularly true in agriculture. They viewed Israel as complementary or an alternative to having to seek assistance from the big powers.

When African states cut off the diplomatic ties with Israel in 1973, Kenya was reluctant but had to act in solidarity with other independent African nations. It kept its cooperation with Israel even before the formal ties were restored in 1988. It facilitated Israel's 1974 rescue operation at Uganda's Entebbe airport. The operation was meant to rescue passengers of a French jet airliner that was hijacked on its way from Israel to France, and flown to Entebbe.

Tanzania, on the other hand, sought a more neutral course after independence. It found the socialist character of the Israeli Labour governments appealing but Israel's occupation of Palestinian territories following the 1967 Six-Day War complicated relations.

Tanzania was one of the last African states to renew relations with Israel in 1994. That was a year after the Oslo Accords between Israel and the Palestinian Liberation Organisation. Tanzania was also the first African country to recognise the Palestinian Liberation Organisation in 1973 and to host a representative office in its capital.

Uganda has had the most tempestuous relationship with Israel. Under the erratic Idi Amin the country broke off relations with Israel and embraced Libya. Israel and Uganda have had good relations under President Yoweri Museveni. Israeli companies currently operate in Uganda's construction, infrastructure, agriculture and water management, communications and technology sectors.

Uganda joined most other African countries in renewing relations with Israel just after the end of the Cold War.

Uganda, along with Kenya, has militarily intervened in Somalia as part of an African Union mission.

The ebbs and flows of these relationships have to be seen against the backdrop of the hard work Israel has put in to building diplomatic relations with a range of other African countries too. By 2023 it had ties with 46 of the 55 African Union member states.

Al-Shabaab is an Islamist extremist group that originated in Somalia. It has been designated as a terrorist organization due to its involvement in acts of terrorism, insurgency, and links to Al-Qaeda.

National security threat

Kenya has been affected by instability in neighbouring Somalia and has been the victim of terror attacks.

In 1998, al Qaeda attacks targeted the US embassy in Nairobi and Dar es Salaam. The Nairobi attack resulted in over 200 deaths and thousands of people were injured. Since then, Israel has taken the lead among foreign countries in aiding and advising Kenyan security.

Kenya has suffered attacks since then by al-Shabaab – across its border as well as in Nairobi in 2019.

Tanzania's security situation has been different. Unlike Kenya, Tanzania has not militarily intervened in Somalia as part of an African Union mission (Amisom). The mission has been operating since 2007 to provide security in that country in the Horn of Africa.

Uganda has its own set of security problems. A terrorist bombing in Uganda's capital Kampala in 2010 was attributed to al-Shabaab. But a bigger threat to Uganda's security has come from Islamist rebels known as the Allied Democratic Forces based in the Democratic Republic of Congo.

Domestic institutions and public opinion

There is one other factor that explains East Africa's relations with Israel: the religious composition of populations in the region.

Israel is popular with many devout Christians in East Africa, as is the case throughout the continent. If given the opportunity, these Christians would make a pilgrimage to the Holy Land. This factor obviously affects public opinion.

Conversely, Muslims in East Africa have a greater concern for the situation of the Palestinians. All three countries – Kenya, Uganda and Tanzania – have populations adhering to these two religions.

Given the democratic characters of Kenya and Tanzania, where there have been peaceful transfers of power, public opinion has more of an impact. This explains Ruto's change of tone after the initial statement strongly critical of Hamas.

Tanzania has remained consistent in condemning all forms of violence. That country calls for a two-state solution to the Israeli-Palestinian conflict, as do the other East African states.

Public pressure is less important in Uganda, where Museveni is quite autocratic.

This article was first published in the Conversation: https://theconversation.com/whats-east-africas-position-on-the-israel-hamas-war-an-expert-unpacks-the-reactions-of-kenya-tanzania-and-uganda-218097

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PHOTO BY SEAN GALLUP/GETTY IMAGES

Activists from different African countries seen on 10 December 2023 at COP28.

African countries at COP28: Several big wins and a united voice

By Bamidele Olajide

African countries entered the recent COP28 negotiations on climate change in high spirits. Before this conference, in September, African government leaders, policymakers, activists and other groups from the continent met at the African Climate Summit in Nairobi, Kenya. The African position and expectations for COP28 were shaped at this summit by the adoption of the Nairobi Declaration.

Africa's main agenda at COP28, hosted by the United Arab Emirates, was to convince global players that they must show more altruism in financially supporting targets to reduce global emissions. For African countries, COP27, hosted by Egypt, was largely deemed a failure for the continent, and they hoped that COP28 would be more successful.

Africa is the region that has been most affected by climate change since 2010, even though the continent is one of the lowest greenhouse gas emitting regions in the world. More than half of the African population faces one or more impacts of climate change. These include drought, rising temperatures, land degradation, flooding, coastal erosion, desertification, and changes in rainfall patterns. This makes it especially important to analyse what gains Africa made at COP28 as a negotiating bloc.

From my perspective as a political scientist, whose field is environmental and energy politics, I believe that Africa gained much

from taking a strong position in several negotiations at COP28.

Many gains

For instance, I view the COP28 Declaration on Sustainable Agriculture, Resilient Food Systems and Climate Action, which aims to reduce emissions and create food security for Africa, as a win.

Agriculture, forestry and other commercial or industrial uses of land are the most significant sources of emissions in Africa. The continent also faces a food security crisis that is worsened by climate change. This declaration shows new thinking in global climate governance, aiming to transform the global food system into a food-secure, yet decarbonised system. With 152 signatories and an early financial commitment of US$7.1 billion, there is potential for African agriculture and food systems to be boosted.

The COP28 Declaration on Climate and Health was also a milestone for Africa. Climate change increases the continent's disease burden. The US$1 billion funding raised at COP28 for transforming health systems to cope with climate change induced illness and protect vulnerable populations will be very useful for Africa.

Hundreds of millions of dollars pledged to Africa

The governments of Germany, France and Japan, along with philanthropic organisations and African and global institutions, pledged over $175 million to the Alliance for Green Infrastructure in Africa to build new green infrastructure.

Africa has committed to net-zero emissions, and this pledge to stimulate Africa's US$10 billion private capital agenda towards a just and equitable energy transition on the continent drives home the vision. With more funding and good execution, the Alliance for Green Infrastructure in Africa could help the continent maximise development opportunities in climate change mitigation.

Many African countries link their development agenda to climate diplomacy. COP28 offered a platform for several bilateral and multilateral development agreements. Nigeria signed an important energy deal with Germany to shore up its energy deficit. Rwanda also signed an innovative Memorandum of Understanding with Singapore to enhance its carbon market. Kenya signed deals worth US$4.48 billion to develop seven important green projects in the country.

African bloc well prepared for tough negotiations

COP28 was Africa's most vocal climate summit. The African bloc sought to speak to its expectations with one voice. It was no surprise that African leaders communicated their positions on various issues at COP28 vehemently. For example, the African Group of Negotiators strongly demanded "fairness and differentiation" towards Africa in the global drive for energy transition.

The continent was also vocal in its demand for the Global Goal on Adaptation at the conference. The Global Goal on Adaptation was proposed by the African Group of Negotiators in 2013 and established as part of the 2015 Paris Agreement. It calls for collective commitment to helping states improve their resilience and reduce vulnerability to climate change. The boldness with which African leaders pursued the agenda is commendable. This sets the African agenda for future climate summits: the continent is becoming assertive in its environmental diplomacy.

The demand for a loss and damage fund has been on the table in many COPs. Its eventual operationalisation at COP28, with an initial US$400 million in pledges, is a victory for Africa – the continent is one of the regions most acutely affected by loss and damage. For example, the destruction caused by Cyclones Idai and Kenneth in southern Africa in 2019 remains one of the worst cases of climate change loss and damage. It left Beira City in Mozambique with 95% destruction in the world's first case of climate-induced destruction of a city.

Maximising COP28 gains for Africa

African countries need to build on continental and country-specific gains from COP28. To achieve this, Africa needs to increase its assertive climate diplomatic voice and stature.

African countries also need to develop the capacity to access various climate finance opportunities opened at COP28.

Lastly, the continent needs to implement the lessons it learned at COP28 on sound environmental governance. This way, COP28 will not be a diplomatic jamboree, but a serious platform that advances development for many countries on the continent.

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